

THE STATE PERMITTING Playbook





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Glossary

CAA: Clean Air Act **CGP**: Construction General Permit **CWA**: Clean Water Act **DEQ**: Department of Environmental Quality **EA**: Environmental Assessment **EIS**: Environmental Impact Statement **EPA**: Environmental Protection Agency **ESA**: Endangered Species Act **ITP**: Incidental Take Permit **MSGP**: Multi-Sector General Permit MS4: Municipal Separate Storm Sewer Systems **MW**: Megawatt NAAQS: National Ambient Air Quality Standards **NEPA:** National Environmental Policy Act **NOI**: Notice of Intent **NPDES**: National Pollution Discharge Elimination System **NSPS:** New Source Performance Standards NSR: New Source Review **PAL:** Plantwide Applicability Limit PBR: Permit-by-Rule **SEPA**: State Environmental Policy Act **SESA**: State Endangered Species Act SIP: State Implementation Plan **USACE:** U.S. Army Corps of Engineers **VOC**: Volatile Organic Compounds

Background

The United States faces significant challenges in its ability to build and maintain critical infrastructure, develop new technologies, and compete globally in strategic industries. A major factor contributing to these challenges is the intricate system of environmental regulations and permitting processes that have evolved over the past five decades.

Since the early 1970s, landmark federal environmental laws such as the National Environmental Policy Act (NEPA), the Clean Air Act, the Clean Water Act, and the Endangered Species Act (ESA) have played an important role in protecting America's natural resources and public health. However, over time, these laws and their associated regulations have grown increasingly sclerotic, leading to lengthy delays, excessive costs, and unintended consequences that hinder economic development and, ironically, often harm the environment.

While much attention is given to federal regulations, states have significant autonomy and flexibility in implementing and enforcing environmental laws. Many states have their own versions of these federal laws, such as State Environmental Policy Acts (SEPAs), as well as state-specific implementations of federal clean air and water regulations. More than 75 percent of the permits authorized by federal law are actually issued by the states.¹ This presents both challenges and opportunities for state policymakers.

States have the power to streamline permitting processes, reduce unnecessary bureaucratic hurdles, and create more efficient regulatory frameworks without compromising environmental protections. By doing so, they can foster economic growth, attract investment, and maintain their competitive edge in crucial industries such as manufacturing, energy production, and technology development.



¹ Terry Davies et al., "Reforming Permitting," Resources for the Future (November 30, 2001), <u>https://www.rff.org/publications/reports/reforming-permitting/</u>.

This playbook aims to provide state legislators with a comprehensive understanding of the key environmental permitting issues affecting economic development and to highlight potential areas for reform.

The playbook is structured in two parts. The first section introduces four key environmental laws—SEPAs, the Clean Air Act, the Clean Water Act, and State Endangered Species Acts (SESAs)—describing how each law is implemented at the state level, outlining key issues, and suggesting broadly applicable reforms. The second section addresses each state individually, considering each state's unique challenges and opportunities.

Thirty-two states are covered in total, as illustrated below. These states were selected for their records of support for regulatory reform, which make them a logical starting point for this research.



Though the remaining 18 states (and the District of Columbia) are not covered in the state-by-state analysis, many of the specific state recommendations included here are applicable nationwide.

The Challenges

State Environmental Policy Acts

State Environmental Policy Acts, often referred to as "little NEPAs" or "SEPAs,"¹ are state-level laws modeled after the federal NEPA.² These acts require state agencies to consider the environmental impacts of certain proposed actions or projects. While intended to promote environmental stewardship, SEPAs are typically *procedural* laws that create significant hurdles for economic development and infrastructure projects without offering *substantive* environmental protections.³ SEPAs require that agencies describe environmental impacts, but most do not mandate specific environmental outcomes (with a few exceptions, such as the California Environmental Quality Act and New York's State Environmental Quality Review Act). Information on timelines is limited, but studies to date have suggested that Environmental Impact Statements (EISs) consistently take more than a year to complete.⁴

¹ Greta Raser, "States as Laboratories: State Environmental Policy Acts Are Tools to Address Pressing Environmental Harms," *Vermont Law Review*, December 5, 2023, <u>https://lawreview.vermontlaw.edu/states-as-laboratories-state-environmental-policy-acts-are-tools-to-address-pressing-environmental-harms/.</u>

^{2 &}quot;States and Local Jurisdictions with NEPA-like Environmental Planning Requirements," Council on Environmental Quality, accessed October 15, 2024, <u>https://ceq.doe.gov/laws-regulations/states.html</u>.

³ Environmental Quality Council Members, *Improving the MEPA Process: Senate Joint Resolution No. 18: Report to the 57th Legislature of the State of Montana* (2000), <u>https://leg.mt.gov/content/Publications/</u> <u>Environmental/2000mepa_report/2000-mepa-report.pdf</u>.

⁴ City of Columbus Joint Planning Commission, *Environmental Review* (2023), <u>https://www.ci.columbus.mn.us/vertical/sites/%7B3E6BBFCC-1CDD-4B18-AFB1-2CB97872D422%7D/uploads/2023-06-07_PRESENTATION__Environmental_Review_Inservice.pdf</u>; Environmental Quality Council Members, *Improving the MEPA Process*.

How It Works

SEPAs generally follow a process similar to NEPA:

1. Trigger: SEPAs are typically triggered by state agency actions, state funding, or projects requiring state permits. The trigger can include activities such as:

- Construction of state facilities (e.g., roads, schools)
- Activities on state land
- Large-scale private developments requiring state permits

2. Initial Review: When a project is proposed, the relevant state agency determines if it falls under SEPA requirements. This often involves checking if the project is above certain thresholds (e.g., size, cost) or if it is on a list of actions requiring review.

3. Environmental Review: If SEPA applies, some form of environmental review is required. This typically involves:

- Describing the proposed action
- Analyzing potential environmental impacts
- Considering alternatives

The depth and complexity of this review can vary significantly based on the state and the project.

4. Impact Determination: Based on the initial review, the agency decides whether a more comprehensive analysis is needed. Some states use a tiered system, while others may have a single level of review for all applicable projects.

5. Comprehensive Analysis (if required): For projects deemed to have potentially significant impacts, a more detailed environmental study is often required. This process:

- Involves a thorough examination of all potential environmental impacts
- Requires months or even years to complete
- Often includes multiple opportunities for public comment

6. Final Decision: After the environmental review process, the agency makes a decision on the project. In most states, SEPAs do not mandate a specific outcome, but only require that environmental impacts be considered.

Key Issues

- Bureaucratic Burden: SEPAs often require extensive environmental assessments (EAs) or EISs, which can be time-consuming and costly for both developers and state agencies. North Carolina, for instance, has a dedicated State Environmental Review Clearinghouse to manage SEPA projects.⁵
- Project Delays: The review process required by SEPAs can significantly delay projects, sometimes by years. This is particularly problematic for time-sensitive developments or in industries where rapid innovation is crucial.
- Potential for Litigation: SEPAs can provide grounds for legal challenges to projects, even when environmental impacts are minimal, leading to further delays and increased costs.⁶
- Duplicative Reviews: In many cases, projects may be subject to both federal NEPA review and state SEPA review, leading to redundant processes and further delays. While some states have provisions for joint NEPA/SEPA documents, the coordination is rarely seamless.⁷
- Inconsistent Application: The implementation of SEPAs varies widely among states. For example, in North Carolina, everything from solar projects to transportation infrastructure can trigger SEPA review, while Indiana has exempted so many actions from its state NEPA that some describe it as a "forgotten" law.⁸ This inconsistency creates an uneven playing field for development across the country.

It's important to note that while SEPAs can pose challenges to development, they are not universal. In fact, *most states do not have their own SEPAs*,⁹ choosing instead to rely on federal environmental regulations and state-specific rules.

^{5 &}quot;State Environmental Review Clearinghouse," North Carolina Department of Administration, accessed October 15, 2024, <u>https://www.doa.nc.gov/about/special-programs/environmental-review-clearinghouse</u>.

^{6 &}quot;MEPA Court Cases," Montana Legislature, accessed October 15, 2024, <u>https://leg.mt.gov/committees/</u> <u>interim/past-interim-committees/2017-2018/eqc/montana-environmental-policy-act/mepa-court-</u> <u>cases/;</u> Environmental Quality Council, *A Guide to the Montana Environmental Policy Act* (2021), <u>https://</u> <u>leg.mt.gov/content/Publications/Environmental/2021-mepa-handbook.pdf</u>.

⁷ Marchman, "Little NEPAs."

⁸ Patrick Marchman, "'Little NEPAs': State Equivalents to the National Environmental Policy Act in Indiana, Minnesota, and Wisconsin," Dukespace (2012), <u>https://dukespace.lib.duke.edu/items/a249cf4b-e073-4e1c-8782-fd7a5389a027</u>.

^{9 &}quot;States and Local Jurisdictions," Council on Environmental Quality.

This creates a patchwork of environmental review requirements across the country, with some states at a competitive disadvantage because of more stringent SEPA requirements.

For state legislators looking to streamline permitting processes, examining the necessity, scope, and implementation of SEPAs (where they exist) will be a fruitful area for reform. Potential strategies include raising thresholds for review, expanding exemptions for low-impact projects, improving coordination between state and federal review processes, and implementing time limits on review processes to prevent indefinite delays.

SEPA Recommendations

1. Full Repeal: Most states do not have SEPAs, relying instead on federal environmental laws and state-specific rules. For states with SEPAs, a full repeal would reduce regulatory burden and align with the majority of states.

2. Reduce SEPA Applicability and/or Impact:

- Raise Review Thresholds: Increase the size, cost, or impact thresholds that trigger SEPA review, focusing only on truly significant projects.
- Expand Exemptions: Broaden the list of activities exempt from SEPA review, particularly for low-impact or routine projects.
- Restrict Legal Challenges: Tighten the criteria for legal standing to challenge SEPA decisions, reducing potential for frivolous lawsuits. Put time limits on injunctive relief.

3. Clarify SEPA Standards: Develop clearer, more standardized criteria for environmental impact assessments to increase predictability and efficiency.

The Clean Air Act

The Clean Air Act (CAA), enacted in 1970, is a cornerstone of U.S. environmental policy. It established a comprehensive framework for regulating air pollution from both stationary and mobile sources. The CAA has been undeniably successful in reducing air pollution—the six most common pollutants dropped by an average of 69 percent between 1980 and 2019¹⁰ but it has also created significant challenges for industrial development and manufacturing in the United States.¹¹

While the CAA is a federal law, its implementation largely falls to the states. States are tasked with developing and implementing State Implementation Plans (SIPs) to meet the National Ambient Air Quality Standards (NAAQS) set by the Environmental Protection Agency (EPA). They also have primary responsibility for issuing permits, conducting inspections, and enforcing regulations. This state-level implementation allows for some flexibility in how air quality goals are achieved, taking into account local conditions and priorities.

How It Works

1. National Standards: EPA sets NAAQS for six criteria pollutants.

2. State Implementation: States develop SIPs to meet these standards, which must be approved by EPA.

3. Permitting: Both major and minor stationary sources of pollution require permits under the CAA. New major sources or significant modifications undergo New Source Review (NSR), a lengthy process demanding detailed environmental analyses and advanced emission controls. While less



¹⁰ Joseph E. Aldy et al., "Looking Back at Fifty Years of the Clean Air Act," Resources for the Future (January 6, 2020), <u>https://www.rff.org/publications/working-papers/looking-back-at-fifty-years-of-the-clean-air-act/</u>.

¹¹ Thomas Hochman, "It's Not Just NEPA: Reforming Environmental Permitting," *American Affairs* (winter 2023), <u>https://americanaffairsjournal.org/2023/11/its-not-just-nepa-reforming-environmental-</u> <u>permitting/;</u> Arthur G. Fraas, John Graham, and Jeff Holmstead. "EPA's New Source Review Program: Time for Reform?," Resources for the Future (January 9, 2017), <u>https://www.rff.org/publications/journalarticles/epas-new-source-review-program-time-for-reform/;</u> and Howard K. Gruenspecht and Robert N. Stavins, "New Source Review Under the Clean Air Act: Ripe for Reform," *Resources* (2002), <u>https://</u> <u>media.rff.org/archive/files/sharepoint/WorkImages/Download/RFF-Resources-147-newsource.pdf</u>.

complex, minor source permitting still poses a significant regulatory hurdle, particularly for small businesses, with upfront review times that take several months and requirements around emissions monitoring and reporting.

4. Ongoing Compliance: Facilities must continually monitor and report their emissions to ensure they meet permit requirements.

The CAA's complex permitting process, particularly NSR, can lead to significant delays and increased costs for industrial projects, discouraging new development or modernization of existing facilities.

Flexible Major NSR (PALs)

Major sources are sources that emit pollutants above a specific pollutant threshold—typically either 100 tons per year or 250 tons per year, depending on the source type. New major sources must undergo NSR.

Plantwide Applicability Limits (PALs) are a type of flexible air permit introduced by EPA in 2002 to streamline the NSR process. PALs set a facilitywide emissions cap, which allows operators to make changes within their facility without triggering NSR as long as they stay below the cap. The idea is that by providing a clear and flexible emissions cap, facilities can more easily manage and optimize their operations, reduce the administrative burdens, and expedite project timelines, all while maintaining compliance with air quality standards.¹² PAL permits have 10-year terms and may be renewed at the end of that term.

Key Issues

- Limited State Adoption: Some states, such as Montana, have not incorporated PALs into their SIPs, making them unavailable to facilities in those jurisdictions.¹³
- Additional Stringency: Other states, such as New York, have added extra requirements to their PAL programs. For example, New York requires PAL



¹² Environmental Protection Agency, *Memorandum on Guidance on Plantwide Applicability Limitation Provisions Under the New Source Review Regulations* (2020), <u>https://www.epa.gov/sites/default/</u> <u>files/2020-08/documents/pal_guidance_final_-_signed.pdf</u>.

¹³ Representative of the Montana Department of Environmental Quality, phone conversation with author, July 18, 2024.

emissions to be reduced to 75 percent of the initial cap after five years unless the facility can prove this is technologically impossible.¹⁴ Such additions can discourage facilities from applying for PALs.

- Lack of Clear Guidance: Many states have not provided clear information about the benefits of PALs or addressed common misconceptions, leading to hesitancy among facility operators to pursue this option. Most state departments of environmental quality do not even put PALs alongside other permitting options on their air permitting websites.
- Low Uptake: As a result of these factors, PAL adoption has been extremely limited. Between 2002 and 2020, only about 70 facilities across 20 states were issued PALs.¹⁵
- Expertise Gap: The low adoption rate has created a self-perpetuating problem where permitting authorities lack experience with PALs, potentially leading to longer review times and further discouraging their use.
- These issues have resulted in a missed opportunity for many facilities to benefit from the operational flexibility and potential emissions reductions that PALs can offer. Addressing these challenges could significantly streamline the permitting process for many industrial facilities while maintaining environmental protections.

PAL Recommendations

1. Incorporate PALs into SIPs: States that have not included PALs in their State Implementation Plans should do so in order to make them available as a permitting option. State legislatures could mandate this inclusion if environmental agencies are hesitant.

2. Remove Additional Stringency: States that have added extra requirements to their PAL programs (such as New York's 75 percent reduction after five years) should remove these additional barriers. PALs should closely align with federal guidelines to maximize their efficacy.

¹⁴ New York State Compilation of Codes, Rules and Regulations, Title 6, Department of Environmental Conservation, Chapter III, Air Resources, Subchapter A, Prevention and Control of Air Contamination and Air Pollution, Part 231, Subpart 231-9. "Setting the Initial PAL." 6 CRR-NY 231-9.4, accessed October 15, 2024, https://www.law.cornell.edu/regulations/new-york/6-NYCRR-231-9.4.

¹⁵ Environmental Protection Agency, *Memorandum on Guidance on Plantwide Applicability Limitation Provisions*.

3. Promote PAL Awareness: State environmental agencies should develop comprehensive guidance documents about PALs, explaining their benefits and application process. These should be prominently featured on agency websites alongside other permitting options.

4. Clarify PAL Renewal Process: Develop clear guidance on the PAL renewal process, emphasizing that there is no automatic downward adjustment or "ratcheting" of PALs at renewal. Explain that reviewing authorities have significant discretion in setting renewed PAL levels. If baseline actual emissions plus the significant level are equal to or greater than 80 percent of the PAL, the reviewing authority may renew the PAL at the same level without additional considerations. Even when below 80 percent, authorities have discretion to renew PALs at the current level or higher if justified. EPA recommends that reviewing authorities approach any downward adjustments with restraint to avoid penalizing emission reductions.

5. Create Certainty in PAL Renewal Language: Federal language around PAL renewal states that if the emissions level is equal to or greater than 80 percent of the current PAL level, the Administrator "may renew" the PAL at the same level, or the Administrator "may adjust" the PAL limit "based on various factors."¹⁶ This ambiguity around renewal has driven much of the concern about PALs, so some states, such as North Carolina, have elected to change "may renew" to "shall renew" in an effort to provide regulated entities with more certainty.¹⁷ States should replicate this approach.

6. Legislative Oversight: State legislatures should require environmental agencies to report on PAL implementation, including uptake rates and explanations for low adoption if applicable.

Flexible Minor NSR

Minor New Source Review is the permitting process for smaller sources of air pollution that do not meet the threshold for major source regulation under the CAA. While less stringent than major NSR, Minor NSR can nevertheless create significant regulatory barriers for small businesses and local development projects, including small manufacturing plants, auto body shops, and certain agricultural operations.



¹⁶ Prevention of significant deterioration of air quality, 40 C.F.R. § 52.21 (2024).

¹⁷ North Carolina Administrative Code, Title 15A, Chapter 02, Subchapter D, Rule .0530. "Prevention of Significant Deterioration," <u>https://www.law.cornell.edu/regulations/north-carolina/15A-N-C-Admin-Code-02D-0530</u>.

Flexible Minor NSR programs are state-level initiatives designed to streamline the permitting process for minor sources. These programs reduce the administrative burden without compromising environmental protections, maintaining the same substantive standards but reducing review times by establishing preset requirements and emissions limitations.

There are three common approaches to flexible Minor NSR permitting: general permits, permits-by-rule, and registration programs. Each of these approaches offers a streamlined alternative to traditional individual permitting, with varying levels of regulatory oversight and flexibility.

General Permits: These are pre-approved permits for specific types of facilities or equipment that have similar operations and emissions. Instead of going through individual permit applications, which require each facility to submit detailed technical information and undergo a lengthy review process, qualifying sources can simply apply to be covered under the general permit.

To obtain coverage under a general permit, facilities typically must submit a Notice of Intent (NOI), certify that they meet all eligibility requirements, and agree to comply with all permit conditions. The NOI process usually involves filling out a standardized form with basic information about the facility, its operations, and how it meets the general permit criteria. Facilities then submit this form to the relevant environmental agency for review and approval.

Permits by Rule: These allow facilities to construct and operate without an individual permit application if they meet certain predefined criteria and agree to specific operational limitations.

The permit-by-rule (PBR) process is even more streamlined than the general permit process. Rather than submitting a NOI, facilities obtaining coverage under a PBR typically must self-certify their compliance with the rule's requirements, maintain records demonstrating ongoing adherence, and, in some cases, notify the regulatory agency of their intent to operate under the PBR.

Registration Programs: These are simplified regulatory mechanisms designed for small sources of emissions that don't warrant full permitting. To complete the registration process, facilities typically must submit basic information about their operations, certify compliance with applicable standards, and agree to specific operational limitations. The registration process usually involves filling out a standardized form with essential details about the facility, its emissions sources, and how it meets the registration criteria.

Registration programs are designed to be the least burdensome regulatory option, typically for very small sources or those with minimal environmental impact. They usually require less detailed information than PBRs or general permits, and often have more flexible criteria.

Key Issues

- Inconsistent Availability: The types of flexible permits available vary widely from state to state, creating an uneven playing field for businesses. Some states, such as Texas, have designed hundreds of flexible permit categories. Others, such as Wyoming, have not designed any.
- Lack of Federal Guidance: Unlike major NSR, there is minimal federal guidance on flexible approaches for Minor NSR, leading to inconsistent implementation across states.
- Resource Constraints: Developing new flexible permitting programs requires significant state resources and expertise, which many state agencies lack.
- Legal Uncertainty: Novel approaches may face legal challenges from environmental groups, discouraging states from innovating. Texas's flexible permit program, for example, was subject to years of legal battles before finally gaining approval.¹⁸
- Limited Scope: Many flexible options are only available for certain industry types or sizes of operations, leaving some businesses without access to streamlined processes.
- Balancing Act: States must balance the desire for streamlined permitting with the need to ensure compliance with NAAQS and other air quality goals.

Minor NSR Recommendations

1. Expand Flexible Permit Options: Expand PBR, general permit, and registration permit options wherever possible for low-impact projects and specific industry categories to reduce the administrative burden, particularly for industry categories that are covered by flexible permits in multiple other states.

2. Develop Clear Guidance: Create comprehensive guidance documents explaining flexible Minor NSR options, their benefits, and application processes. Make these prominently available on state environmental agency websites.

3. Allow Pre-construction Activities: Allow certain pre-construction activities to begin before the full air permit is issued, reducing project delays.

4. Train Agency Staff: Invest in training programs for permitting staff to build expertise in flexible permitting approaches for minor sources.

¹⁸ Hollie O'Connor, "Court Faults EPA's Rejection of Flexible Permits Program," *Texas Tribune*, August 13, 2012, <u>https://www.texastribune.org/2012/08/13/court-permits-were-disapproved-inadequate-reasons/</u>.

The Clean Water Act

The Clean Water Act (CWA), enacted in 1972, is the primary federal law governing water pollution in the United States. Its objective is to restore and maintain the chemical, physical, and biological integrity of the nation's waters. While the CWA has been instrumental in improving water quality across the country, it has also created significant regulatory challenges for development and industry.

How It Works

1. Water Quality Standards: States establish water quality standards for water bodies, subject to EPA approval.

2. Permitting Programs: The CWA establishes two main permitting programs:

- Section 404 for the discharge of dredged or fill material into waters of the United States
- National Pollutant Discharge Elimination System (NPDES) for point source discharges

3. Enforcement: EPA and authorized states enforce the CWA through inspections, monitoring, and legal action when necessary.

While the CWA has successfully reduced water pollution, its complex permitting requirements and broad jurisdiction have often led to delays in development projects and legal uncertainties for landowners and businesses.

Section 404

Section 404 of the Clean Water Act regulates the discharge of dredged or fill material into waters of the United States, including wetlands. This program is crucial for many development projects, including construction, water resource projects, and infrastructure development.

The Section 404 permit process typically involves a detailed application submitted to the U.S. Army Corps of Engineers (USACE), which includes project plans, EAs, and proposed mitigation measures. For larger or more complex projects, obtaining a Section 404 permit can take several months to years, in part because the issuance of a 404 permit tends to be considered a "major federal action," triggering NEPA review. This extensive review process, while designed to protect water resources, often becomes a major hurdle for developers.

While Section 404 permitting is predominantly carried out by the USACE, states have the right to "assume" authority. 404 assumption is rare, but a number of states have begun to consider taking control over the program over the last decade.

Section 404 Assumption

Section 404 state assumption allows states to take over the administration of the Section 404 permit program from the USACE within their borders. This process offers several advantages, including local control, streamlined permitting, and better integration with other state environmental programs. In Michigan, for example, the average processing time for Section 404 general permits is 14 days or less.¹⁹ By comparison, the USACE sets a "goal" of 60 days for general permits, though the "actual time . . . depends on the project's complexity, impact on the aquatic environment, effect on ESA-listed species, archaeological and/or tribal issues, Corps workload, and other factors."²⁰

States must commit substantial resources to implement the program, however, and the approval process is complicated. Oregon considered assuming Section 404 authority in the late 2010s, and estimated that the assumption application package would cost \$970,000 and that the program would cost just over \$1.7 million per biennium.²¹ As of 2023, only two states have successfully assumed Section 404 administration: Michigan in 1984 and New Jersey in 1994.²² Florida briefly held this authority starting in 2020, but it was subsequently

^{19 &}quot;Introduction to Michigan's Wetland Program," Michigan Department of Environmental Quality, accessed October 15, 2024, <u>https://www.michigan.gov/-/media/Project/Websites/egle/</u> <u>Documents/Programs/WRD/Wetlands/Introduction-to-Michigans-Section-404-Wetland-Program.</u> <u>pdf?rev=a1ad3d8e01bc42a680a0ed2bf47ff8c9</u>.

^{20 &}quot;Discharge of Dredged or Fill Material Into Water," Governor's Office for Regulatory Innovation and Assistance, last updated February 22, 2022, <u>https://www.oria.wa.gov/site/alias_oria/</u> mid_12357/403/handbook-entry?ItemID=37.

^{21 &}quot;SPGP's and 404 Assumption: Oregon's Experience," National Association of Wetland Managers, March 22, 2021, <u>https://nawm.org/pdf_lib/assumption_webinar/spgps_and_404_assumption_oregons_experience_022621_metz_poage.pdf</u>.

²² Environmental Protection Agency, "State and Tribal Assumption of Section 404 of the Clean Water Act," accessed October 15, 2024, <u>https://www.epa.gov/cwa404g</u>.

revoked in response to legal challenges from environmental groups.²³ The Trump administration made a concerted push to facilitate state assumption, and a number of states, such as Nebraska, Minnesota, and Alaska, have reportedly begun making plans to pursue assumption.²⁴

Importantly, state assumption appears to remove the federal trigger for NEPA requirements, which offers enormous advantages in terms of administrative and regulatory burden.²⁵ In New Jersey, for example, certain elements of Endangered Species Act and National Historic Preservation Act review are incorporated into the state's permitting assumption agreement, but NEPA is not.²⁶

Key Issues

- Legislative Requirements: States must enact laws and regulations that are at least as stringent as the federal program.
- Resources: States must demonstrate they have adequate funding and staffing to implement the program effectively.
- Program Development: States must develop comprehensive permit, compliance, and enforcement programs specifically for Section 404.
- Partial Authority: States can only assume authority over certain waters (for example, the USACE would likely retain authority over waters involved in interstate commerce), which can create confusion and reduce the perceived benefits of assumption.
- EPA Approval: The state must apply for and receive EPA approval, a process that can be lengthy and complex.
- Interagency Coordination: States must establish agreements with federal agencies, including EPA, USACE, and U.S. Fish and Wildlife Service.
- Political Will: There must be strong political support to take on this responsibility, given the significant challenges involved.

²³ Center for Biological Diversity, et al. v. Michael S. Regan, et al., D.D.C. Civil Action No. 21-119 (2024), https://floridaspecifier.com/wp-content/uploads/2024/02/Moss-404-Vacatur.pdf.

²⁴ E.A. Crunden, "EPA Preps Trump-Era Plan to Push Wetlands Permitting to States," *E&E News*, May 8, 2023, <u>https://www.eenews.net/articles/epa-preps-trump-era-plan-to-push-wetlands-permitting-to-states/</u>.

^{25 &}quot;Clean Water Act Section 404 State Assumption," National Association of Wetland Managers (2010), https://www.oregonlegislature.gov/committees/hagnr/WorkgroupDocuments/Eric%20Metz,%20 DSL%20(fact%20sheets%20-%2011-5-2018%20meeting).pdf.

²⁶ Representative of the New Jersey Department of Environmental Protection, email correspondence with author, September 25, 2024.

The low rate of state assumption for Section 404 permitting, compared to NPDES primacy, highlights the unique challenges associated with this program. The complex nature of wetland regulation, the partial nature of state authority under assumption, and the significant resources required have deterred many states from pursuing this option. However, recent interest, as evidenced by Florida's assumption in 2020, as well as recent efforts from Alaska, Nebraska, and Minnesota, suggest that some states are considering the potential benefits of local control over this important regulatory program.

Section 404 Recommendations

States should strongly consider assuming Section 404 permitting authority from USACE. State assumption can offer increased local control, streamlined permitting processes, and better coordination with other state environmental programs, which could lead to more efficient and environmentally sound decisions.

This process does come with significant resource requirements and complex approval processes, but the experiences of Michigan and New Jersey demonstrate that successful implementation is possible and can yield positive outcomes. States interested in assumption should conduct a thorough costbenefit analysis, assessing their capacity to handle the administrative and technical demands of the program.

NPDES

The National Pollutant Discharge Elimination System (NPDES) is a permit program that controls water pollution by regulating both traditional point sources and certain stormwater discharges that release pollutants into waters of the United States.

NPDES permits fall into two general categories: stormwater and non-stormwater.

Stormwater permits cover discharges from precipitation events, such as rain or snowmelt, that flow over land and impervious surfaces (such as paved streets, parking lots, and building rooftops). These permits are designed to prevent pollutants from being washed into local water bodies. They typically apply to three main sectors:

- Construction activities disturbing one or more acres of land
- Industrial activities exposed to stormwater
- Municipal Separate Storm Sewer Systems (MS4)

Non-stormwater permits cover point source discharges of pollutants to surface waters. These permits are primarily focused on regulating the surface discharge of wastewater from various sources, including municipal wastewater treatment plants, industrial facilities, and commercial and agricultural operations. Non-stormwater permits set specific limits on the types and amounts of pollutants that can be discharged, and often mandate monitoring and reporting requirements.

NPDES permitting is predominantly carried out by the states, with a few exceptions.

NPDES Authority

NPDES authority refers to the authority granted by EPA to a state to implement and enforce the NPDES program within its borders. This arrangement has been far more widely adopted than Section 404, with 47 states currently holding NPDES authority as of 2023. The exceptions are Massachusetts, New Hampshire, New Mexico, the District of Columbia, and most U.S. territories, where EPA directly implements the program.²⁷

NPDES authority offers several advantages, including local control, the potential for faster permit processing, and closer oversight of permitted facilities.

Key Issues

- Legislative Requirements: States must pass laws and regulations that are at least as stringent as the federal program.
- Resources: States must demonstrate that they have adequate personnel and funding to implement the program.
- Program Development: States must develop comprehensive permit, compliance, and enforcement programs.
- EPA Approval: The state must apply for and receive EPA approval, a process that can be lengthy and complex.



^{27 &}quot;NPDES State Program Authority," Environmental Protection Agency, last updated April 22, 2024, <u>https://www.epa.gov/npdes/npdes-state-program-authority</u>.

NPDES General Permits

NPDES permitting is split between general and individual permits. Individual permitting is the conventional permitting approach, whereby facilities undergo case-by-case review and receive tailored permits based on their specific discharge characteristics, location, and potential environmental impacts. This process typically involves a detailed application, thorough evaluation by the permitting authority, opportunity for public comment, and the development of permit conditions specific to the individual facility.

By contrast, much like with general permits under the Clean Air Act, NPDES general permits are a type of permit designed to provide coverage for multiple facilities or activities that have similar operations and types of discharges. These permits streamline the permitting process for both the regulating authority and the regulated community, offering a more efficient alternative to individual permits for certain categories of dischargers while maintaining the same substantive environmental standards. Whereas individual permits tend to take six months or more to process, general permits often take just a few weeks.²⁸

The majority of states have developed three general permits for stormwater:

- The Construction General Permit (CGP), which covers stormwater discharges from construction activities that disturb one or more acres of land.
- The Multi-Sector General Permit (also known as the Industrial General Permit), which covers stormwater discharges from specific categories of industrial activity.
- Small Municipal Separate Storm Sewer System (MS4) General Permit, which covers stormwater discharges from municipal separate storm sewer systems serving populations of less than 100,000. Large MS4s serving populations of 100,000 or more still require individual permitting.²⁹

Non-stormwater general permits are more variable, though some, such as the Pesticide General Permit, are almost ubiquitous. Some states, such as

²⁸ Representative of the North Dakota Department of Environmental Quality, phone conversation with author, July 17, 2024; Kansas Department of Health and Environment, *Proposed Project Information Water And Wastewater Regulatory Requirements Kansas Department Of Health And Environment* (2024), <u>https://www.kdhe.ks.gov/DocumentCenter/View/40095/2024-03-15-Proposed-Project-Letter-PDF?bidId=</u>.

²⁹ Environmental Protection Agency, *Stormwater Phase II Regulations: An Overview* (2023), <u>https://www.epa.gov/system/files/documents/2023-09/EPA-Stormwater-Phase-II-Final-Rule-Factsheet-1.0-Overview.pdf</u>.

Wisconsin and Missouri, have developed upwards of 25 general permits. Others, such as Kansas and Wyoming, have developed fewer than 10.

NPDES Recommendations

1. Assume Authority: Massachusetts, New Hampshire, and New Mexico should align with the rest of the United States and assume NPDES authority.

2. Expand General Permits: Expand general permit options wherever possible for low-impact projects and specific industry categories to reduce the administrative burden, particularly to industry categories that are covered by general permits in multiple other states.

3. Consider Other Flexible Permits: Some states have experimented with other flexible permit options, such as PBR. Michigan uses a PBR for stormwater construction, for example. Given that PBR is typically more streamlined than general permits, states should consider designing such programs where appropriate.

State Endangered Species Acts

State Endangered Species Acts (SESAs) are state-level laws modeled after the federal ESA. These acts require state agencies to protect species at risk of extinction within their borders. While intended to complement federal protection efforts, SESAs vary widely in their scope, effectiveness, and implementation across the country, and often create months of regulatory delays.

How It Works

1. Listing and Prohibitions: States maintain their own lists of threatened and endangered species, often including federally listed species. Most states prohibit the taking, possession, transportation, or sale of listed species. This means that development projects or activities that could potentially harm or disturb listed species are often delayed, modified, or even blocked entirely. The definition of take varies by state, but tends to cover the harassment, hunting, capturing, or killing of listed animals.

2. Consultation: Some states require state agencies to consult with wildlife departments on actions affecting listed species. This is a time-consuming procedural requirement—Nebraska reports that its formal consultation takes an average of almost five months, for example.³⁰ These consultations can significantly delay project timelines and increase costs, especially for large-scale development or infrastructure projects that may affect multiple species or habitats.

3. Critical Habitat: A few states go further, authorizing the designation of critical habitat. This designation can impose additional restrictions on land use and development within these areas by requiring more stringent environmental reviews, mandating specific conservation measures, limiting the types of activities permitted, or even prohibiting certain forms of development altogether.

4. Permits: Some states have established incidental take permit programs, which, similar to the federal ESA system, provide some flexibility for



³⁰ Representative of the Nebraska Parks and Game Commission, email correspondence with author, September 25, 2024.

development activities by allowing projects to proceed even if they may result in the unintentional harm or death of protected species. These permits typically require mitigation measures to minimize and offset impacts on protected species. Additionally, many states offer exemptions for take related to scientific research, wildlife management, zoological display, or educational purposes, subject to specific conditions and approvals.

Key Issues

- Regulatory Burden: Much like the federal ESA, SESAs can create significant regulatory hurdles for development projects, often requiring extensive assessments and mitigation measures, limiting land use options for public and private sector projects, and creating significant permitting delays.
- Inconsistent Application: The strength and scope of SESAs vary dramatically between states, creating an uneven playing field for businesses operating across state lines.
- Outdated Lists: Several states report that their endangered species lists are outdated, potentially protecting species that no longer need protection while creating unnecessary regulatory burdens.³¹
- Private Land Challenges: Because much of the habitat for listed species is on private land, SESAs can significantly affect property rights and land values.

Well-designed state wildlife protections can play a role in preventing costly federal listings by protecting species before they reach critical levels. However, there is significant room for improvement in many states to streamline these laws, reduce regulatory burdens, and create more balanced approaches that protect both species and economic interests.



³¹ National Caucus of Environmental Legislators, "A Natural Legacy for the Future: State Laws for Endangered and Threatened Species" (January 2023), <u>https://www.ncelenviro.org/app/uploads/2023/03/SESA-Report.pdf</u>.

SESA Recommendations

1. Consider Targeted Alternatives: States who want to protect species from federal listing to prevent the federal ESA from applying should enter into Conservation Agreements or programmatic Conservation Benefit Agreements, which much more efficiently target at-risk species than heavily procedural state ESA equivalents.

2. Focus on Pre-Federal Listing: Ensure that SESAs primarily target species that are at risk of becoming federally listed. This proactive approach can prevent more stringent federal regulations while allowing states to maintain control over species management.

3. Develop Incidental Take Permits: This will allow for self-regulation on the part of developers while still ensuring protection for listed species. Incidental take permits can require developers to create habitat conservation plans that mitigate impacts, but also provide regulatory certainty and streamlined approval processes for projects that meet predetermined criteria. This approach can balance species protection with economic development needs, reducing conflicts and encouraging proactive conservation efforts from the private sector.

4. Regular List Updates: Implement mandatory, periodic reviews of state endangered species lists to ensure they reflect current scientific data, remove species that have recovered, and focus on those truly at risk of federal listing. Develop clear, achievable recovery goals for each listed species to provide a path for delisting and regulatory relief.

5. Consider Landowner Incentives: Consider incentive programs for private landowners to voluntarily conserve species and habitats, such as safe harbor agreements.

State Checklists

Note: Bolded text reflects areas in need of attention. Asterisks reflect a qualified status that is further explained in the state-by-state analysis.

State Environmental Policy Acts

State	SEPA	Used Often Includes Private Sector		Major Exemptions
Alabama	No	-	-	-
Alaska	No	-	-	-
Arizona	No	-	-	-
Arkansas	No	-	-	-
Florida	No	-	-	-
Georgia	Yes	No	No	Yes
Idaho	No	-	-	-
Indiana	Yes	No	No	Yes
Iowa	No	-	-	-
Kansas	No	-	-	-
Kentucky	No	-	-	-
Louisiana	No	-	-	-
Minnesota	Yes	Yes	Yes	No
Mississippi	No	-	-	-
Missouri	No	-	-	-
Montana	Yes	Yes	Yes	No
Nebraska	No	-	-	-
New Hampshire	No	-	-	-
North Carolina	Yes	Yes	Yes	Yes
North Dakota	No	-	-	-
Ohio	No	-	-	-
Oklahoma	No	-	-	-
Pennsylvania	No	-	-	-

State Environmental Policy Acts (Cont.)

State	SEPA	Used Often	Includes Private Sector	Major Exemptions
South Carolina	No	-	-	-
South Dakota	Yes	No	No	Yes
Tennessee	No	-	-	-
Texas	No	-	-	-
Utah	No	-	-	-
Virginia	Yes	Yes	Yes*	Yes
West Virginia	No	-	-	-
Wisconsin	Yes	Yes	Yes	No
Wyoming	No	-	-	-

Clean Air Act

State	PALs in SIP	PALs in Use	PAL Guidance	PBR/ Registration Permits	General Permits	Other
Alabama	Yes	Yes	No	No	No	-
Alaska	Yes	Yes	No	No	Yes	PAELs, ORLs
Arizona	Yes	Yes	No	Yes	Yes	-
Arkansas	Yes	Yes	No	Yes	Yes	-
Florida	Yes	No	No	Yes	No	-
Georgia	Yes*	Yes*	No	Yes	Yes	-
Idaho	Yes	No	No	Yes	Yes	FECs
Indiana	Yes	Yes	Yes	Yes	Yes	-
Iowa	Yes	Yes	No	Yes	Yes	-
Kansas	No	-	-	Yes	Stone Facilities	Expedited Construction
Construction						
Kentucky	Yes	Yes	No	Yes	No	-
Louisiana	Yes	Yes	Yes	No	Yes	-



Clean Air Act (Cont.)

State	PALs in SIP	PALs in Use	PAL Guidance	PBR/ Registration Permits	General Permits	Other
Minnesota	Yes	Yes	Yes*	Yes	Yes	Capped Permits
Mississippi	Yes	No	No	No	Oil & Gas	Multimedia Permit
Missouri	Yes	Yes	No	Yes	No	-
Montana	No	-	-	Yes	No	-
Nebraska	Yes	Yes	No	Yes	Yes	-
New Hampshire	Yes	Yes*	No	Rock Crushers	Emergency Generators	-
North Carolina	Yes	Yes	No	Yes	Yes	Renewable Permits
North Dakota	Yes	Yes	No	Oil & Gas	Yes	-
Ohio	Yes	Yes	No	Yes	Yes	-
Oklahoma	Yes	Yes	No	Yes	Yes	-
Pennsylvania	Yes*	Yes	No	No	Yes	-
South Carolina	Yes*	Yes	No	Yes	Yes	-
South Dakota	Yes	No	No	No	Yes	-
Tennessee	Yes	Yes	No	Yes	Yes	-
Texas	Yes	Yes	Yes	Yes	Yes	RAPs, Flexible Permits
Utah	Yes	Yes	No	Oil & Gas	No	-
Virginia	Yes	Yes	No	No	Yes	Exemptions, Renewable PBR
West Virginia	Yes	No	No	No	Yes	-
Wisconsin	Yes	Yes	No	Yes	Yes	-
Wyoming	Yes	Yes	No	No	No*	-

Clean Water Act

State	Section 404 Assumption	NPDES Authority	Number of NPDES General Permits
Alabama	No	Yes	24
Alaska	No	Yes	25
Arizona	No	Yes	7
Arkansas	No	Yes	13
Florida	In a legal dispute	Yes	8
Georgia	No	Yes	11
Idaho	No	Yes	8
Indiana	No	Yes	12
Iowa	No	Yes	10
Kansas	No	Yes	6
Kentucky	No	Yes	12
Louisiana	No	Yes	14
Minnesota	No	Yes	16
Mississippi	No	Yes	13
Missouri	No	Yes	31
Montana	No	Yes	15
Nebraska	No	Yes	8
New Hampshire	No	No	12*
North Carolina	No	Yes	10
North Dakota	No	Yes	10
Ohio	No	Yes	17
Oklahoma	No	Yes	16
Pennsylvania	No	Yes	13
South Carolina	No	Yes	14
South Dakota	No	Yes	13
Tennessee	No	Yes	7
Texas	No	Yes	17
Utah	No	Yes	10
Virginia	No	Yes	15
West Virginia	No	Yes	13
Wisconsin	No	Yes	28
Wyoming	No	Yes	9



State Endangered Species Acts

State	SESA	Consultation Critical Hab Requirements Designatio		Incidental Take Permit
Alabama	No	-	-	-
Alaska	Yes	No	No No	
Arizona	Yes	No	No	No
Arkansas	Yes	No	No*	No
Florida	Yes	No	No	No
Georgia	Yes	No	No	No
Idaho	Yes	No	No	No
Indiana	Yes	No	No	No
Iowa	Yes	No	No	No
Kansas	Yes	No	No	No
Kentucky	Yes	No	No	No
Louisiana	Yes	No	No	No
Minnesota	Yes	No	No*	Yes
Mississippi	Yes	No	No	No
Missouri	Yes	No	No	No
Montana	Yes	No	No	No
Nebraska	Yes	Yes	Yes	No*
New Hampshire	Yes	No	Yes	No
North Carolina	Yes	No	No*	No*
North Dakota	Yes	No	No	No
Ohio	Yes	No	No	No
Oklahoma	Yes	No	No	No
Pennsylvania	Yes	No	No	No
South Carolina	Yes	No	No	No
South Dakota	Yes	No	No	No
Tennessee	Yes	No	No	No
Texas	Yes	No	No	No
Utah	No*	No	No	No
Virginia	Yes	No*	No	Yes*
West Virginia	No	_	-	-
Wisconsin	Yes	Yes	No	Yes
Wyoming	No	-	-	-



State-by-State Analysis

Alabama

State Environmental Policy Act

SEPA	Used Often	Includes Private Sector	Major Exemptions
No	-	-	-

Notes

Alabama does not have a SEPA.

Recommendations

N/A

Clean Air Act

PALs in SIP	PALs in Use	PAL Guidance	PBR/ Registration Permits	General Permits	Other
Yes	Yes	No	No	No	-

Notes

Alabama has incorporated PALs into its SIP. The state's PAL language aligns closely with federal regulations and does not contain additional stringent permitting language.³²

Alabama has issued one PAL permit to the Mercedes plant in Tuscaloosa.³³

Alabama does not have general permits, PBR programs, or other flexible air permitting options.³⁴

Recommendations

The Alabama legislature should direct the Alabama Department of Environmental Management (ADEM) to develop and publish comprehensive PAL guidance documents on its website, explaining the benefits and application process and referencing EPA's 2020 PAL guidance where relevant. ADEM should clarify the PAL renewal process, emphasizing that there is no automatic downward adjustment at renewal, which could alleviate industry concerns about future operational flexibility. The legislature should also mandate annual reporting from the ADEM on PAL implementation, including uptake rates and explanations for low adoption. By enacting these measures, legislators can promote more efficient permitting processes while maintaining environmental protections, making Alaska more attractive for industrial development.

Alabama should modify its PAL renewal language to provide greater certainty for regulated entities. Currently, federal PAL language states that if the emissions level is equal to or greater than 80 percent of the current PAL level, the Administrator "may renew" the PAL at the same level, or "may adjust" it based on various factors. This ambiguity has caused concern about the potential for "automatic ratcheting" of the PAL level upon renewal among regulated entities. To address this, Alabama should follow North Carolina's example and change the language from "may renew" to "shall renew" in its state regulations. This approach would offer regulated entities more certainty in the PAL renewal process.

³² Alabama Administrative Code r. 335-3-14-.04 (2024).

Alabama Department of Environmental Management, Major Source Operating Permit No. 413-0034 (2022), https://lf.adem.alabama.gov/WebLink/DocView.aspx?id=104785147&dbid=0.

³⁴ Representative of the Alabama Department of Environmental Management, phone conversation with author, August 22, 2024.

For Minor NSR, the ADEM should be encouraged to implement a general or PBR program for common industrial categories (see Appendix I).

Clean Water Act

Section 404 Assumption	NPDES Authority	Number of NPDES General Permits
No	Yes	24

Notes

Alabama has not assumed the federal Section 404 permitting program, which remains under the jurisdiction of the U.S. Army Corps of Engineers and EPA. Alabama has had NPDES authority since 1979 and operates its program under the Alabama Department of Environmental Management (ADEM). It has established a set of general permits.³⁵

Alabama has established the following general permits under its stormwater program:

- Construction General Permit (CGP)
- Phase II MS4 Permit (MS4)

Beyond the CGP and MS4 permits, Alabama does not clearly delineate between stormwater and non-stormwater discharges. Many of its permits cover both wastewater and stormwater processes within specific industries or activities. Alabama's remaining general permits include:

- Asphalt Permit
- Boat/Ship Permit
- Lumber & Wood Permit
- Concrete Permit
- Metals Permit



^{35 &}quot;NPDES Permits," Alabama Department of Environmental Management, accessed October 15, 2024, <u>https://adem.alabama.gov/programs/water/permitting.cnt</u>.

- Transportation Permit
- Food Permit
- Landfill Permit
- Paint Permit
- Salvage/Recycling Permit
- Plastic & Rubber Permit
- Stone/Glass/Clay Permit
- Textile Permit
- Non-Contact Cooling Water Permit
- Offshore Permit
- Petroleum Permit
- Hydroelectric Permit
- Water Treatment Permit
- Hydrostatic Test Permit
- Non-Coal/Non-Metallic Aggregate Mining
- Pesticides (PGP)
- <5 Acre Small Mining (Mining)

In addition to these general permits, Alabama utilizes a PBR approach for Concentrated Animal Feeding Operations (CAFOs) and Animal Feeding Operations (AFOs).³⁶ As of 2020, approximately 820 AFO/CAFO facilities had NPDES permit coverage under the state's PBR regulations.³⁷

³⁶ Representative of the Alabama Department of Environmental Management, email correspondence with author, September 12, 2024.

³⁷ Environmental Protection Agency, *EPA Region 4 NPDES Permit Quality Review Alabama* (2020), <u>https://www.epa.gov/sites/default/files/2020-06/documents/alabama_2018.pdf</u>.

Recommendations

For the main Section 404 recommendations, see p. 17.

For NPDES, Alabama should expand its general permit program to other commonly covered facilities and operations (see Appendix II).

State Endangered Species Act

SESA	Consultation	Critical Habitat	Incidental Take
	Requirements	Designation	Permit
No	-	-	-

Notes

Alabama does not have a SESA.

Recommendations

N/A


Alaska

State Environmental Policy Act

SEPA	Used Often	Includes Private Sector	Major Exemptions
No	-	-	-

Notes

Alaska does not have a SEPA.

Recommendations

N/A

Clean Air Act

PALs in SIP	PALs in Use	PAL Guidance	PBR/ Registration Permits	General Permits	Other
Yes	Yes	No	No	Yes	PAELs, ORLs

Notes

Alaska has written a PAL into its SIP. The state's PAL language aligns closely with federal regulations and does not contain additional stringent permitting language.³⁸

^{38 18} Alaska Admin. Code § 50 (2022), https://dec.alaska.gov/media/1038/18-aac-50.pdf.

A PAL has been issued to one facility in the state: the Nushagak Electric and Telephone Cooperative.³⁹ Given that Alaska has a significant presence of heavy industry, this level of PAL uptake is quite low.

Alaska has general permits for both major sources (which are general operating permits) and minor sources:⁴⁰

General Major (Operating) Permits

- Fuel Limited Diesel Electric Plants
- Asphalt Plants

General Minor Permits

- Asphalt Plants
- Rock Crusher
- Oil and Gas Drilling Rigs
- Portable Oil and Gas Operations

Alaska also has two unique flexible permitting mechanisms: Owner Requested Limits (ORLs) and Preapproved Emission Limits (PAELs). ORLs allow owners or operators of stationary sources to request enforceable emission limits to avoid more stringent permitting requirements.⁴¹ PAELs are specifically designed for stationary sources with diesel engines or gasoline distribution facilities, allowing higher annual fuel limits for facilities using newer, lower-emission EPA-certified engines.⁴² Alaska does not have a PBR program.

^{39 &}quot;Notice of Public Notice State of Alaska Department of Environmental Conservation Nushagak Electric Cooperative Inc., Dillingham power Plant," State of Alaska, November 30, 2020, <u>https://aws.state.ak.us/OnlinePublicNotices/Notices/View.aspx?id=200294</u>.

^{40 &}quot;Air Permits, Approvals, and Public Notices," Alaska Department of Environmental Conservation, accessed October 15, 2024, <u>https://dec.alaska.gov/Applications/Air/airtoolsweb/</u><u>AirPermitsApprovalsAndPublicNotices</u>.

^{41 18} Alaska Admin. Code § 50.225 (2024), <u>https://casetext.com/regulatioN/Alaska-administrative-code/</u> <u>title-18-environmental-conservation/chapter-50-air-quality-control/article-2-program-administration/</u> <u>section-18-aac-50225-owner-requested-limits</u>.

^{42 &}quot;ORL & PAEL Applications and Forms," Alaska Department of Environmental Conservation, accessed October 15, 2024, <u>https://dec.alaska.gov/air/air-permit/orl-pael-application/</u>.

Recommendations

The Alaska legislature should direct the Alaska Department of Environmental Conservation (DEC) to develop and publish comprehensive PAL guidance documents on its website, explaining the benefits and application process and referencing EPA's 2020 PAL guidance where relevant. The DEC should clarify the PAL renewal process, emphasizing that there is no automatic downward adjustment at renewal, which could alleviate industry concerns about future operational flexibility. The legislature should also mandate annual reporting from the DEC on PAL implementation, including uptake rates and explanations for low adoption. By enacting these measures, legislators can promote more efficient permitting processes while maintaining environmental protections, making Alaska more attractive for industrial development.

Alaska should modify its PAL renewal language to provide greater certainty for regulated entities. Currently, federal PAL language states that if the emissions level is equal to or greater than 80 percent of the current PAL level, the Administrator "may renew" the PAL at the same level, or "may adjust" it based on various factors. This ambiguity has caused concern about the potential for "automatic ratcheting" of the PAL level upon renewal among regulated entities. To address this, Alaska should follow North Carolina's example and change the language from "may renew" to "shall renew" in its state regulations. This approach would offer regulated entities more certainty in the PAL renewal process.

Alaska should consider expanding its existing general permit program to cover other sources that other states' flexible permitting programs commonly cover (see Appendix I).

Clean Water Act

Section 404 Assumption	NPDES Authority	Number of NPDES General Permits
No	Yes	25

Notes

Alaska has not assumed the federal Section 404 permitting program, which remains under the jurisdiction of the U.S. Army Corps of Engineers and EPA. Alaska has had NPDES authority—known as the Alaska Pollutant Discharge Elimination System (APDES) in the state—since 2008 and has established a comprehensive set of general permits under its water quality programs. Alaska has established the following general permits under its stormwater program:⁴³

- Construction General Permit (CGP)
- Multi-Sector General Permit (MSGP)
- Municipal Separate Storm Sewer System (MS4)
- Ted Stevens Int'l Airport (ANC-GP)
- Excavation Dewatering General Permit
- Hydrostatic General Permit
- Pesticide General Permit

Alaska has also established general permits for the following industrial and wastewater facilities and operations:⁴⁴

- Log Transfer Facility Pre 1985
- Log Transfer Facility Post 1985
- Alaska Offshore Seafood Processor
- Seafood Processors in Alaska
- Graywater Discharges From Facilities Related to Oil and Gas Extraction That Have an Approved Minimum Treatment Waiver
- Wastewater Discharges from Drinking Water Treatment Facilities
- North Slope Oil and Gas
- Non-Contact Cooling Water
- Hydrostatic and Aquifer Pump Test General Permit



^{43 &}quot;Stormwater," Alaska Department of Environmental Conservation, accessed October 15, 2024, <u>https://dec.alaska.gov/water/wastewater/stormwater/</u>.

^{44 &}quot;Industrial or Non-Domestic Discharges - Applications," Alaska Department of Environmental Conservation, accessed October 15, 2024, <u>https://dec.alaska.gov/water/wastewater/permit-entry/industrial-or-nondomestic</u>.

- Excavation Dewatering
- Small Suction Dredging⁴⁵

Alaska has a special section for Seafood and Hatchery permits, including:⁴⁶

- Remote Onshore Seafood Processors
- Alaska Offshore Seafood Processors
- Seafood Processors Operating Onshore Facilities in Kodiak, Alaska
- Aquaculture Facilities in Alaska
- Seafood General Permits for Activities Greater than 3.0 Nautical Miles from Shore

For municipal and domestic wastewater, Alaska has established:47

- Small Publicly Owned Treatment Works and other Small Treatment Works Providing Secondary Treatment of Domestic Wastewater and Discharging to Surface Water
- Domestic Wastewater Treatment Lagoons Discharging to Surface Water

Additionally, Alaska has implemented a PBR system for domestic wastewater systems, which was part of regulatory updates in 2023.⁴⁸

^{45 &}quot;Small Suction Dredge General Permit – AKG375000 Discharge Registration – Frequently Asked Questions," Alaska Department of Environmental Conservation, May 9, 2023, <u>https://dec.alaska.gov/media/f4lfomux/akg375000-registration-faq-230509.pdf</u>.

^{46 &}quot;Seafood Processing and Hatchery Section," Alaska Department of Environmental Conservation, accessed October 15, 2024, <u>https://dec.alaska.gov/water/wastewater/seafood/</u>.

^{47 &}quot;Domestic and Municipal Discharges Applications," Alaska Department of Environmental Conservation, accessed October 15, 2024, <u>https://dec.alaska.gov/water/wastewater/permit-entry/domestic-and-municipal/</u>.

^{48 &}quot;Proposed Updates to Wastewater Treatment and Disposal Regulations at 18 AAC 72," Alaska Department of Environmental Conservation, last updated April 30, 2024, <u>https://dec.alaska.gov/water/wastewater/engineering/2022-regulation-updates/faq;</u> "Summary Crosswalk for 18 AAC 72," Alaska Department of Environmental Conservation, October 1, 2023, <u>https://dec.alaska.gov/media/3eedro5v/summary-crosswalk-for-18-aac-72-amended-through-oct-1-2023.pdf</u>.

Recommendations

For the main Section 404 recommendations, see p. 17.

For NPDES, Alaska should expand its general permit program to other commonly covered facilities and operations (see Appendix II).

State Endangered Species Act

SESA	Consultation	Critical Habitat	Incidental Take
	Requirements	Designation	Permit
Yes	No	No	No

Notes

Alaska has a SESA.⁴⁹ Alaska's SESA does not include formal consultation requirements in the same sense as the federal ESA, nor does it provide for critical habitat designation.

Alaska prohibits take of state-listed species, which it defines as the harvest, capture, or propagation of animals, with narrow exemptions.⁵⁰ It does not offer incidental take permits. Alaska's current state list only covers species which are also federally listed, though that is subject to change.⁵¹

Recommendations

Given that Alaska may designate state-listed species beyond those federally listed under the Endangered Species Act, and prohibits take of those species, it should design an "incidental take permit" to allow for take under specific circumstances. This would give developers some flexibility to move forward on critical projects that may result in incidental take, so long as they implement approved conservation measures and mitigate any potential impacts on protected species.

Alaska should also consider shifting away from its SESA program towards



⁴⁹ Alaska Stat. § 16.20.180 (2024).

⁵⁰ Alaska Stat. § 16.20.195 (2024).

^{51 &}quot;ESA General Information," Alaska Department of Fish and Game, accessed October 15, 2024, <u>https://www.adfg.alaska.gov/index.cfm?adfg=wildlifediversity.esalisted&id=esa-general-information</u>.

a more targeted series of Conservation Agreements and Programmatic Conservation Benefit Agreements, so that it focuses on efficiently preventing the federal listing (and thus federal regulation) of at-risk species.

For more, see the general State Endangered Species Act recommendations on p. 23.

Arizona

State Environmental Policy Act

SEPA	Used Often	Includes Private Sector	Major Exemptions
No	-	-	-

Notes

Arizona does not have a SEPA.

Recommendations

N/A

Clean Air Act

PALs in SIP	PALs in Use	PAL Guidance	PBR/ Registration Permits	General Permits	Other
Yes	Yes	No	Yes	Yes	-

Notes

Arizona's air quality permitting is managed by multiple jurisdictions: the Arizona Department of Environmental Quality (ADEQ), the Maricopa County Air Quality Department (MCAQD), Pinal County, and Pima County.

PALs are incorporated into Arizona's SIP. The state's PAL language aligns closely with federal regulations and does not contain additional stringent permitting language. Maricopa County has issued at least one PAL permit,⁵²



⁵² Maricopa County Air Quality Department, *Title V Air Quality Operating Permit No. P0006742* (2021), <u>https://www.exploreintel.com/assets/documents/ocotillo/other/2021%20Air%20Permit.pdf</u>.

but PALs have not been issued elsewhere in the state.⁵³

ADEQ has both General Permits and Registration Permits. Its registration permit program is based on emissions thresholds.⁵⁴ Its general permit program covers a number of facilities:⁵⁵

- Air Curtain Incinerators
- Concrete Batch Plants
- Crushing and Screening
- Dust Action
- Hospitals
- Hot Mix Asphalt Plants
- Soil Vapor Extraction Units

MCAQD has General Permits for:⁵⁶

- Asphalt Kettle Operations
- Crematories
- Dry Cleaning Operations
- Fuel Burning Operations
- Gasoline Dispensing Operations
- Graphic Arts Operations
- Stationary Dust-Generating Operations



⁵³ Representative of the Arizona Department of Environmental Quality, phone conversation with author, 2024.

^{54 &}quot;Why Do I Need Air Quality Standard Registration," Arizona Department of Environmental Quality, September 19, 2017, <u>https://azdeq.gov/why-do-i-need-air-quality-standard-registration</u>.

^{55 &}quot;Permit Compliance Assistance," Arizona Department of Environmental Quality, last updated April 7, 2024, <u>https://azdeq.gov/air-quality-permitting-compliance-assistance</u>.

^{56 &}quot;General Permit Information," Maricopa County, accessed October 15, 2024, <u>https://www.maricopa.gov/2430/General-Permit-Information</u>.

- Stationary Emergency Internal Combustion Engines
- Surface Coating and/or Abrasive Blasting Operations
- Vehicle and Mobile Equipment Refinishing Operations
- Wastewater Treatment Plants
- Wood Furniture, Fixture, and Millwork Operations

Pima County has General Permits for:57

- Perchloroethylene Dry Cleaners
- Human and Animal Crematories
- Gasoline Dispensing Facilities
- Non-Metallic Material Handling Facilities
- Plating, Anodizing, and Polishing Facilities
- Fuel Burning Equipment (Boilers and Generators)

Pinal County does not have general permits or PALs.⁵⁸

Recommendations

The Arizona legislature should direct ADEQ and the county air quality departments to develop and publish comprehensive PAL guidance documents on their websites, explaining the benefits and application process and referencing EPA's 2020 PAL guidance where relevant. ADEQ should clarify the PAL renewal process, emphasizing that there is no automatic downward adjustment at renewal, which could alleviate industry concerns about future operational flexibility. The legislature should also mandate annual reporting from the ADEQ on PAL implementation, including uptake rates and explanations for low adoption. By enacting these measures, legislators can promote more efficient permitting processes while maintaining environmental protections, making Arizona more attractive for industrial development.

^{57 &}quot;General Permits," Pima County, accessed October 15, 2024, <u>https://www.pima.gov/499/General-Permits</u>

⁵⁸ Representative of the Pinal County Air Quality Department, phone conversation with author, August 20, 2024.

Arizona should modify its PAL renewal language to provide greater certainty for regulated entities. Currently, federal PAL language states that if the emissions level is equal to or greater than 80 percent of the current PAL level, the Administrator "may renew" the PAL at the same level, or "may adjust" it based on various factors. This ambiguity has caused concern about the potential for "automatic ratcheting" of the PAL level upon renewal among regulated entities. To address this, Arizona should follow North Carolina's example and change the language from "may renew" to "shall renew" in its state regulations. This approach would offer regulated entities more certainty in the PAL renewal process.

ADEQ and the county air quality departments should be encouraged to harmonize their permitting programs where possible to reduce complexity for businesses operating across county lines. This could include aligning general permit categories and registration permit thresholds.

Pinal County should be directed to explore the possibility of implementing general permits and registration permits to provide more flexible options for businesses in their jurisdiction.

Both ADEQ and the county air quality departments should be encouraged to expand their general permit programs to cover additional industrial categories (see Appendix I).

Clean Water Act

Section 404 Assumption	NPDES Authority	Number of NPDES General Permits
No	Yes	7

Notes

Arizona has not assumed the federal Section 404 permitting program, which remains under the jurisdiction of the U.S. Army Corps of Engineers and EPA. Arizona has had NPDES authority since 2002 and operates its program under the name Arizona Pollutant Discharge Elimination System (AZPDES). It has established a set of general permits.⁵⁹

^{59 &}quot;Surface Water Protection Permitting Unit," Arizona Department of Environmental Quality, last updated September 5, 2023, <u>https://azdeq.gov/SWPPermitting</u>.

Arizona has established the following general permits under its nonstormwater program:

- De Minimis General Permit (DMGP)
- Pesticides General Permit (PGP)
- Biosolids General Permit

Arizona has established the following general permits under its stormwater program:

- Construction General Permit (CGP)
- Industrial Multi-Sector General Permit (MSGP)
- Mining Multi-Sector General Permit (Mining MSGP)
- Phase II MS4 General Permit (MS4)

Recommendations

For the main Section 404 recommendations, see p. 17.

For NPDES, Arizona should expand its general permit program to other commonly covered facilities and operations (see Appendix II).

State Endangered Species Act

SESA	Consultation	Critical Habitat	Incidental Take
	Requirements	Designation	Permit
Yes	No	No	No

Notes

Arizona has a SESA.⁶⁰ Arizona's SESA does not include formal consultation requirements in the same sense as the federal ESA, nor does it provide for critical habitat designation.

⁶⁰ Ariz. Rev. Stat. Ann. § 17-268 (2024).

Arizona prohibits take of state-listed species, which it defines as the taking, wounding, killing, or possessing of animals, with narrow exemptions.⁶¹ It does not offer incidental take permits. Arizona's current state list covers species beyond those that are listed under the federal ESA.⁶²

Recommendations

Given that Arizona has state-listed species beyond those federally listed under the Endangered Species Act, and prohibits take of those species, it should design an "incidental take permit" to allow for take under specific circumstances. This would give developers some flexibility to move forward on critical projects that may result in incidental take, so long as they implement approved conservation measures and mitigate any potential impacts on protected species.

Arizona should also consider shifting away from its SESA program towards a more targeted series of Conservation Agreements and Programmatic Conservation Benefit Agreements, so that it focuses on efficiently preventing the federal listing (and thus federal regulation) of at-risk species.

For more, see the general State Endangered Species Act recommendations on p. 23.



⁶¹ Arizona Revised Statutes § 17-314 (2022).

^{62 &}quot;Arizona Wildlife Conservation Strategy," Arizona Game and Fish Department, accessed October 15, 2024, <u>https://awcs.azgfd.com/arizonas-biodiversity</u>.

Arkansas

State Environmental Policy Act

SEPA	Used Often	Includes Private Sector	Major Exemptions
No	_	-	-

Notes

Arkansas does not have a SEPA.

Recommendations

N/A

Clean Air Act

PALs in SIP	PALs in Use	PAL Guidance	PBR/ Registration Permits	General Permits	Other
Yes	Yes	No	Yes	Yes	-

Notes

Arkansas has written a PAL into its SIP.⁶³ The state's PAL language aligns closely with federal regulations and does not contain additional stringent permitting language.

The first and only PAL in Arkansas was issued in August 2023 to Evergreen Packaging Inc., a pulp and paper mill.⁶⁴

^{63 &}quot;Regulation No. 19: Regulations of the Arkansas Plan of Implementation For Air Pollution Control," Arizona Pollution Control and Ecology Commission, February 26, 2016, <u>https://www.adeq.state.ar.us/</u> regs/files/reg19_final_160314.pdf.

⁶⁴ Arkansas Division of Environmental Quality, *Air Operating Permit No. 0580-AOP-R18* (2023), <u>https://www.adeq.state.ar.us/downloads/WebDatabases/PermitsOnline/Air/0580-AOP-R18.pdf</u>.

Arkansas has a general permit program, which covers a number of facilities:⁶⁵

- Air Curtain Incinerators
- Animal/Human Remains Incinerator Facilities
- Cotton Gins
- Gasoline Bulk Plants
- Hot Mix Asphalt Facilities
- Natural Gas Compression Stations
- Rock Crushing Facilities

Arkansas also has a registration program, which is set by emissions level.⁶⁶

Recommendations

The Arkansas legislature should direct the Arkansas Division of Environmental Quality (ADEQ) to develop and publish comprehensive PAL guidance documents on its website, explaining the benefits and application process and referencing EPA's 2020 PAL guidance where relevant. ADEQ should clarify the PAL renewal process, emphasizing that there is no automatic downward adjustment at renewal, which could alleviate industry concerns about future operational flexibility. The legislature should also mandate annual reporting from ADEQ on PAL implementation, including uptake rates and explanations for low adoption. By enacting these measures, legislators can promote more efficient permitting processes while maintaining environmental protections, making Arkansas more attractive for industrial development.

Arkansas should modify its PAL renewal language to provide greater certainty for regulated entities. Currently, federal PAL language states that if the emissions level is equal to or greater than 80 percent of the current PAL level, the Administrator "may renew" the PAL at the same level, or "may adjust" it based on various factors. This ambiguity has caused concern about the potential for "automatic ratcheting" of the PAL level upon renewal among



^{65 &}quot;Air Permits," Arkansas Division of Environmental Quality, accessed October 15, 2024, <u>https://www.adeq.state.ar.us/air/permits/</u>.

^{66 &}quot;Air Application Instructions," Arkansas Division of Environmental Quality, last updated August 18, 2021, <u>https://eportal.adeq.state.ar.us/webfiles/Air/Instructions/air_permit_application_forms_instructions.htm</u>

regulated entities. To address this, Arkansas should follow North Carolina's example and change the language from "may renew" to "shall renew" in its state regulations. This approach would offer regulated entities more certainty in the PAL renewal process.

For Minor NSR, ADEQ should be directed to expand general permitting options wherever possible to cover additional common industrial categories (see Appendix I).

Clean Water Act

Section 404 Assumption	NPDES Authority	Number of NPDES General Permits
No	Yes	13

Notes

Arkansas has not assumed the federal Section 404 permitting program, which remains under the jurisdiction of the U.S. Army Corps of Engineers and EPA. Arkansas has had NPDES authority since 1986 and has established a set of general permits under its water quality programs.

For stormwater, Arkansas has established:⁶⁷

- Large Site Construction General Permit (CGP) 5+ acres
- Small Site Construction General Permit (CGP) 1–5 acres
- Industrial General Permit (MSGP)
- MS4 General Permit (MS4)

Arkansas has established the following general permits for non-stormwater facilities:⁶⁸

• Landfill Sediment Ponds

^{67 &}quot;General Stormwater NPDES Permits," Arkansas Department of Energy and Environment, accessed October 15, 2024, <u>https://www.adeq.state.ar.us/water/permits/npdes/stormwater/</u>.

^{68 &}quot;General Non-Stormwater NPDES Permits," Arkansas Department of Energy and Environment, accessed October 15, 2024, <u>https://www.adeq.state.ar.us/water/permits/npdes/nonstormwater/</u>.

- Non-contact Cooling Water, Cooling Tower Blowdown, and Boiler Blowdown
- Aggregate Facility (Sand and Gravel)
- Individual Treatment System for Domestic Waste (Non-Industrial)
- Water Treatment Plants with a Wastewater Discharge
- Hydrostatic Testing
- Car/Truck Wash (with surface discharge)
- Groundwater Cleanup
- Pesticide Runoff

Recommendations

For the main Section 404 recommendations, see p. 17.

For NPDES, Arkansas should expand its general permit program to other commonly covered facilities and operations (see Appendix II).

State Endangered Species Act

SESA	Consultation	Critical Habitat	Incidental Take
	Requirements	Designation	Permit
Yes	No	No*	No

Notes

Arkansas has a SESA.⁶⁹ Arkansas's SESA does not include formal consultation requirements in the same sense as the federal ESA. While it does not provide for critical habitat designation, there are restrictions on the purchase of habitat for most severely threatened endangered species.

While Arkansas has state-listed species beyond those that are listed under the federal ESA, it *does not* prohibit their take.



⁶⁹ Ark. Code Ann. § 15-45-301 (2023).

Recommendations

Arkansas should consider shifting away from its SESA program towards a more targeted series of Conservation Agreements and Programmatic Conservation Benefit Agreements, so that it focuses on efficiently preventing the federal listing (and thus federal regulation) of at-risk species.

For more, see the general State Endangered Species Act recommendations on p. 23.

Florida

State Environmental Policy Act

SEPA	Used Often	Includes Private Sector	Major Exemptions
No	_	-	-

Notes

Florida does not have a SEPA.

Recommendations

N/A

Clean Air Act

PALs in SIP	PALs in Use	PAL Guidance	PBR/ Registration Permits	General Permits	Other
Yes	No	No	Yes	No	-

Notes

Florida has written a PAL (Rule 62-212.720) into its SIP.⁷⁰ The state's PAL language aligns closely with federal regulations and does not contain additional stringent permitting language.

⁷⁰ Fla. Admin. Code r. 62-212 (2008), <u>https://www.flrules.org/gateway/ChapterHome.</u> <u>asp?Chapter=62-212</u>.

However, there is not a single PAL in use in the state.⁷¹ While Florida may not have as much traditional heavy industry as other states, it has a significant and diverse industrial base, with a number of sources that could potentially benefit from PALs. This suggests either a lack of industry awareness or a lack of clear guidance from the Florida Department of Environmental Protection about the benefits of PALs.

Florida has what is effectively a PBR program, though it is confusingly called the General Permit Program within the state.⁷²

This program covers a wide range of facility types, including:

- Animal Crematories
- Asbestos Manufacturing and Fabrication Facilities
- Asphalt Concrete Plants
- Bulk Gasoline Plants
- Cast Polymer Operations
- Chromium Electroplaters
- Concrete Batching Plants
- Ethylene Oxide Sterilizers
- Halogenated Solvent Degreaser
- Human Crematories
- Mercury Recovery and Reclamation
- Nonmetallic Mineral Processing Plants
- Perchloroethylene Dry Cleaners
- Printing Operations



⁷¹ Representative of the Florida Department of Environmental Protection, phone conversation with author, July 18, 2024.

^{72 &}quot;Air General Permits," Florida Department of Environmental Protection, last updated April 1, 2024, <u>https://floridadep.gov/air/permitting-compliance/content/air-general-permits</u>.

- Reciprocating Internal Combustion Engines (RICE)
- Reinforced Polyester Resin Operations
- Secondary Aluminum Sweat Furnace
- Surface Coating Operations

Recommendations

The Florida legislature should direct the Florida Department of Environmental Protection (DEP) to develop and publish comprehensive PAL guidance documents on its website, explaining the benefits and application process and referencing EPA's 2020 PAL guidance where relevant. The DEP should clarify the PAL renewal process, emphasizing that there is no automatic downward adjustment at renewal, which could alleviate industry concerns about future operational flexibility. The legislature should also mandate annual reporting from the DEP on PAL implementation, including uptake rates and explanations for low adoption. By enacting these measures, legislators can promote more efficient permitting processes while maintaining environmental protections, making Florida more attractive for industrial development.

Florida should modify its PAL renewal language to provide greater certainty for regulated entities. Currently, federal PAL language states that if the emissions level is equal to or greater than 80 percent of the current PAL level, the Administrator "may renew" the PAL at the same level, or "may adjust" it based on various factors. This ambiguity has caused concern about the potential for "automatic ratcheting" of the PAL level upon renewal among regulated entities. To address this, Florida should follow North Carolina's example and change the language from "may renew" to "shall renew" in its state regulations. This approach would offer regulated entities more certainty in the PAL renewal process.

The Florida legislature should also direct DEP to expand its existing PBR program to facilities covered in other states' flexible permit programs (see Appendix I).

Clean Water Act

Section 404 Assumption	NPDES Authority	Number of NPDES General Permits
In a legal dispute	Yes	8

Notes

Florida's efforts to assume authority over the federal Section 404 permitting program since the late 2010s have faced significant legal challenges from environmental groups. These groups argued that Florida's program would weaken protections and lacked adequate compliance with federal standards. In 2023, a federal judge ruled that EPA's approval of Florida's assumption was improper and vacated the assumption, returning the permitting authority to the U.S. Army Corps of Engineers and EPA.

Florida has had NPDES authority since 1995. It has established the following general permits under its stormwater program, which are known as "generic" permits in the state:⁷³

- Construction Generic Permit (CGP)
- Multi-Sector Generic Permit (MSGP)
- MS4 Phase II Generic Permit

Florida has also established the generic permits for the following facilities and/ or operations under its wastewater program:⁷⁴

- Petroleum Contaminated Sites
- Ground Water from Dewatering Operations
- Concrete Batch Plants
- Pesticide Application
- Fresh Citrus Packinghouses (for Discharge to Percolation Ponds)



^{73 &}quot;NPDES Stormwater Program," Florida Department of Environmental Protection, accessed October 15, 2024, <u>https://floridadep.gov/Water/Stormwater</u>.

^{74 &}quot;Industrial Wastewater Generic/General Permits," Florida Department of Environmental Protection, last updated July 18, 2024, <u>https://floridadep.gov/water/industrial-wastewater/content/industrial-wastewater-genericgeneral-permits</u>.

Recommendations

While the legal challenges to Florida's Section 404 program are beyond the scope of this paper, Florida's efforts to assume the program are an indication of the benefits that assumption could bring to the state's Clean Water Act permitting process. Florida should make it a priority to reapply for assumption in the future.

Florida should also expand its generic permit program to other commonly covered facilities and operations (see Appendix II).

SESA	Consultation	Critical Habitat	Incidental Take
	Requirements	Designation	Permit
Yes	No	No	No

Notes

Florida has a SESA, known as the Florida Endangered and Threatened Species Act (FETSA). FETSA does not include formal consultation requirements in the same sense as the federal ESA, nor does it provide for critical habitat designation.

Florida prohibits take of state-listed species, which it defines as the intentional killing or wounding of animals, with narrow exemptions.⁷⁵ It does not offer incidental take permits. Florida's current state list covers species beyond those that are listed under the federal ESA.⁷⁶

Recommendations

Given that Florida has state-listed species beyond those federally listed under the Endangered Species Act, and prohibits take of those species, it should design an "incidental take permit" to allow for take under specific



^{75 &}quot;Florida Threatened and Endangered Species Act," Animal Legal and Historical Center, last updated October 2023, <u>https://www.animallaw.info/statute/fl-endangered-endangered-and-threatened-species-act</u>.

^{76 &}quot;Wildlife," Florida Fish and Wildlife Conservation Commission, accessed October 15, 2024, https://myfwc.com/conservation/value/fwcg/wildlife/.

circumstances. This would give developers some flexibility to move forward on critical projects that may result in incidental take, so long as they implement approved conservation measures and mitigate any potential impacts on protected species.

Florida should also consider shifting away from its SESA program towards a more targeted series of Conservation Agreements and Programmatic Conservation Benefit Agreements, so that it focuses on efficiently preventing the federal listing (and thus federal regulation) of at-risk species.

For more, see the general State Endangered Species Act recommendations on p. 23.

Georgia

State Environmental Policy Act

SEPA	Used Often	Includes Private Sector	Major Exemptions
Yes	No	No	Yes

Notes

Georgia has a SEPA known as the Georgia Environmental Policy Act (GEPA), which it enacted in 1991. Like NEPA, GEPA requires state agencies to evaluate the environmental impacts of proposed actions and to consider alternatives. This process includes preparing Environmental Effects Reports (EERs) to ensure that environmental considerations are integrated into the decision-making process.⁷⁷ However, GEPA narrowly applies to actions directly undertaken or significantly funded by state agencies, explicitly excluding private sector activities and most local government actions. The law sets high thresholds for triggering EERs, including land disturbances of five acres or more and state land sales exceeding five acres.

GEPA also includes broad exemptions for emergency measures, ministerial actions, and, following a 2016 revision, transportation projects under \$100 million.⁷⁸ The responsible official also has some discretion in determining whether an action requires an EER, potentially further limiting its application. Public participation is restricted, with a high bar of 100 written requests needed to mandate a public hearing. Legal challenges to decisions under GEPA are also constrained.

These factors collectively result in GEPA being infrequently invoked. So while the law exists on paper, its practical impact on state operations and



⁷⁷ Ga. Code Ann. § 12-16-1– § 12-16-9 (2023), <u>https://law.justia.com/codes/georgia/title-12/chapter-16/article-1/</u>.

^{78 &}quot;Georgia House Exempted GDOT From Georgia Environmental Policy Act Without Votes Of Oconee County Representatives," Oconee County Observations, March 23, 2016, <u>http://www. oconeecountyobservations.org/2016/03/georgia-house-exempted-gdot-from.html</u>; S.B. 346, 2015-2016 Ga. Reg. Sess. (2016).

environmental protection appears minimal compared to more robust SEPAs in other states. Still, GEPA continues to be triggered for some agency actions.⁷⁹

Recommendations

Where possible, the Georgia legislature should reform, create exclusions from, and raise the trigger threshold for, GEPA.

Georgia's implementation of GEPA does not create significant drag on the state economy or government projects. That said, the fact that the law has not been repealed creates the possibility that the law will be expanded or otherwise "remembered" in the future. The best course of action for Georgia, then, is to simply repeal the law in its entirety.

Clean Air Act

PALs in SIP	PALs in Use	PAL Guidance	PBR/ Registration Permits	General Permits	Other
Yes*	Yes*	No	Yes	Yes	-

Notes

For PALs, Georgia adopted parts of the 2002 NSR Reform rule (which designed PALs) by reference while modifying parts of the rule with state-specific provisions.⁸⁰

Georgia's PAL rules are largely more stringent than federal PAL language. Georgia's PAL rules require the PAL level to be adjusted downward to exclude non-compliant emissions, mandate that all non-compliant emissions exceeding regulations or permit conditions be included in compliance calculations, and impose stricter methods for adding emissions from new units.⁸¹

⁷⁹ Representative of the Georgia Department of Natural Resources, email correspondence with author, July 17, 2024; "Environmental Effects Report For Campus Greenway At Georgia State University," Georgia State University (2019), <u>https://facilities.gsu.edu/files/2019/06/Kell_Hall_EER_Draft5-1.pdf</u>.

⁸⁰ Environmental Protection Agency, *Response to Comments Document on Proposed Rule: "Prevention of Significant Deterioration (PSD) and Nonattainment New Source Review (NNSR): Project Emissions Accounting" - 84 FR 39244, August 9, 2019* (2020), <u>https://downloads.regulations.gov/EPA-HQ-OAR-2018-0048-0099/content.pdf</u>.

⁸¹ Ga. Comp. R. & Regs. r. 391-3-1-.02 (2024). https://rules.sos.ga.gov/gac/391-3-1-.02

There has been at least one PAL issued in the state, but there have been no PAL applications in over a decade. State officials are not aware of any PALs currently in use within the state.⁸²

Georgia has a PBR program covering a number of facilities:⁸³

- Fuel-burning equipment
 - Using natural gas/LPG and/or distillate oil
 - Using natural gas/LPG and/or residual oil
- On-Site Power Generation
- Concrete and concrete products
- Asphalt plants
 - New plants using natural gas/LPG and/or distillate oil
 - New and existing plants using any combination of natural gas/LPG, distillate oil, and residual oil
 - Plants in the Atlanta ozone nonattainment area
- Cotton ginning operations
- Coating and gluing operations (with various usage limits)
- Printing operations
- Non-reactive mixing operations
- Fiberglass molding and forming operations
- Peanut/nut shelling operations

⁸² Representative of the Georgia Environmental Protection Division, phone conversation with author, August 7, 2024.

^{83 &}quot;Permit-by-Rule," Georgia Environmental Protection Division, accessed October 15, 2024, <u>https://epd.</u> georgia.gov/permit-rule.

It also has a general (or "generic", to use the state's language) program covering the following facilities:⁸⁴

- Concrete Batch Plants
- Hot Mix Asphalt Plants

Recommendations

Georgia should revise its PAL language to align with federal requirements, removing the additional stringent language. This will require a revision to Georgia's SIP.

Georgia should also modify its PAL renewal language to provide greater certainty for regulated entities. Currently, federal PAL language states that if the emissions level is equal to or greater than 80 percent of the current PAL level, the Administrator "may renew" the PAL at the same level, or "may adjust" it based on various factors. This ambiguity has caused concern about the potential for "automatic ratcheting" of the PAL level upon renewal among regulated entities. To address this, Georgia should follow North Carolina's example and change the language from "may renew" to "shall renew" in its state regulations. This approach would offer regulated entities more certainty in the PAL renewal process.

The Georgia legislature should direct the Georgia Environmental Protection Division (EPD) to develop and publish comprehensive PAL guidance documents on its website, explaining the benefits and application process and referencing EPA's 2020 PAL guidance where relevant. The EPD should clarify the PAL renewal process, emphasizing that there is no automatic downward adjustment at renewal, which could alleviate industry concerns about future operational flexibility. The legislature should also mandate annual reporting from the EPD on PAL implementation, including uptake rates and explanations for low adoption. By enacting these measures, legislators can promote more efficient permitting processes while maintaining environmental protections, making Georgia more attractive for industrial development.

For Minor NSR, the EPD should be directed to expand general permitting and PBR options wherever possible for other common facilities types (see Appendix I).

^{84 &}quot;Generic Air Permits," Georgia Environmental Protection Division, accessed October 15, 2024, <u>https://epd.georgia.gov/generic-air-permits</u>

Clean Water Act

Section 404 Assumption	NPDES Authority	Number of NPDES General Permits	
No	Yes	11	

Notes

Georgia has not assumed the federal Section 404 permitting program, which remains under the jurisdiction of the U.S. Army Corps of Engineers and EPA. Georgia has had NPDES authority since 1974 and has established a set of general permits under its water quality programs.

For stormwater, Georgia has established the following general permits:

- Three Construction General Permits (CGP):⁸⁵
 - Stand Alone Construction (CGP)
 - Infrastructure Construction (CGP)
 - Common Development Construction (CGP)
- Industrial General Permit (MSGP)⁸⁶
- Three MS4 General Permits:⁸⁷
 - Small Municipal Separate Storm Sewer Systems (MS4s) at Military Facilities
 - Discharges From Georgia Department of Transportation Municipal Separate Storm Sewer System (MS4)
 - Phase II MS4

^{85 &}quot;NPDES Construction Stormwater General Permits," Georgia Environmental Protection Division, accessed October 15, 2024, <u>https://epd.georgia.gov/forms-permits/watershed-protection-branch-forms-permits/storm-water-forms/npdes-construction</u>.

^{86 &}quot;NPDES Industrial Storm Water General Permits," Georgia Environmental Protection Division, accessed October 15, 2024, <u>https://epd.georgia.gov/forms-permits/watershed-protection-branch-forms-permits/storm-water-forms/npdes-industrial-storm</u>.

^{87 &}quot;Municipal Stormwater," Georgia Environmental Protection Division, accessed October 15, 2024, https://epd.georgia.gov/watershed-protection-branch/stormwater/municipal-stormwater.

Georgia has established the following general permits for wastewater:⁸⁸

- Animal Feeding Operation
- Aquatic Pesticides
- Filter Backwash for Water Treatment Plants
- Mining and Processing Facilities
- Private and Institutional Development
- Once-Through Non-Contact Cooling Water with No Chemical Additives
- Settlement Pond Discharge from Sand & Gravel Dredgers
- Treated Water Associated with the Use of Reclaimed Water Discharges From Reclaimed Water Treatment Systems in the City of Pooler

Georgia's approach to general permits covers a range of industrial, municipal, and stormwater discharges. The state has separate construction permits for stand-alone, infrastructure, and common development projects, allowing for more tailored regulation based on the type of construction activity. The state's MS4 permits include specific coverage for military facilities and the Department of Transportation, reflecting attention to the unique stormwater management needs of these entities.

Recommendations

For the main Section 404 recommendations, see p. 17.

For NPDES, Georgia should expand its general permit program to other commonly covered facilities and operations (see Appendix II).



^{88 &}quot;NPDES and LAS General Permits," Georgia Environmental Protection Division, accessed October 15, 2024, <u>https://epd.georgia.gov/forms-permits/watershed-protection-branch-forms-permits/</u> <u>wastewater-permitting/national-pollutant-1</u>.

State Endangered Species Act

SESA	Consultation	Critical Habitat	Incidental Take
	Requirements	Designation	Permit
Yes	No	No	No

Notes

Georgia has a SESA, called the Endangered Wildlife Act of 1973. Georgia's SESA does not include formal consultation requirements in the same sense as the federal ESA, nor does it provide for critical habitat designation.

The Endangered Wildlife Act does not expressly prohibit take of state-listed species, though it does authorize prohibitions by rule.⁸⁹ Georgia does not offer incidental take permits, and its current state list covers species beyond those that are listed under the federal ESA.⁹⁰

Recommendations

Given that Georgia has state-listed species beyond those federally listed under the Endangered Species Act, and may prohibit take of those species through rulemaking, it should design an "incidental take permit" to allow for take under specific circumstances. This would give developers some flexibility to move forward on critical projects that may result in incidental take, so long as they implement approved conservation measures and mitigate any potential impacts on protected species.

Georgia should also consider shifting away from its SESA program towards a more targeted series of Conservation Agreements and Programmatic Conservation Benefit Agreements, so that it focuses on efficiently preventing the federal listing (and thus federal regulation) of at-risk species.

For more, see the general State Endangered Species Act recommendations on p. 23.



⁸⁹ Ga. Code Ann. § 27-3-132 (2023).

⁹⁰ U.S. Department of Agriculture, *Endangered and Protected Species* (2000), <u>https://efotg.sc.egov.usda.gov/references/Agency/GA/Archived_s1_endandered_protected_species_170209.pdf</u>.

Idaho

State Environmental Policy Act

SEPA	Used Often	Includes Private Sector	Major Exemptions
No	_	-	-

Notes

Idaho does not have a SEPA.

Recommendations

N/A

Clean Air Act

PALs in SIP	PALs in Use	PAL Guidance	PBR/ Registration Permits	General Permits	Other
Yes	No	No	Yes	Yes	FECs

Notes

Idaho has written a PAL into its SIP. The state's PAL language aligns closely with federal regulations and does not contain additional stringent permitting language.⁹¹

However, there is not a single PAL in use in the state.⁹² While Idaho may not have as much traditional heavy industry as other states, it has a significant and



⁹¹ Idaho Admin. Code r. 58.01.01 (2024).

⁹² Representative of the Idaho Department of Environmental Quality, email correspondence with author, August 22, 2024.

diverse industrial base, with a number of sources that could potentially benefit from PALs. This suggests either a lack of industry awareness or a lack of clear guidance from the Idaho Department of Environmental Quality about the benefits of PALs.

Idaho has a PBR program covering:93

- Rock Crushers
- Certain Dairy Operations

Idaho has a general permit program covering:

- Concrete Batch Plants
- Hot-Mix Asphalt Plants
- Automotive Coating Operations

Idaho has a unique mechanism: Facility Emissions Caps, which function as something akin to PALs for minor sources.⁹⁴ Like PALs, FECs provide a facility-wide emissions cap, offer operational flexibility within that cap, and are designed to simplify compliance.

Recommendations

The Idaho legislature should direct the Idaho Department of Environmental Quality (DEQ) to develop and publish comprehensive PAL guidance documents on its website, explaining the benefits and application process and referencing EPA's 2020 PAL guidance where relevant. The DEQ should clarify the PAL renewal process, emphasizing that there is no automatic downward adjustment at renewal, which could alleviate industry concerns about future operational flexibility. The legislature should also mandate annual reporting from the DEQ on PAL implementation, including uptake rates and explanations for low adoption. By enacting these measures, legislators can promote more efficient permitting processes while maintaining environmental protections, making Idaho more attractive for industrial development.

^{93 &}quot;Air Quality Permitting," Idaho Department of Environmental Quality, accessed October 15, 2024, <u>https://www.deq.idaho.gov/permits/air-quality-permitting/</u>.

⁹⁴ Idaho Admin. Code r. 58.01.01.176 (2024).

Idaho should modify its PAL renewal language to provide greater certainty for regulated entities. Currently, federal PAL language states that if the emissions level is equal to or greater than 80 percent of the current PAL level, the Administrator "may renew" the PAL at the same level, or "may adjust" it based on various factors. This ambiguity has caused concern about the potential for "automatic ratcheting" of the PAL level upon renewal among regulated entities. To address this, Idaho should follow North Carolina's example and change the language from "may renew" to "shall renew" in its state regulations. This approach would offer regulated entities more certainty in the PAL renewal process.

Idaho DEQ should also be directed to expand its general and PBR programs to facilities covered in other states' flexible permit programs (see Appendix I).

Clean Water Act

Section 404 Assumption	NPDES Authority	Number of NPDES General Permits
No	Yes	9

Notes

Idaho has not assumed the federal Section 404 permitting program, which remains under the jurisdiction of the U.S. Army Corps of Engineers and EPA. Idaho has had NPDES authority—called the Idaho Pollutant Discharge Elimination System (IPDES) in the state—since 2018. The state has established a set of general permits under its water quality programs.

For stormwater, Idaho has established:95

- Construction General Permit (CGP)
- Multi-Sector General Permit (MSGP)
- MS4 Phase II General Permit (MS4)



^{95 &}quot;Storm Water Permits," Idaho Department of Environmental Quality, accessed October 15, 2024, <u>https://www.deq.idaho.gov/permits/water-quality-permits-certifications/storm-water-permits/;</u> Representative of the Idaho Department of Environmental Quality, phone conversation with author, October 7, 2024.

Idaho has established the following general permits for wastewater and industrial facilities:⁹⁶

- Concentrated Animal Feeding Operations (CAFO)
- Concentrated Aquatic Animal Production (CAAP) Facilities:
 - 2007 IPDES General Permits Aquaculture and Associated Fish Processing Facilities Upper Snake-Rock in Idaho
 - 2019 NPDES General permits Aquaculture Facilities in Idaho
- Drinking Water Facilities
- Groundwater Remediation Facilities
- Small Suction Dredge Placer Miners
- Pesticide Applications

Recommendations

For the main Section 404 recommendations, see p. 17.

For NPDES, Idaho should expand its general permit program to other commonly covered facilities and operations (see Appendix II).

State Endangered Species Act

SESA	Consultation	Critical Habitat	Incidental Take
	Requirements	Designation	Permit
Yes	No	No	No

Notes

Idaho has a SESA.⁹⁷ Idaho's SESA does not include formal consultation requirements in the same sense as the federal ESA, nor does it provide for

^{96 &}quot;Permit Options," Idaho Department of Environmental Quality, accessed October 15, 2024, <u>https://www.deq.idaho.gov/water-quality/wastewater/permit-options/</u>.

⁹⁷ Idaho Code § 36-201 (2024).

critical habitat designation.

Idaho prohibits take—which it defines as to hunt, pursue, catch, capture, shoot, fish, seine, trap, kill, or possess or any attempt to do so—of certain species, such as game, birds, and fur-bearing animals.⁹⁸ It does not offer incidental take permits. Idaho's current state list does not cover species beyond those that are listed under the federal ESA, though it does have certain special protections for sage grouse.⁹⁹

Recommendations

Given that Idaho may list state species beyond those federally listed under the Endangered Species Act, and prohibits take of those species, it should design an "incidental take permit" to allow for take under specific circumstances. This would give developers some flexibility to move forward on critical projects that may result in incidental take, so long as they implement approved conservation measures and mitigate any potential impacts on protected species.

Idaho should consider shifting away from its SESA program towards a more targeted series of Conservation Agreements and Programmatic Conservation Benefit Agreements, so that it focuses on efficiently preventing the federal listing (and thus federal regulation) of at-risk species.

For more, see the general State Endangered Species Act recommendations on p. 23.

⁹⁸ Idaho Code § 36-202 (2024); Idaho Admin. Code r. 13.01.06 (2024).

⁹⁹ Representative of the Idaho Department of Fish and Game, email correspondence with author, September 30, 2024.
Indiana

State Environmental Policy Act

SEPA	Used Often	Includes Private Sector	Major Exemptions
Yes	No	No	Yes

Notes

Indiana enacted its Environmental Policy Act (IEPA) in 1972, modeled closely after NEPA. However, IEPA has been rarely used because of its numerous exemptions and is considered a "forgotten" environmental law in the state.¹⁰⁰ Key aspects of IEPA include:¹⁰¹

- It only applies to actions directly undertaken by state agencies. It explicitly exempts permits, licenses, and actions by local governments.
- There are broad categorical exemptions for many types of state agency actions.
- Unlike some other state NEPAs, IEPA does not require agencies to prefer environmentally preferable alternatives or mitigate impacts.
- There is no established standard for judicial review of agency decisions under IEPA.
- The first legal challenge using IEPA was not filed until 2002. In response, the legislature further exempted the state forestry division from IEPA requirements.¹⁰²

¹⁰⁰ Jeffrey L. Carmichael, "The Indiana Environmental Policy Act: Casting a New Role for a Forgotten Statute," *Indiana Law Journal* vol. 70, iss. 2, art. 6 (1995), <u>https://www.repository.law.indiana.edu/cgi/viewcontent.cgi?article=1670&context=ilj</u>.

^{101 327} Ind. Admin. Code 11 (2024); Ind. Code § 13-12-4 (2023).

¹⁰² Marchman, "Little NEPAs."

It is not clear if and when IEPA is actually triggered, though the state's finance agency has completed environmental assessments (EAs) as part of its State Revolving Fund program.¹⁰³ EAs completed under the State Revolving Fund, however, are potentially a streamlining action, as they serve as a substitute for federal environmental review.

Recommendations

Indiana's implementation of IEPA does not create significant drag on the state economy or government projects. That said, the fact that the law has not been repealed creates the possibility that the law will be "remembered" in the future. The best course of action for Indiana, then, is to simply repeal the law in its entirety.

Clean Air Act

PALs in SIP	PALs in Use	PAL Guidance	PBR/ Registration Permits	General Permits	Other
Yes	Yes	Yes	Yes	Yes	-

Notes

Indiana has incorporated PALs into its SIP. The state's PAL language aligns closely with federal regulations and does not contain additional stringent permitting language.

PALs are being used in the state, with examples such as the Essroc Cement Corporation.¹⁰⁴ The state also provides PAL guidance through the Indiana Department of Environmental Management (IDEM) website.¹⁰⁵



¹⁰³ Representative of the Indiana Department of Environmental Management, email correspondence with author, July 16, 2024.

¹⁰⁴ Indiana Department of Environmental Management, *Notice of Decision: Approval – Effective Immediately, Essroc Cement Corporation / 019-21450-00008* (2008), <u>https://permits.air.idem.in.gov/21450f.pdf</u>.

^{105 &}quot;Plantwide Applicability Limit," Indiana Department of Environmental Management, accessed October 15, 2024, <u>https://www.in.gov/idem/airpermit/information-about/new-source-review/new-source-review/new-source-review/new-source-review/new-source-review/new-source-review/new-source-review/new-source-review/new-source-review/new-source-review/new-source-review/new-source-review/new-source-review/new-source-review/new-source-review/new-source-review/new-sourcereview-reform-manual/plantwide-applicability-limit-pal/#:~:text=A%20plantwide%20applicability%20 limit%20.</u>

Indiana has two types of PBR programs.¹⁰⁶ The first (Rule 11) is a sourcespecific PBR program covering three facilities:

- Gasoline dispensing operations
- Grain elevators
- Grain processing and milling operations

The second PBR program (Rule 10) is unique. For facilities with actual emissions less than 20 percent of major source thresholds, after demonstrating compliance for one year, facilities do not need to renew the permit and have no annual or permitting fees.

Indiana has a registration program, which applies to existing sources with potential to emit within certain ranges, generally between 5–25 tons per year for various pollutants.

It also has Source Specific Operating Agreements (SSOAs), which function very similarly to general permits and cover various operations, including:

- Industrial or commercial surface coating
- Graphic arts
- Woodworking
- Abrasive cleaning
- Grain elevators
- Sand and gravel plants
- Crushed stone processing
- Ready-mix concrete batch plants
- Coal mines and preparation plants
- Automobile refinishing
- Degreasing operations
- External and internal combustion sources

^{106 &}quot;Alternate Approvals," Indiana Department of Environmental Management, accessed October 15, 2024, https://www.in.gov/idem/airpermit/information-about/alternate-approvals/.



Recommendations

Indiana should modify its PAL renewal language to provide greater certainty for regulated entities. Currently, federal PAL language states that if the emissions level is equal to or greater than 80 percent of the current PAL level, the Administrator "may renew" the PAL at the same level, or "may adjust" it based on various factors. This ambiguity has caused concern about the potential for "automatic ratcheting" of the PAL level upon renewal among regulated entities. To address this, Indiana should follow North Carolina's example and change the language from "may renew" to "shall renew" in its state regulations. This approach would offer regulated entities more certainty in the PAL renewal process.

For Minor NSR, Indiana should expand its PBR and SSOA programs to a wider range of commonly-covered sources (see Appendix I).

Clean Water Act

Section 404 Assumption	NPDES Authority	Number of NPDES General Permits
No	Yes	12

Notes

Indiana has not assumed the federal Section 404 permitting program, which remains under the jurisdiction of the U.S. Army Corps of Engineers and EPA. Indiana has had NPDES authority since 1975 and has established a set of general permits under its water quality programs.

Indiana has established the following general permits for wastewater:107

- Coal mining, coal processing, and reclamation activities
- Once-through Noncontact cooling water
- Petroleum products terminals



^{107 &}quot;National Pollution Discharge Elimination System," Indiana Department of Environmental Management, accessed October 15, 2024, <u>https://www.in.gov/idem/cleanwater/wastewater-permitting/national-pollutant-discharge-elimination-system-npdes/</u>.

- Groundwater petroleum remediation systems
- Hydrostatic testing of commercial pipelines
- Sand, gravel, dimension stone and crushed stone operations
- Onsite Residential Sewage Discharging Disposal Systems
- Temporary Wastewater Discharges
- Pesticide Applications

For stormwater, Indiana has established:¹⁰⁸

- Construction Stormwater General Permit (CGP)
- Industrial Stormwater General Permit (MSGP)
- MS4 General Permit (MS4)

Recommendations

For the main Section 404 recommendations, see p. 17.

For NPDES, Indiana should expand its general permit program to other commonly covered facilities and operations (see Appendix II).

State Endangered Species Act

SESA	Consultation	Critical Habitat	Incidental Take
	Requirements	Designation	Permit
Yes	No	No	No

Notes

Indiana has a SESA.¹⁰⁹ Indiana's SESA does not include formal consultation requirements in the same sense as the federal ESA, nor does it provide for critical habitat designation.



^{108 &}quot;Stormwater Regulations, Permitting, and Related Information," Indiana Department of Environmental Management, accessed October 15, 2024, <u>https://www.in.gov/idem/stormwater/</u>.

¹⁰⁹ Ind. Code. Ann. § 14-22-34-1 (2023).

Indiana prohibits take of state-listed species—which it defines as harassment, hunting, capturing, or killing—with narrow exemptions.¹¹⁰ It does not offer incidental take permits. Indiana's current state list covers species beyond those that are listed under the federal ESA.¹¹¹

Recommendations

Given that Indiana has state-listed species beyond those federally listed under the Endangered Species Act, and prohibits take of those species, it should design an "incidental take permit" to allow for take under specific circumstances. This would give developers some flexibility to move forward on critical projects that may result in incidental take, so long as they implement approved conservation measures and mitigate any potential impacts on protected species.

Indiana should also consider shifting away from its SESA program towards a more targeted series of Conservation Agreements and Programmatic Conservation Benefit Agreements, so that it focuses on efficiently preventing the federal listing (and thus federal regulation) of at-risk species.

For more, see the general State Endangered Species Act recommendations on p. 23.



^{110 &}quot;Endangered Species - Protections and Prohibited Actions - Indiana," Association of Fish and Wildlife Agencies, accessed October 15, 2024, <u>https://www.fishwildlife.org/law-research-library/law-categories/endangered-species/endangered-species-protections-and-prohibited-actions-indiana</u>.

¹¹¹ Susan M. Brackney, "150 Species in Indiana Now Listed As Endangered or 'Special Concern," *Limestone Post*, March 11, 2016, <u>https://limestonepostmagazine.com/150-species-in-indiana-now-listed-as-endangered-or-special-concern/</u>.

lowa

State Environmental Policy Act

SEPA	Used Often	Includes Private Sector	Major Exemptions
No	_	-	-

Notes

Iowa does not have a SEPA.

Recommendations

N/A

Clean Air Act

PALs in SIP	PALs in Use	PAL Guidance	PBR/ Registration Permits	General Permits	Other
Yes	Yes	No	Yes	Yes	-

Notes

Iowa has incorporated PALs into its SIP. The state's PAL language aligns closely with federal regulations and does not contain additional stringent permitting language.

Iowa has issued at least one PAL permit. The University of Iowa's power plant is operating under a PAL, which was announced as a landmark agreement in 2016.¹¹²



¹¹² Wendy Moorehead, "University of Iowa and Iowa DNR announce landmark agreement," *Iowα Now*, April 12, 2016, <u>https://now.uiowa.edu/news/2016/04/university-iowa-and-iowa-dnr-announce-landmark-agreement</u>.

Iowa has a limited PBR program covering:

• Surface coating operations using less than three gallons per day

Iowa has a General Permits program covering several categories:

- Aggregate processing facility/plant (related to criteria of operation level)
- Asphalt plant
- Bulk gasoline facilities
- Concrete batch plants

Iowa also has a Registration permit program for:¹¹³

• Grain elevators

Recommendations

The Iowa legislature should direct the Department of Natural Resources (DNR) to develop and publish comprehensive PAL guidance documents on its website, explaining the benefits and application process and referencing EPA's 2020 PAL guidance where relevant. The DNR should clarify the PAL renewal process, emphasizing that there is no automatic downward adjustment at renewal, which could alleviate industry concerns about future operational flexibility. The legislature should also mandate annual reporting from the DNR on PAL implementation, including uptake rates and explanations for low adoption. By enacting these measures, legislators can promote more efficient permitting processes while maintaining environmental protections, making Iowa more attractive for industrial development.

Iowa should modify its PAL renewal language to provide greater certainty for regulated entities. Currently, federal PAL language states that if the emissions level is equal to or greater than 80 percent of the current PAL level, the Administrator "may renew" the PAL at the same level, or "may adjust" it based on various factors. This ambiguity has caused concern about the potential for "automatic ratcheting" of the PAL level upon renewal among regulated entities. To address this, Iowa should follow North Carolina's example and change the language from "may renew" to "shall renew" in its state regulations. This approach would offer regulated entities more certainty in the PAL renewal process.

¹¹³ Representative of the Iowa Department of Natural Resources, phone conversation with author, August 22, 2024.

For Minor NSR, the DNR should be encouraged to expand its PBR, general permit and registration programs to cover additional low-impact activities (see Appendix I).

Clean Water Act

Section 404 Assumption	NPDES Authority	Number of NPDES General Permits
No	Yes	10

Notes

Iowa has not assumed the federal Section 404 permitting program, which remains under the jurisdiction of the U.S. Army Corps of Engineers and EPA. Iowa has had NPDES authority since 1978 and operates its program under the Iowa Department of Natural Resources (IDNR). It has established a set of general permits.¹¹⁴

Iowa has established the following general permits under its non-stormwater program:

- Discharge from Private Sewage Disposal Systems
- Discharge from Mining and Processing Facilities
- Discharge Associated with Well Construction Activities
- Pesticide General Permit (PGP) for Point Source Discharges to Waters of the United States From the Application of Pesticides
- NPDES and State Operation permit, Discharge from Hydrostatic Testing, Tank Ballasting and Water Lines
- NPDES and State Operation permit, Dewatering and Residential Geothermal Systems



^{114 &}quot;NPDES General Permits," Iowa Department of Natural Resources, accessed October 15, 2024, <u>https://www.iowadnr.gov/Environmental-Protection/Water-Quality/NPDES-Wastewater-Permitting/NPDES-General-Permits</u>.

Iowa has established the following general permits under its stormwater program:

- Stormwater Discharge Associated with Construction Activities (CGP)
- Stormwater Discharge Associated with Industrial Activity (MSGP)
- Stormwater Discharge Associated with Industrial Activity for Asphalt Plants, Concrete Batch Plants, Rock Crushing Plants, and Construction Sand and Gravel Facilities
- Small MS4 (MS4)¹¹⁵

Recommendations

For the main Section 404 recommendations, see p. 17.

For NPDES, Iowa should expand its general permit program to other commonly covered facilities and operations (see Appendix II).

State Endangered Species Act

SESA	Consultation	Critical Habitat	Incidental Take
	Requirements	Designation	Permit
Yes	No	No	No

Notes

Iowa has a SESA.¹¹⁶ Iowa's SESA does not include formal consultation requirements in the same sense as the federal ESA, nor does it provide for critical habitat designation.

Iowa prohibits take of state-listed species—which it defines as shooting, wounding, killing, trapping, capturing, or collecting—with narrow



¹¹⁵ Iowa Department of Natural Resources, *Iowa Storm Water Management Manual* (2009), <u>https://www.iowadnr.gov/Portals/idnr/uploads/water/stormwater/manual/iswmm_chapter01.pdf</u>.

¹¹⁶ Iowa Code Ann. § 481B.1 (2024).

exemptions.¹¹⁷ It does not offer incidental take permits. Iowa's current state list covers species beyond those that are listed under the federal ESA.¹¹⁸

Recommendations

Given that Iowa has state-listed species beyond those federally listed under the Endangered Species Act, and prohibits take of those species, it should design an "incidental take permit" to allow for take under specific circumstances. This would give developers some flexibility to move forward on critical projects that may result in incidental take, so long as they implement approved conservation measures and mitigate any potential impacts on protected species.

Iowa should also consider shifting away from its SESA program towards a more targeted series of Conservation Agreements and Programmatic Conservation Benefit Agreements, so that it focuses on efficiently preventing the federal listing (and thus federal regulation) of at-risk species.

For more, see the general State Endangered Species Act recommendations on p. 23.



^{117 &}quot;Endangered Species - Protections and Prohibited Actions - Iowa," Association of Fish and Wildlife Agencies, accessed October 15, 2024, <u>https://www.fishwildlife.org/law-research-library/law-</u> categories/endangered-species/endangered-species-protections-and-prohibited-actions-iowa.

¹¹⁸ Brittney J. Miller, "Nature's Alarm: Exploring Iowa's Endangered and Threatened Wildlife," *The Gazette*, July 16, 2023, <u>https://www.thegazette.com/environment-nature/natures-alarm-exploring-iowas-endangered-and-threatened-wildlife/</u>.

Kansas

State Environmental Policy Act

SEPA	Used Often	Includes Private Sector	Major Exemptions
No	_	-	-

Notes

Kansas does not have a SEPA.

Recommendations

N/A

Clean Air Act

PALs in SIP	PALs in Use	PAL Guidance	PBR/ Registration Permits	General Permits	Other
No	-	-	Yes	Stone Facilities	Expedited Construction

Notes

Kansas has incorporated PALs by reference into its regulations through the prevention of significant deterioration (PSD) program, but PALs are *not* written into Kansas's SIP and are not used in permitting.¹¹⁹



¹¹⁹ Kansas Department of Environmental Health, *Kansas Air Quality Regulations*, last updated February 8, 2024, <u>https://www.kdhe.ks.gov/DocumentCenter/View/485/KS-Air-Quality-Regulations-PDF</u>; representative of the Kansas Department of Environmental Health, email correspondence with author, August 26, 2024.

Kansas has not issued any PAL permits to date.

Kansas has a PBR program covering the following facility types:

- Reciprocating engines
- Organic solvent evaporative sources
- Hot mix asphalt facilities
- Sources with actual emissions less than 50 percent of major source thresholds

Kansas has a limited general permit program, currently used only for crushed and broken stone facilities.

The state has an Expedited Permit program for several facility types.¹²⁰ This streamlined process is somewhat similar to the general permitting approach, and allows facilities proposing to construct and operate to bypass more extensive permitting procedures if they comply with detailed design and operational criteria. The Expedited Permit program covers several facilities:

- Rock Crusher (Class II General Site) including quarries
- Portable Rock Crusher (Standalone)
- Emergency Generators
- Minor Source Oil and Natural Gas Production Facilities and Compressor Stations
- Animal Incinerators
- Concrete Batch

Recommendations

The Kansas legislature should direct the Kansas Department of Environmental Quality (DEQ) to write PALs into its SIP.

Upon writing PALs into its SIP, the Kansas legislature should direct the

¹²⁰ Gyanendra Prasai, "Kansas Air Permitting Update," Kansas Department of Environmental Health, August 13, 2019, <u>https://www.coronavirus.kdheks.gov/DocumentCenter/View/2700/Air-Permit-Update-PDF</u>.

Department of Health and Environment (KDHE) to develop and publish comprehensive PAL guidance documents on its website, explaining the benefits and application process and referencing EPA's 2020 PAL guidance where relevant. The KDHE should clarify the PAL renewal process, emphasizing that there is no automatic downward adjustment at renewal, which could alleviate industry concerns about future operational flexibility. The legislature should also mandate annual reporting from the KDHE on PAL implementation, including uptake rates and explanations for low adoption. By enacting these measures, legislators can promote more efficient permitting processes while maintaining environmental protections, making Kansas more attractive for industrial development.

Kansas should modify its PAL renewal language to provide greater certainty for regulated entities. Currently, federal PAL language states that if the emissions level is equal to or greater than 80 percent of the current PAL level, the Administrator "may renew" the PAL at the same level, or "may adjust" it based on various factors. This ambiguity has caused concern about the potential for "automatic ratcheting" of the PAL level upon renewal among regulated entities. To address this, Kansas should follow North Carolina's example and change the language from "may renew" to "shall renew" in its state regulations. This approach would offer regulated entities more certainty in the PAL renewal process.

For Minor NSR, the KDHE should be directed to expand its flexible permit programs to cover additional industrial categories (see Appendix I).

Clean Water Act

Section 404 Assumption	NPDES Authority	Number of NPDES General Permits
No	Yes	6

Notes

Kansas has not assumed the federal Section 404 permitting program, which remains under the jurisdiction of the U.S. Army Corps of Engineers and EPA. Kansas has had NPDES authority since 1974 and has established a set of general permits under its water quality programs. Kansas has established the following general permits under its non-stormwater program:¹²¹

- Concrete Ready-Mix Plants General Permit
- Hydrostatic Test Discharges General Permit
- Pesticide General Permit

Kansas has established the following general permits under its stormwater program:¹²²

- Construction Stormwater General Permit (CGP)
- Industrial Stormwater General Permit (MSGP)
- Municipal Separate Sewer Storm System (MS4) General Permit

Recommendations

For the main Section 404 recommendations, see p. 17.

For NPDES, Kansas should expand its general permit program to other commonly covered facilities and operations (see Appendix II).

State Endangered Species Act

SESA	Consultation	Critical Habitat	Incidental Take
	Requirements	Designation	Permit
Yes	No	No	No

^{121 &}quot;Kansas Implementation Procedures: Wastewater Permitting," Kansas Department of Health and Environment, accessed October 15, 2024, <u>https://www.kdhe.ks.gov/DocumentCenter/View/9333/</u> <u>Kansas-Implementation-Procedures---Wastewater-Permitting-PDF</u>; "Issued Pesticide General Permit 2021," Kansas Department of Health and Environment, 2021, <u>https://www.kdhe.ks.gov/</u> <u>DocumentCenter/View/29218/Issued-Pesticide-General-Permit-2021-PDF</u>.

^{122 &}quot;Stormwater Programs," Kansas Department of Health and Environment, accessed October 15, 2024, https://www.kdhe.ks.gov/756/Stormwater-Programs.

Notes

Kansas has a SESA, called the Nongame and Endangered Species Conservation Act. Kansas's SESA does not include formal consultation requirements in the same sense as the federal ESA, nor does it provide for critical habitat designation.

Kansas prohibits take of state-listed species, with narrow exemptions.¹²³ It does not offer incidental take permits. Kansas's current state list covers species beyond those that are listed under the federal ESA.¹²⁴

Recommendations

Given that Kansas has state-listed species beyond those federally listed under the Endangered Species Act, and prohibits take of those species, it should design an "incidental take permit" to allow for take under specific circumstances. This would give developers some flexibility to move forward on critical projects that may result in incidental take, so long as they implement approved conservation measures and mitigate any potential impacts on protected species.

Kansas should also consider shifting away from its SESA program towards a more targeted series of Conservation Agreements and Programmatic Conservation Benefit Agreements, so that it focuses on efficiently preventing the federal listing (and thus federal regulation) of at-risk species.

For more, see the general State Endangered Species Act recommendations on p. 23.



¹²³ Kan. Stat. Ann. § 32-1011 (2024).

^{124 &}quot;Kansas Threatened and Endangered Species Statewide," Kansas Department of Wildlife and Parks, accessed October 15, 2024, <u>https://ksoutdoors.com/Services/Threatened-and-Endangered-Wildlife/Kansas-Threatened-and-Endangered-Species-Statewide</u>.

Kentucky

State Environmental Policy Act

SEPA	Used Often	Includes Private Sector	Major Exemptions
No	_	-	-

Notes

Kentucky does not have a SEPA.

Recommendations

N/A

Clean Air Act

PALs in SIP	PALs in Use	PAL Guidance	PBR/ Registration Permits	General Permits	Other
Yes	Yes	No	Yes	No	-

Notes

Kentucky has written a PAL into its SIP. The state's PAL language aligns closely with federal regulations and does not contain additional stringent permitting language.¹²⁵

PALs have been issued in the state to facilities such as Ford Motor Company's Kentucky Truck Plant.¹²⁶ Nevertheless, Kentucky has a significant presence of



^{125 401} KAR 51:017 (2021).

¹²⁶ Louisville Metro Air Pollution Control District, *PAL Construction Permit No. C-0073-21-0039-V* (2023), https://louisvilleky.gov/air-pollution-control-district/document/apcd-proposed-permit-c-0073-21-0039-v-ford-motor-company.

heavy industry, and PAL uptake has been quite low.

Kentucky does not have general permits.¹²⁷ The state does have a registration program for air pollution sources that fall between major emitters and minor, exempt sources.¹²⁸ This applies to facilities emitting 2–100 tons per year of various pollutants, depending on the type. Sources meeting these criteria must register with the state, providing a simpler alternative to full permitting while still allowing regulatory oversight.

Recommendations

The Kentucky legislature should direct the Kentucky Department for Environmental Protection (DEP) to develop and publish comprehensive PAL guidance documents on its website, explaining the benefits and application process and referencing EPA's 2020 PAL guidance where relevant. The DEP should clarify the PAL renewal process, emphasizing that there is no automatic downward adjustment at renewal, which could alleviate industry concerns about future operational flexibility. The legislature should also mandate annual reporting from the DEP on PAL implementation, including uptake rates and explanations for low adoption. By enacting these measures, legislators can promote more efficient permitting processes while maintaining environmental protections, making Kentucky more attractive for industrial development.

Kentucky should modify its PAL renewal language to provide greater certainty for regulated entities. Currently, federal PAL language states that if the emissions level is equal to or greater than 80 percent of the current PAL level, the Administrator "may renew" the PAL at the same level, or "may adjust" it based on various factors. This ambiguity has caused concern about the potential for "automatic ratcheting" of the PAL level upon renewal among regulated entities. To address this, Kentucky should follow North Carolina's example and change the language from "may renew" to "shall renew" in its state regulations. This approach would offer regulated entities more certainty in the PAL renewal process.

For Minor NSR, the DEP should be directed to expand its flexible permit options to commonly-covered facilities (see Appendix I).



^{127 &}quot;Air Permitting," Kentucky Energy and Environment Cabinet, accessed October 15, 2024, <u>https://eec.ky.gov/Environmental-Protection/Air/Pages/Air-Permitting.aspx</u>.

^{128 401} KAR 52:070 (2021).

Clean Water Act

Section 404 Assumption	NPDES Authority	Number of NPDES General Permits
No	Yes	12

Notes

Kentucky has not assumed the federal Section 404 permitting program, which remains under the jurisdiction of the U.S. Army Corps of Engineers and EPA. Kentucky has had NPDES authority since 1983 and has established a set of general permits under its Kentucky Pollutant Discharge Elimination System (KPDES) programs.¹²⁹

Kentucky has established the following general permits under its stormwater program:

- Stormwater Construction (CGP)
- Stormwater Associated with Industrial Activities (MSGP)
- Phase II small MS4

Kentucky has also established general permits for the following facilities and/ or operations under its non-stormwater program:

- Coal Mining Operations
- Inactive Mine Lands
- Construction Material Manufacturing Operations
- General Aviation Airports
- On-Site Wastewater Treatment Systems Serving Individual Family Residences
- Drinking Water Production



^{129 &}quot;Wastewater Discharge Permits," Kentucky Energy and Environment Cabinet, accessed October 15, 2024, <u>https://eec.ky.gov/Environmental-Protection/Water/PermitCert/KPDES/Pages/default.aspx</u>.

- Public Swimming and Bathing Facilities
- Non Coal (Mineral) Mining Operations
- Pesticide

Kentucky is also in the process of developing a hydrostatic general permit.¹³⁰

Recommendations

For the main Section 404 recommendations, see p. 17.

For NPDES, Kentucky should expand its general permit program to other commonly covered facilities and operations (see Appendix II).

State Endangered Species Act

SESA	Consultation	Critical Habitat	Incidental Take
	Requirements	Designation	Permit
Yes	No	No	No

Notes

Kentucky has a SESA.¹³¹ Kentucky's SESA does not include formal consultation requirements in the same sense as the federal ESA, nor does it provide for critical habitat designation.

Kentucky has a state list that covers species beyond those that are listed under the federal ESA, but it does not prohibit their take.

Recommendations

Kentucky should also consider shifting away from its SESA program towards a more targeted series of Conservation Agreements and Programmatic Conservation Benefit Agreements, so that it focuses on efficiently preventing



^{130 &}quot;Hydrostatic Test Water General Permit," Kentucky Department For Environmental Protection, accessed October 15, 2024, <u>https://eec.ky.gov/Environmental-Protection/Water/Public%20Notices/ KYG670000%20Draft%20Fact%20Sheet.pdf</u>.

¹³¹ Ky. Rev. Stat. Ann. § 150.180 (2024).

the federal listing (and thus federal regulation) of at-risk species.

For more, see the general State Endangered Species Act recommendations on p. 23.

Louisiana

State Environmental Policy Act

SEPA	Used Often	Includes Private Sector	Major Exemptions
No	_	-	-

Notes

Louisiana does not have a SEPA.

Recommendations

N/A

Clean Air Act

PALs in SIP	PALs in Use	PAL Guidance	PBR/ Registration Permits	General Permits	Other
Yes	Yes	Yes	No	Yes	-

Notes

Louisiana has incorporated PALs into its SIP. The state's PAL language aligns closely with federal regulations and does not contain additional stringent permitting language.¹³²

Louisiana has issued at least one PAL permit. The Louisiana Generating, LLC's Big Cajun II Power Plant is operating under a PAL.¹³³



¹³² Louisiana Admin. Code 33:111 (2024).

¹³³ Louisiana Department of Environmental Quality, *Title V Regular Permit Renewal No. 2260-00012-V6*, (04/25/2019), <u>https://edms.deq.louisiana.gov/app/doc/view?doc=11624907</u>.

Louisiana has developed and published PAL guidance. The "Louisiana Guidance for Air Permitting Actions" document includes information on PALs, including expiration and renewal.¹³⁴

Louisiana has a General Permits program covering two main categories:¹³⁵

- Surface Coating and Fabrication
- Crude Oil and Natural Gas Production

The state does not have a PBR program or other flexible permitting options beyond the general permits mentioned above.

Recommendations

Louisiana should modify its PAL renewal language to provide greater certainty for regulated entities. Currently, federal PAL language states that if the emissions level is equal to or greater than 80 percent of the current PAL level, the Administrator "may renew" the PAL at the same level, or "may adjust" it based on various factors. This ambiguity has caused concern about the potential for "automatic ratcheting" of the PAL level upon renewal among regulated entities. To address this, Louisiana should follow North Carolina's example and change the language from "may renew" to "shall renew" in its state regulations. This approach would offer regulated entities more certainty in the PAL renewal process.

The Louisiana legislature should direct the Louisiana Department of Environmental Quality to expand its general permit program to cover additional industrial categories (see Appendix I).

^{134 &}quot;Louisiana Guidance for Air Permitting Actions," Louisiana Department of Environmental Quality, accessed October 15, 2024, <u>https://www.deq.louisiana.gov/assets/docs/Air/</u> LouisianaGuidanceforAirPermittingActions.pdf.

^{135 &}quot;Minor Source General Permits," Louisiana Department of Environmental Quality, accessed October 15, 2024, <u>https://www.deq.louisiana.gov/page/minor-source-general-permits</u>.

Clean Water Act

Section 404 Assumption	NPDES Authority	Number of NPDES General Permits
No	Yes	24

Notes

Louisiana has not assumed the federal Section 404 permitting program, which remains under the jurisdiction of the U.S. Army Corps of Engineers and EPA. Louisiana has had NPDES authority since 1996 and has established a set of general permits under its Louisiana Pollutant Discharge Elimination System (LPDES) programs.¹³⁶

Louisiana has established the following general permits under its nonstormwater program:

- Discharges from Vessel Cleaning and Repair Operations and Shipyards
- Discharges from Cement, Concrete and Asphalt Facilities
- Discharges from oil and gas exploration, development and production facilities located within territorial seas of Louisiana
- Discharges associated with Dewatering of Petroleum Storage Tanks, Tank Beds, New Tanks and Excavations
- Discharges from oil and gas exploration, development and production facilities located within coastal waters
- Discharges from Potable Water Treatment Plants
- Short-Term and Emergency Discharges
- Discharges from Automotive Dealerships, Paint and Body Shops, Motorcycle Dealerships, Recreational Vehicle Dealerships and Automotive Repair and Maintenance Shops
- Discharges from Light Commercial Facilities

^{136 &}quot;Louisiana Pollutant Discharge Elimination System (LPDES)," Louisiana Department of Environmental Quality, accessed October 15, 2024, <u>https://deq.louisiana.gov/page/lpdes</u>.

- Discharges from Sand and Gravel Extraction Facilities
- Sanitary discharges totaling less than 5,000 gpd
- Sanitary discharges totaling less than 25,000 gpd
- Sanitary discharges totaling less than 50,000 gpd
- Sanitary discharges totaling less than 100,000 gpd
- Discharges of Hydrostatic Test Wastewater
- Discharges of Exterior Vehicle Washwater
- Discharges from Construction, Demolition Debris and Woodwaste Landfills
- Discharges resulting from the Cleanup of Petroleum UST Systems
- Applications/Discharge of Pesticides into or near Waters of the State

Louisiana has established the following general permits under its stormwater program:

- Discharges from Small Municipal Separate Storm Sewer Systems (MS4)
- Multi-Sector General Stormwater Permit (MSGP)
- Storm Water Discharges from Construction Activities of 5 Acres or More (CGP)
- Storm Water Discharges from Small Construction Activities (CGP)
- General Permit for Storm Water Discharges Related to the Louisiana Department of Transportation and Development's Statewide Construction and Maintenance Activities Resulting in Land Disturbance

Recommendations

For the main Section 404 recommendations, see p. 17.

For NPDES, Louisiana should expand its general permit program to other commonly covered facilities and operations (see Appendix II).

State Endangered Species Act

SESA	Consultation	Critical Habitat	Incidental Take
	Requirements	Designation	Permit
Yes	No	No	No

Notes

Louisiana has a SESA.¹³⁷ Louisiana's SESA does not include formal consultation requirements in the same sense as the federal ESA, nor does it provide for critical habitat designation.

Louisiana prohibits take of state-listed species, with narrow exemptions. It does not offer incidental take permits. Louisiana current state list covers species beyond those that are listed under the federal ESA.¹³⁸

Recommendations

Given that Louisiana has state-listed species beyond those federally listed under the Endangered Species Act, and prohibits take of those species, it should design an "incidental take permit" to allow for take under specific circumstances. This would give developers some flexibility to move forward on critical projects that may result in incidental take, so long as they implement approved conservation measures and mitigate any potential impacts on protected species.

Louisiana should also consider shifting away from its SESA program towards a more targeted series of Conservation Agreements and Programmatic Conservation Benefit Agreements, so that it focuses on efficiently preventing the federal listing (and thus federal regulation) of at-risk species.

For more, see the general State Endangered Species Act recommendations on p. 23.



¹³⁷ La. Stat. Ann. § 56:1901 (2023).

¹³⁸ Representative of the Louisiana Department of Fish and Wildlife, phone conversation with author, October 4, 2024; "Rare, Threatened, and Endangered Ranks and Statuses," Louisiana Department of Wildlife and Fisheries, accessed October 15, 2024, <u>https://www.wlf.louisiana.gov/page/rarethreatened-and-endangered-ranks-and-statuses</u>.

Minnesota

State Environmental Policy Act

SEPA	Used Often	Includes Private Sector	Major Exemptions
Yes	Yes	Yes	No

Notes

Minnesota has a State Environmental Policy Act known as MEPA. It requires state agencies and local governments to consider environmental impacts of proposed actions through Environmental Assessment Worksheets (EAWs) and Environmental Impact Statements (EISs).¹³⁹ MEPA is frequently used, with over 100 projects triggered since May 2023 across state and local levels.¹⁴⁰

Much like NEPA, MEPA applies to both public and private sector projects. It covers a wide range of activities including energy projects (solar, wind, pipelines, transmission lines), infrastructure development, industrial expansions, and water-related projects.¹⁴¹

While MEPA is comprehensive, there are some exemptions. For example, animal feedlot facilities with fewer than 1,000 animal units are exempt under certain conditions. The Environmental Quality Board (EQB) has the authority to modify or eliminate mandatory categories for environmental review.¹⁴²

The EQB oversees MEPA implementation, providing rules and guidance. Other key agencies involved include the Department of Natural Resources and the Pollution Control Agency. MEPA allows for alternative forms of environmental



¹³⁹ Minn. Stat. § 116D (2024).

^{140 &}quot;Environmental Review Projects Database," Minnesota Environmental Quality Board, accessed October 15, 2024, <u>https://webapp.pca.state.mn.us/eqb-search/search</u>.

¹⁴¹ Stephanie Hemphill, "MEPA Turns 50," Minnesota Environmental Quality Board, accessed October 15 2024, <u>https://www.eqb.state.mn.us/sites/eqb/files/MEPA%20Turns%2050.pdf</u>.

¹⁴² Kevin Swanberg, "No Alternative: The Failure of the Minnesota Environmental Policy Act to Consider Project Alternatives and Proposed Remedies." *Mitchell Hamline Law Review* vol. 49, issue 1, article 6, 2023, <u>https://open.mitchellhamline.edu/cgi/viewcontent.cgi?article=1310&context=mhlr</u>.

review like the hybrid EIS/EAW known as the Alternative Urban Areawide Review (AUAR).¹⁴³

Similar to NEPA, MEPA has provisions for public participation, including comment periods on EAWs and EISs. It also provides for judicial review of decisions regarding the need for and adequacy of environmental review documents.

Recommendations

Just as NEPA imposes an enormous regulatory burden on federal agencies and infrastructure development, MEPA imposes an enormous regulatory burden on state agencies and state infrastructure development. Where possible, the Minnesota legislature should reform, create exclusions from, and raise the trigger threshold for MEPA. For example, the legislature could:

- Significantly increase the threshold for triggering MEPA on state projects. Similar reforms have already been carried out in North Carolina (in 2015)¹⁴⁴ and Georgia (in 2016)¹⁴⁵ with a great deal of success.
- 2. Expand exemptions, particularly in the energy and transportation sectors, to streamline private sector development. Indiana's and South Dakota's various state NEPA exemptions, from the issuance of permits to "actions of an environmental protective regulatory nature," are good examples of efforts to this end.¹⁴⁶
- 3. Set a time limit on injunctive relief to reduce the ability of obstructionists to block projects.
- 4. Repeal MEPA in its entirety, aligning Minnesota's environmental regulatory requirements with the majority of the country.

- 145 S.B. 346, 2015-2016 Ga. Reg. Sess. (2016).
- 146 S.D. Codified Laws § 34A-9-1 (2024).



^{143 &}quot;Alternative Urban Areawide Review (AUAR) Process," Minnesota Environmental Quality Board, accessed October 15, 2024, <u>https://www.eqb.state.mn.us/environmental-review/environmental-review/environmental-review-program/alternative-urban-areawide-review-auar-process</u>.

^{144 2015} N.C. Sess. Laws 90.

Clean Air Act

PALs in SIP	PALs in Use	PAL Guidance	PBR/ Registration Permits	General Permits	Other
Yes	Yes	Yes*	Yes	Yes	Capped Permits

Notes

Minnesota has written a PAL into its SIP. The state's PAL language aligns closely with federal regulations and does not contain additional stringent permitting language.¹⁴⁷

The state has issued a PAL to one facility: Andersen Corporation, a window manufacturer.¹⁴⁸ It has also issued limited guidance around PALs.¹⁴⁹

Minnesota has a registration permit program, which works via emissions level:¹⁵⁰

- Option A: For sources subject to certain New Source Performance Standards (NSPS)
- Option B: For sources using less than 2,000 gallons of VOC-containing materials per year
- Option C: For sources with actual emissions below 50 percent of major source thresholds
- Option D: For sources with actual emissions below specific thresholds for each pollutant



¹⁴⁷ Minn. R. 7007.0100 (2024).

^{148 &}quot;Anderson Corporation," Minnesota Pollution Control Agency, accessed October 15, 2024, <u>https://webapp.pca.state.mn.us/wimn/site/575/documents</u>.

^{149 &}quot;Maximizing the Flexibility of Your Air Permit," Minnesota Pollution Control Agency, January 2011, <u>https://www.pca.state.mn.us/sites/default/files/aq2-12.pdf;</u> "Comparison of Air Permit Flexibility Options," Minnesota Pollution Control Agency, April 2021, <u>https://www.pca.state.mn.us/sites/default/files/aq2-29.pdf</u>.

^{150 &}quot;Air Registration Permits," Minnesota Pollution Control Agency, accessed October 15, 2024, <u>https://www.pca.state.mn.us/business-with-us/air-registration-permits</u>.

Minnesota has a "Manufacturing General Permit" for Title V (large or major) sources, which covers facilities using processes such as abrasive blasting, brazing, catalytic or thermal oxidizers, dip tanks, injection molding, resin and gel coating, spraying and coating activities, welding, and more. The general permit offers cost savings, faster issuance, and flexibility for changes without amendments, as long as permit requirements are continuously met.¹⁵¹

Minnesota has a unique "capped permit" program, designed for non-complex facilities that don't require site-specific permit conditions. There are two categories:

- Sources with emissions below 90 percent of major source thresholds
- Sources with emissions below 75–85 percent of major source thresholds (varies by pollutant)

Similar to PALs (but for smaller sources), capped permits allow physical and operational changes without advance approval or amendments if requirements are met and emissions remain below thresholds.¹⁵²

Recommendations

The Minnesota legislature should direct the Minnesota Pollution Control Agency (MPCA) to develop and publish comprehensive PAL guidance documents on its website, explaining the benefits and application process and referencing EPA's 2020 PAL guidance where relevant. The MPCA should clarify the PAL renewal process, emphasizing that there is no automatic downward adjustment at renewal, which could alleviate industry concerns about future operational flexibility. The legislature should also mandate annual reporting from the MPCA on PAL implementation, including uptake rates and explanations for low adoption. By enacting these measures, legislators can promote more efficient permitting processes while maintaining environmental protections, making Minnesota more attractive for industrial development.

Minnesota should modify its PAL renewal language to provide greater certainty for regulated entities. Currently, federal PAL language states that if the emissions level is equal to or greater than 80 percent of the current PAL level, the Administrator "may renew" the PAL at the same level, or "may

^{151 &}quot;Part 70 Manufacturing General Permit," Minnesota Pollution Control Agency, accessed October 15, 2024, <u>https://www.pca.state.mn.us/business-with-us/part-70-manufacturing-general-permit</u>.

^{152 &}quot;Capped Emission Permit," Minnesota Pollution Control Agency, accessed October 15, 2024, <u>https://www.pca.state.mn.us/business-with-us/capped-emission-permit</u>.

adjust" it based on various factors. This ambiguity has caused concern about the potential for "automatic ratcheting" of the PAL level upon renewal among regulated entities. To address this, Minnesota should follow North Carolina's example and change the language from "may renew" to "shall renew" in its state regulations. This approach would offer regulated entities more certainty in the PAL renewal process.

The Minnesota legislature should direct MPCA to implement a robust minor source flexible permitting program, designing either general permits or permits-by-rule to cover additional industrial categories (see Appendix I).

Clean Water Act

Section 404 Assumption	NPDES Authority	Number of NPDES General Permits
No	Yes	16

Notes

Minnesota has not assumed authority over the Section 404 program, which remains under the jurisdiction of the U.S. Army Corps of Engineers and EPA, though it has recently expressed interest in pursuing assumption.¹⁵³ Minnesota has had NPDES authority since 1974 and has established a set of general permits under its water quality programs.

Minnesota has established the following general permits under its stormwater program:¹⁵⁴

- Construction Stormwater General Permit (CSGP, also known as the CGP)
- Industrial Stormwater General Permit (MSGP)
- MS4 General Permit (MS4)



¹⁵³ E.A. Crunden, "EPA Preps Trump-Era Plan."

^{154 &}quot;Stormwater Permits," Minnesota Pollution Control Agency, accessed October 15, 2024, <u>https://www.pca.state.mn.us/business-with-us/stormwater-permits</u>.

Minnesota has also established general permits for the following facilities and/ or operations under its wastewater program:¹⁵⁵

- Metal Finishing Pretreatment Discharges
- Untreated Non-Contact Cooling Water
- Treated Non-Contact Cooling Water
- Stabilization Pond
- Wastewater Pond
- Water Treatment Plant Surface Water Discharge
- Water Treatment Plant Subsurface Disposal
- Groundwater Pump-Out
- Vessel Discharge in Lake Superior
- Minnesota River Basin: General Phosphorus Permit Phase 1
- Nonmetallic Mining
- Industrial By-Products
- Pesticide Applications

Recommendations

For the main Section 404 recommendations, see p. 17.

For NPDES, Minnesota should expand its general permit program to other commonly covered facilities and operations (see Appendix II).



^{155 &}quot;General Permits for Wastewater," Minnesota Pollution Control Agency, accessed October 15, 2024, <u>https://www.pca.state.mn.us/business-with-us/general-permits-for-wastewater</u>.

State Endangered Species Act

SESA	Consultation	Critical Habitat	Incidental Take
	Requirements	Designation	Permit
Yes	No	No*	Yes

Notes

Minnesota has a SESA.¹⁵⁶ Minnesota's SESA allows for the *acquisition* of critical habitat,¹⁵⁷ though the Minnesota Department of Natural Resources suggests that this is not the same as critical habitat *designation*.¹⁵⁸ Minnesota's SESA does not include formal consultation requirements in the same sense as the federal ESA.

Minnesota's current state list covers species beyond those that are listed under the federal ESA, and it prohibits take of state-listed species. Minnesota offers incidental take permits (ITPs). These permits are designed for development projects, and require applicants to demonstrate that all alternatives have been considered and rejected, and that take is unavoidable. A key feature of Minnesota's ITPs is the requirement for compensatory mitigation that must result in a net benefit to the species.¹⁵⁹ This language is more stringent than federal ESA ITPs, which typically aim for no net loss rather than a net benefit to the species.¹⁶⁰

Minnesota offers a unique general permit for the propagation (including take) of butternut.¹⁶¹

¹⁵⁶ Minn. Stat. Ann. § 84.0895 (2023).

¹⁵⁷ Minn. Stat. § 84.944 (2023).

¹⁵⁸ Representative of the Minnesota Department of Natural Resources, email correspondence with author, September 26, 2024.

^{159 &}quot;Permit for the Take of Endangered or Threatened Species Incidental To a Development Project," Minnesota Department of Natural Resources, accessed October 15, 2024, <u>https://files.dnr.state.mn.us/</u> <u>natural_resources/ets/endangered-species-permit-development.pdf</u>.

¹⁶⁰ U.S. Fish and Wildlife Service, *Endangered Species Act Compensatory Mitigation Policy* (2023), <u>https://www.fws.gov/sites/default/files/policy/pdfs/FWS-ESA-Compensatory-Mitigation-Policy.pdf</u>.

^{161 &}quot;Endangered and Threatened Species Permits," Minnesota Department of Natural Resources, accessed October 15, 2024, <u>https://www.dnr.state.mn.us/nhnrp/endangered_permits.html</u>.

Recommendations

Minnesota should align its incidental take compensatory mitigation language with the federal ESA's goal of ensuring "no net loss." The state's current "net benefit" standard is unnecessarily stringent and more ambiguous than the federal standard.

Minnesota should consider shifting away from its SESA program towards a more targeted series of Conservation Agreements and Programmatic Conservation Benefit Agreements, so that it focuses on efficiently preventing the federal listing (and thus federal regulation) of at-risk species.

For more, see the general State Endangered Species Act recommendations on p. 23.

Mississippi

State Environmental Policy Act

SEPA	Used Often	Includes Private Sector	Major Exemptions
No	_	-	-

Notes

Mississippi does not have a SEPA.

Recommendations

N/A

Clean Air Act

PALs in SIP	PALs in Use	PAL Guidance	PBR/ Registration Permits	General Permits	Other
Yes	No	No	No	Oil & Gas	Multimedia Permit

Notes

Mississippi has incorporated PALs into its SIP. The state's PAL language aligns closely with federal regulations and does not contain additional stringent permitting language. However, no PAL permits have been issued to date.¹⁶²

¹⁶² Representative of the Mississippi Department of Environmental Quality, phone conversation with author, August 22, 2024.

Mississippi has a general permit program covering oil and gas facilities.¹⁶³ The state also has "multi-media" general permits, which combine Clean Air Act permitting with other environmental permitting (such as NPDES). These multi-media general permits cover:

- Hot mix asphalt plants¹⁶⁴
- Ready-mix concrete facilities¹⁶⁵

Mississippi does not have a PBR program.

Recommendations

The Mississippi legislature should direct the Department of Environmental Quality (MDEQ) to develop and publish comprehensive PAL guidance documents on its website, explaining the benefits and application process and referencing EPA's 2020 PAL guidance where relevant. MDEQ should clarify the PAL renewal process, emphasizing that there is no automatic downward adjustment at renewal, which could alleviate industry concerns about future operational flexibility. The legislature should also mandate annual reporting from the MDEQ on PAL implementation, including uptake rates and explanations for low adoption. By enacting these measures, legislators can promote more efficient permitting processes while maintaining environmental protections, making Mississippi more attractive for industrial development.

Mississippi should modify its PAL renewal language to provide greater certainty for regulated entities. Currently, federal PAL language states that if the emissions level is equal to or greater than 80 percent of the current PAL level, the Administrator "may renew" the PAL at the same level, or "may adjust" it based on various factors. This ambiguity has caused concern about the potential for "automatic ratcheting" of the PAL level upon renewal among regulated entities. To address this, Mississippi should follow North Carolina's example and change the language from "may renew" to "shall renew" in its state regulations. This approach would offer regulated entities more certainty in the PAL renewal process.

^{163 &}quot;Oil Production General Permit," Mississippi Department of Environmental Quality, accessed October 15, 2024, <u>https://www.mdeq.ms.gov/wp-content/uploads/2019/08/OPGP-Draft-Permit.pdf</u>.

^{164 &}quot;Hot Mix Asphalt General Permit," Mississippi Department of Environmental Quality, accessed October 15, 2024, <u>https://www.mdeq.ms.gov/wp-content/uploads/2022/10/Hot-Mix-Asphalt-General-Permit.pdf</u>

^{165 &}quot;Ready-Mix Concrete General Permit," Mississippi Department of Environmental Quality, accessed October 15, 2024, <u>https://www.mdeq.ms.gov/wp-content/uploads/2020/12/Ready-Mix-Concrete-General-Permit.pdf</u>.
For Minor NSR, the MDEQ should be encouraged to expand its general permit program to cover additional industrial categories beyond oil and gas facilities (see Appendix I). MDEQ should also evaluate the effectiveness of its multimedia permit approach and consider expanding it to other suitable industrial categories.

Clean Water Act

Section 404 Assumption	NPDES Authority	Number of NPDES General Permits
No	Yes	13

Notes

Mississippi has not assumed the federal Section 404 permitting program, which remains under the jurisdiction of the U.S. Army Corps of Engineers and EPA. Mississippi has had NPDES authority since 1974 and has established a set of general permits under its water quality programs.¹⁶⁶

Mississippi has established the following general permits under its nonstormwater program:

- CAFO
- Dry Litter Poultry AFO
- Hydrostatic Testing
- Pesticide
- Underground Storage Tank
- Wet Deck Log Spray



^{166 &}quot;Types of General Permits and Notice of Intent Forms," Mississippi Department of Environmental Quality, accessed October 15, 2024, <u>https://www.mdeq.ms.gov/permits/environmental-permits-</u> <u>divisioN/Applications-forms/generalpermits/</u>.

Mississippi has established the following general permits under its stormwater program:

- Industrial Stormwater (MSGP)
- Construction (CGP)
- Small Construction (CGP)
- Mining Storm Water
- Municipal Storm Water (MS4)

As discussed in the Clean Air Act section, Mississippi has multi-media permits that combine what is effectively a general permit for air quality with a general permit for water quality. Those facilities are:

- Hot mix asphalt plants
- Ready-mix concrete facilities

Recommendations

For the main Section 404 recommendations, see p. 17.

For NPDES, Mississippi should expand its general permit program to other commonly covered facilities and operations (see Appendix II).

State Endangered Species Act

SESA	Consultation	Critical Habitat	Incidental Take
	Requirements	Designation	Permit
Yes	No	No	No

Notes

Mississippi has a SESA, called The Nongame and Endangered Species Conservation Act. Mississippi's SESA does not include formal consultation requirements in the same sense as the federal ESA, nor does it provide for critical habitat designation.

Mississippi prohibits take of state-listed species—which it defines as

the harassing, hunting, capturing, or killing of animals—with narrow exemptions.¹⁶⁷ It does not offer incidental take permits. Mississippi's current state list covers species beyond those that are listed under the federal ESA.¹⁶⁸

Recommendations

Given that Mississippi has state-listed species beyond those federally listed under the Endangered Species Act, and prohibits take of those species, it should design an "incidental take permit" to allow for take under specific circumstances. This would give developers some flexibility to move forward on critical projects that may result in incidental take, so long as they implement approved conservation measures and mitigate any potential impacts on protected species.

Mississippi should also consider shifting away from its SESA program towards a more targeted series of Conservation Agreements and Programmatic Conservation Benefit Agreements, so that it focuses on efficiently preventing the federal listing (and thus federal regulation) of at-risk species.

For more, see the general State Endangered Species Act recommendations on p. 23.



¹⁶⁷ Miss. Code Ann. § 49-5-105 (2023).

¹⁶⁸ Mississippi Department of Wildlife, Fisheries, and Parks, *Endangered Species of Mississippi* (2014), https://www.mdwfp.com/sites/default/files/2024-03/this-is-the-print-version-of-endangered-speciesof-mississippi-as-it-went-to-print-may-through-june-2014.pdf.

Missouri

State Environmental Policy Act

SEPA	Used Often	Includes Private Sector	Major Exemptions
No	_	-	-

Notes

Missouri does not have a SEPA.

Recommendations

N/A

Clean Air Act

PALs in SIP	PALs in Use	PAL Guidance	PBR/ Registration Permits	General Permits	Other
Yes	Yes	No	Yes	No	_

Notes

Missouri has written a PAL into its SIP. The state's PAL language aligns closely with federal regulations and does not contain additional stringent permitting language.¹⁶⁹

PALs have been issued in the state to facilities such as Archimica, a pharmaceutical manufacturing company, and Ford Motor Company's Kansas

¹⁶⁹ Mo. Code Regs. tit. 10, § 10-6.060 (2024).

City Assembly Plant.¹⁷⁰ Nevertheless, Missouri has a significant presence of heavy industry, and PAL uptake has been quite low.

Missouri has a PBR program covering:¹⁷¹

- Printing operations
- Crematories and animal incinerators
- Surface coating activities

Missouri does not currently have any general permits.

Recommendations

The Missouri legislature should direct the Missouri Department of Natural Resources (DNR) to develop and publish comprehensive PAL guidance documents on its website, explaining the benefits and application process and referencing EPA's 2020 PAL guidance where relevant. The DNR should clarify the PAL renewal process, emphasizing that there is no automatic downward adjustment at renewal, which could alleviate industry concerns about future operational flexibility. The legislature should also mandate annual reporting from the DNR on PAL implementation, including uptake rates and explanations for low adoption. By enacting these measures, legislators can promote more efficient permitting processes while maintaining environmental protections, making Missouri more attractive for industrial development.

Missouri should modify its PAL renewal language to provide greater certainty for regulated entities. Currently, federal PAL language states that if the emissions level is equal to or greater than 80 percent of the current PAL level, the Administrator "may renew" the PAL at the same level, or "may adjust" it based on various factors. This ambiguity has caused concern about the potential for "automatic ratcheting" of the PAL level upon renewal among regulated entities. To address this, Missouri should follow North Carolina's example and change the language from "may renew" to "shall renew" in its state regulations. This approach would offer regulated entities more certainty in the PAL renewal process.



^{170 &}quot;Archimica-Springfield, 092011-004," Missouri Department of Natural Resources, September 19, 2011, <u>https://dnr.mo.gov/air/business-industry/air-permits/archimica-springfield-092011-004;</u> "Ford Motor Co.-Claycomo, 012022-007," Missouri Department of Natural Resources, January 14, 2022, <u>https://dnr.mo.gov/air/business-industry/air-permits/ford-motor-co-claycomo-012022-007</u>.

¹⁷¹ Mo. Code Regs. tit. 10, § 10-6.062.

Missouri DNR should also be directed to expand its PBR program to facilities covered in other states' flexible permit programs (see Appendix I).

Clean Water Act

Section 404 Assumption	NPDES Authority	Number of NPDES General Permits
No	Yes	31

Notes

Missouri has not assumed the federal Section 404 permitting program, which remains under the jurisdiction of the U.S. Army Corps of Engineers and EPA. Missouri has had NPDES authority since 1974 and has established a set of general permits under its water quality programs.

Missouri has established the following general permits under its stormwater program:¹⁷²

- Phase II Small Municipal Separate Storm Sewer Systems (MS4)
- Phase II Municipal Separate Storm Sewer Systems (MS4) Comprehensive
- Area-Wide Land Disturbance (CGP)
- Construction or Land Disturbance (CGP)
- 14 industry-specific stormwater permits including:
 - Textile and Apparel/ Printing and Publishing
 - Fabricating Metal, Light Industria
 - Lumber and Wood Primary
 - Wood Treaters
 - Chemical Manufacturing



^{172 &}quot;Stormwater Permits," Missouri Department of Natural Resources, accessed October 15, 2024, <u>https://dnr.mo.gov/water/business-industry-other-entities/permits-certification-engineering-fees/stormwater</u>.

- Plastics and Rubber Manufacturing
- Biodiesel Manufacturing
- Agrichemical Facilities
- Motor Vehicle Salvage
- Motor Freight Transportation
- Airports
- Solid Waste Transfer

Missouri has also established general permits for the following facilities and/or operations under its wastewater program:¹⁷³

- Concentrated Animal Feeding Operation (CAFO)
- Abandoned Mine Land Reclamation > 5 Acres
- Fish Farms/ Hatcheries
- Oil/ Water Separators
- Small Meat Processors
- Heat Pumps
- Petroleum Storage < 250,000 Gallons
- Limestone Quarries
- Sand and Gravel Washing
- Water Treatment Plant Settling Basins
- Zeolite Softeners
- Hydrostatic Testing of Pipelines and Storage Tanks



^{173 &}quot;Wastewater Permits," Missouri Department of Natural Resources, accessed October 15, 2024, https://dnr.mo.gov/water/business-industry-other-entities/permits-certification-engineering-fees/wastewater; Missouri Department of Natural Resources, NPDES Electronic Reporting Rule Phase 2 Implementation Plan (2016), https://dnr.mo.gov/water/business-industry-other-entities/permits-certification-engineering-fees/wastewater; Missouri Department of Natural Resources, NPDES Electronic Reporting Rule Phase 2 Implementation Plan (2016), https://dnr.mo.gov/document-search/npdes-electronic-reporting-rule-phase-2-implementation-plan.

- Discharges from Dredged Aggregate to Lakes Rivers Harbors
- Discharges from Dredged Aggregate to Big Rivers
- Car Wash
- Swimming Pools Discharges
- Land Application of Domestic Wastewater Biosolids
- Land Application of Food Processing Wastewater
- Land Application of Domestic Wastewater
- Clay Pits
- Pesticide Applications
- Feedstock Compost Sites
- Petroleum Impacted Water Remediation
- Yard Waste Compost Sites
- Treatment Works ≤ 50,000 Gallons in Lakes/ Reservoirs
- Treatment Works \leq 50,000 Gallons in Rivers/ Streams

Unlike many states that use a single Multi-Sector General Permit (MSGP) for industrial stormwater, Missouri has developed 14 separate industry-specific general permits for industrial stormwater discharges.¹⁷⁴ This approach allows for more tailored permit conditions based on the specific needs and impacts of different industries, though it may also mean that certain non-covered industries must go through individual permitting.

Recommendations

For the main Section 404 recommendations, see p. 17.

For NPDES, Kentucky should expand its general permit program to other commonly covered facilities and operations (see Appendix II).



¹⁷⁴ Environmental Protection Agency, *State Review Framework and Integrated Clean Water Act Permit Quality Review: Missouri* (2015), <u>https://www.epa.gov/sites/default/files/2019-08/documents/missouri_2014_pqr_final.pdf</u>.

State Endangered Species Act

SESA	Consultation	Critical Habitat	Incidental Take
	Requirements	Designation	Permit
Yes	No	No	No

Notes

Missouri has a SESA.¹⁷⁵ Missouri's SESA does not include formal consultation requirements in the same sense as the federal ESA, nor does it provide for critical habitat designation.

Missouri's SESA does not directly prohibit take of state-listed species, though it may do so by rule. It does not offer incidental take permits. Missouri's current state list covers species beyond those that are listed under the federal ESA.¹⁷⁶

Recommendations

Given that Missouri has state-listed species beyond those federally listed under the Endangered Species Act, and may prohibit take of those species through regulation, it should design an "incidental take permit" to allow for take under specific circumstances. This would give developers some flexibility to move forward on critical projects that may result in incidental take, so long as they implement approved conservation measures and mitigate any potential impacts on protected species.

Missouri should also consider shifting away from its SESA program towards a more targeted series of Conservation Agreements and Programmatic Conservation Benefit Agreements, so that it focuses on efficiently preventing the federal listing (and thus federal regulation) of at-risk species.

For more, see the general State Endangered Species Act recommendations on p. 23.



¹⁷⁵ Mo. Ann. Stat. § 252.240 (2024).

^{176 &}quot;Sac River," Missouri Department of Conservation, accessed October 15, 2024, <u>https://mdc.mo.gov/your-property/watershed-inventory/sac-river#:~:text=There%20are%20several%20state%20</u> listed,darter%2C%20southern%20brook%20lamprey%2C%20blacknose.

Montana

State Environmental Policy Act

SEPA	Used Often	Includes Private Sector	Major Exemptions
Yes	Yes	Yes	No

Notes

Montana has a State Environmental Policy Act, known as the Montana Environmental Policy Act (MEPA). Like NEPA, MEPA requires state agencies to evaluate the environmental impacts of proposed actions and to consider alternatives and mitigation measures. This process includes preparing Environmental Assessments (EAs) and Environmental Impact Statements (EISs) to ensure that environmental considerations are integrated into the decision-making process.

MEPA is broadly applied and has led to significant litigation over the years. As of December 2020, state agencies had completed over 72,000 MEPA documents since 1971, with 79 of these state actions being litigated. Of the cases decided by courts on MEPA issues, the state prevailed 60 percent of the time overall, with an 82 percent success rate in the Montana Supreme Court.¹⁷⁷

MEPA applies to all state agency actions that may affect people and their environment, and is overseen by the Environmental Quality Council (EQC).

MEPA has been subject to numerous legislative amendments since its enactment in 1971, with 71 bills modifying or studying MEPA having been enacted as of 2021. Recent changes have tended to (narrowly) limit the scope of MEPA and make it more difficult for plaintiffs to litigate MEPA cases against state agencies.

MEPA's broad application and history of litigation has contributed to delays and increased project costs in the state for decades. Though information on MEPA processing times is limited, the most comprehensive study to date (published

¹⁷⁷ Environmental Quality Council, Montana Environmental Policy Act.

in 2000) found that the average MEPA review time for metal mines was 15 months, and that average review time for timber land sale EAs was 13 months. Both of these are likely to be somewhat significant *under*estimates, as the MEPA start date for metal mines was the date at which the application was deemed complete, while the MEPA start date for timber land sales was the initiation of public scoping. Both start dates occur long after the MEPA process actually begins.¹⁷⁸

Recommendations

Just as NEPA imposes an enormous regulatory burden on federal agencies and infrastructure development, MEPA imposes an enormous regulatory burden on state agencies and state infrastructure development. Where possible, the Montana legislature should reform, create exclusions from, and raise the trigger threshold for MEPA. For example, the legislature could:

- Significantly increase the threshold for triggering MEPA on state projects. Similar reforms have already been carried out in North Carolina (in 2015)¹⁷⁹ and Georgia (in 2016)¹⁸⁰ with a great deal of success.
- 2. Expand exemptions, particularly in the energy and transportation sectors, to streamline private sector development. Indiana's and South Dakota's various state NEPA exemptions, from the issuance of permits to "actions of an environmental protective regulatory nature," are good examples of efforts to this end.¹⁸¹
- 3. Set a time limit on injunctive relief to reduce the ability of obstructionists to block projects.
- 4. Repeal MEPA in its entirety, aligning Montana's environmental regulatory requirements with the majority of the country.

It's worth noting that Article II, Section 3 of the Montana Constitution explicitly guarantees citizens the right to a clean and healthful environment. The Montana Supreme Court has consistently interpreted this provision robustly, ruling in favor of maintaining stringent environmental protections. This could make broad MEPA reforms more difficult than in other states, but the many MEPA reforms that have already been enacted would suggest that MEPA reform is still possible.

¹⁷⁸ Environmental Quality Council Members, Improving the MEPA Process.

^{179 2015} N.C. Sess. Laws 90.

¹⁸⁰ S.B. 346, 2015-2016 Ga. Reg. Sess. (2016).

¹⁸¹ S.D. Codified Laws § 34A-9-1 (2024).

Clean Air Act

PALs in SIP	PALs in Use	PAL Guidance	PBR/ Registration Permits	General Permits	Other
No	-	-	Yes	No	-

Notes

Montana has not written PALs into its SIP.¹⁸²

Montana has a registration program covering:183

- Oil and Gas
- Crushers and Screens
- Concrete Batch Plants
- Asphalt Plants

Recommendations

The Montana legislature should direct the Montana Department of Environmental Quality (DEQ) to write PALs into its SIP.

Upon writing PALs into its SIP, the Montana legislature should direct DEQ to develop and publish comprehensive PAL guidance documents on its website, explaining the benefits and application process and referencing EPA's 2020 PAL guidance where relevant. The DEQ should clarify the PAL renewal process, emphasizing that there is no automatic downward adjustment at renewal, which could alleviate industry concerns about future operational flexibility. The legislature should also mandate annual reporting from the DEQ on PAL implementation, including uptake rates and explanations for low adoption. By enacting these measures, legislators can promote more efficient permitting processes while maintaining environmental protections, making Montana more attractive for industrial development.

¹⁸² Representative of the Montana Department of Environmental Quality, phone conversation with author, July 18, 2024.

^{183 &}quot;Permitting and Operator Assistance," Montana Department of Environmental Quality, accessed October 15, 2024, <u>https://deq.mt.gov/air/assistance</u>.

Montana should modify its PAL renewal language to provide greater certainty for regulated entities. Currently, federal PAL language states that if the emissions level is equal to or greater than 80 percent of the current PAL level, the Administrator "may renew" the PAL at the same level, or "may adjust" it based on various factors. This ambiguity has caused concern about the potential for "automatic ratcheting" of the PAL level upon renewal among regulated entities. To address this, Montana should follow North Carolina's example and change the language from "may renew" to "shall renew" in its state regulations. This approach would offer regulated entities more certainty in the PAL renewal process.

Montana DEQ should also be directed to expand its registration program to facilities covered in other states' flexible permit programs (see Appendix I).

Clean Water Act

Section 404 Assumption	NPDES Authority	Number of NPDES General Permits
No	Yes	15

Notes

Montana has not assumed the federal Section 404 permitting program, which remains under the jurisdiction of the U.S. Army Corps of Engineers and EPA. Montana has had NPDES authority since 1974 and has established a set of general permits under its water quality programs.¹⁸⁴

Montana has established the following general permits under its stormwater program:

- Storm Water Construction (SWC, known elsewhere as the CGP)
- Storm Water Industrial (MSGP)
- Municipal Separate Storm Sewer System (MS4)



^{184 &}quot;Permitting and Operator Assistance," Montana Department of Environmental Quality, accessed October 15, 2024, <u>https://deq.mt.gov/water/assistance</u>.

Montana has also established general permits for the following facilities and/or operations under its wastewater program:

- Concentrated Animal Feeding Operations (CAFO)
- Construction Dewatering
- Disinfected Water & Hydrostatic Testing
- Domestic Sewage Treatment Lagoons
- Batch & Non-Discharging Facilities
- Continuous Discharging Facilities
- Fish Farms
- Pesticides
- Petroleum Cleanup Discharges
- Produced Water from Oil and Gas Production
- Sand and Gravel
- Suction Dredges

Recommendations

For the main Section 404 recommendations, see p. 17.

For NPDES, Montana should expand its general permit program to other commonly covered facilities and operations (see Appendix II).

State Endangered Species Act

SESA	Consultation	Critical Habitat	Incidental Take
	Requirements	Designation	Permit
Yes	No	No	No

Notes

Montana has a SESA, called The Nongame and Endangered Species Conservation Act. Montana's SESA does not include formal consultation requirements, nor does it provide for critical habitat designation.

Montana prohibits take of state-listed species—which it defines as the harassing, hunting, capturing, or killing of animals—with narrow exemptions.¹⁸⁵ Montana's current state list does *not* list species beyond those listed under the federal ESA, and it does not offer incidental take permits.¹⁸⁶

Recommendations

Though it does not have any state-listed species currently, given that Montana may list species beyond those federally listed under the Endangered Species Act, and prohibits take of those species, it should consider designing an "incidental take permit" to allow for take under specific circumstances. This would give developers some flexibility to move forward on critical projects that may result in incidental take, so long as they implement approved conservation measures and mitigate any potential impacts on protected species.

Montana should also consider shifting away from its SESA program towards a more targeted series of Conservation Agreements and Programmatic Conservation Benefit Agreements, so that it focuses on efficiently preventing the federal listing (and thus federal regulation) of at-risk species.

For more, see the general State Endangered Species Act recommendations on p. 23.



¹⁸⁵ Montana Code Ann. 87-5-102.

¹⁸⁶ Representative of the Montana Department of Fish, Wildlife, and Parks, email correspondence with author, September 25, 2024.

Nebraska

State Environmental Policy Act

SEPA	Used Often	Includes Private Sector	Major Exemptions
No	_	-	-

Notes

Nebraska does not have a SEPA.

Recommendations

N/A

Clean Air Act

PALs in SIP	PALs in Use	PAL Guidance	PBR/ Registration Permits	General Permits	Other
Yes	Yes	No	Yes	Yes	-

Notes

Nebraska has written a PAL into its SIP. The state's PAL language aligns closely with federal regulations and does not contain additional stringent permitting language.¹⁸⁷

Nebraska has at least one facility in the state with a PAL: Omaha Public Power District's Nebraska City Station, a coal-fired power station.¹⁸⁸

^{188 &}quot;Public Notice," Nebraska Department of Environment and Energy, February 24, 2020, http://www.deq.state.ne.us/ PublicNo.nsf/12f5e2d735d6a4e806256db90068e4a3/0d4223420d5a5310862584c20056d696!OpenDocument.



^{187 129} Neb. Admin. Code ch. 4 (2022).

Nebraska has a PBR program, which covers two facility categories:¹⁸⁹

- Asphalt Plants
- Small Animal Incinerators

It also has a general permit program,¹⁹⁰ which covers several facility categories:

- Aggregate Processing Plants
- Asphalt Plants
- Concrete Plants
- Emergency Engines
- Incinerators
- Surface Coating Operations

In Nebraska, three local agencies—the Lincoln/Lancaster County Health Department, the Omaha Air Quality Control, and the Douglas County Health Department—have some level of individual control over their air programs.¹⁹¹

Recommendations

The Nebraska legislature should direct the Nebraska Department of Environment and Energy (NDEE) to develop and publish comprehensive PAL guidance documents on its website, explaining the benefits and application process and referencing EPA's 2020 PAL guidance where relevant. The NDEE should clarify the PAL renewal process, emphasizing that there is no automatic downward adjustment at renewal, which could alleviate industry concerns about future operational flexibility. The legislature should also mandate annual reporting from the NDEE on PAL implementation, including uptake rates and

^{189 &}quot;Permit-by-Rule," Nebraska Department of Environment and Energy, last updated September 19, 2022, <u>http://dee.ne.gov/Publica.nsf/PubsForm.</u> <u>xsp?documentId=8EEACF6C66CB74BF86257090006182EC&action=openDocument.</u>

^{190 &}quot;Air General Permits," Nebraska Department of Environment and Energy, last updated February 23, 2018, <u>http://deq.ne.gov/publica.nsf/PubsForm.</u> xsp?documentId=2DECBA28B55FE6F186257F33005CC8C7&action=openDocument.

^{191 &}quot;Air Quality Introduction," Nebraska Department of Environment and Energy, accessed October 15, 2024, <u>http://dee.ne.gov/NDEQProg.nsf/AirHome.xsp</u>.

explanations for low adoption. By enacting these measures, legislators can promote more efficient permitting processes while maintaining environmental protections, making Nebraska more attractive for industrial development.

Nebraska should modify its PAL renewal language to provide greater certainty for regulated entities. Currently, federal PAL language states that if the emissions level is equal to or greater than 80 percent of the current PAL level, the Administrator "may renew" the PAL at the same level, or "may adjust" it based on various factors. This ambiguity has caused concern about the potential for "automatic ratcheting" of the PAL level upon renewal among regulated entities. To address this, Nebraska should follow North Carolina's example and change the language from "may renew" to "shall renew" in its state regulations. This approach would offer regulated entities more certainty in the PAL renewal process.

For Minor NSR, the NDEE should be directed to expand its general permit and PBR programs wherever possible for low-impact projects and specific industry categories to reduce the administrative burden (see Appendix I).

Clean Water Act

Section 404 Assumption	NPDES Authority	Number of NPDES General Permits
No	Yes	8

Notes

Nebraska has not assumed authority over the Section 404 program, which remains under the jurisdiction of the U.S. Army Corps of Engineers and EPA, though it has recently expressed interest in pursuing assumption.¹⁹² Nebraska has had NPDES authority since 1974 and has established a set of general permits under its water quality programs.¹⁹³



¹⁹² E.A. Crunden, "EPA Preps Trump-Era Plan."

^{193 &}quot;NPDES General Permits," Nebraska Department of Environment and Energy, last updated February 2, 2023, <u>http://www.deq.state.ne.us/Publica.nsf/PubsForm.</u> xsp?documentId=5BE0CBAFA80E9A7C8625808E0053CED3&action=openDocument.

Nebraska has established the following non-stormwater general permits:

- Hydrostatic Permit
- Dewatering Permit
- Remediation Permit
- Pesticide Permit
- Grooving Grinding

For stormwater, Nebraska has established:

- Construction Stormwater Permit (CGP)
- NPDES Industrial Stormwater Permit (MSGP)
- MS4 General Permit (MS4)¹⁹⁴

Recommendations

For the main Section 404 recommendations, see p. 17.

For NPDES, Nebraska should expand its general permit program to other commonly covered facilities and operations (see Appendix II).

State Endangered Species Act

SESA	Consultation	Critical Habitat	Incidental Take
	Requirements	Designation	Permit
Yes	Yes	Yes	No*

Notes

Nebraska has a SESA, called the Nongame and Endangered Species Conservation Act of 1971. Nebraska's SESA has formal consultation requirements: state agencies must ensure that their actions do not jeopardize

^{194 &}quot;Re: MS4 Public Notice for the City of Gretna," Nebraska Department of Environment and Energy, May 7, 2018, https://www.gretnane.org/DocumentCenter/View/1301/MS4-Permit-PDF.

species or critical habitats. Formal consultation takes an average of 145 days (almost five months) in the state.¹⁹⁵

Nebraska also allows for the designation of critical habitat, including the acquisition of habitat for the purposes of protection,¹⁹⁶ though to date it has not designated any critical habitat beyond that which is already required under the federal ESA.¹⁹⁷

Nebraska prohibits take of state-listed species—which it defines as the harassing, harming, pursuing, hunting, shooting, wounding, killing, trapping, capturing, or collecting of animals—with narrow exemptions.¹⁹⁸ It does not offer incidental take permits, but it does allow for state agencies, through consultation, to acquire an Incidental Take Statement for actions that are determined to have adverse effects that would not jeopardize the continued existence of a species. To receive an Incidental Take Statement, the formal consultation process needs to be followed, after which the Commission will issue a Biological Opinion.¹⁹⁹ Crucially, this means that private entities are not able to come directly to the state agency for incidental take permits.

Nebraska's current state list covers species beyond those that are listed under the federal ESA.²⁰⁰

Recommendations

Nebraska's consultation requirements under its SESA impose an enormous regulatory burden on agencies, as seen in the 145-day average timeline. This state-level requirement is very unusual; of the 32 states surveyed here, Wisconsin is the only other state to have formal consultation as part of its SESA process. Consultation is ultimately a procedural—rather than a substantive— process, and creates regulatory delays despite many of the species in the state's SESA not being at high risk of becoming federally listed. Nebraska should strongly consider removing the formal consultation requirement, aligning itself with the majority of the country.

¹⁹⁵ Representative of the Nebraska Parks and Game Commission, email correspondence with author, September 25, 2024.

¹⁹⁶ Nebraska Rev. Stat. 37-807 (2024).

¹⁹⁷ Representative of the Nebraska Game and Parks Commission, email correspondence with author, September 23, 2024.

¹⁹⁸ Nebraska Rev. Stat. 37-802 (2024).

¹⁹⁹ Representative of the Nebraska Game and Parks Commission, email correspondence with author, September 23, 2024.

^{200 &}quot;Threatened and Endangered Species," Outdoor Nebraska, accessed October 15, 2024, <u>https://outdoornebraska.gov/learn/nebraska-wildlife/threatened-and-endangered-species/</u>.

For critical habitat, Nebraska should shift from a designation to an acquisitiononly framework, whereby the state can *acquire* land for the purposes of species preservation, but not *designate* private land. This would restore property rights to landowners while still preserving a critical habitat mechanism for the state. Alternatively, Nebraska could remove its critical habitat acquisition and designation authority in its entirety, aligning its state endangered species law with the majority of the country.

Given that Nebraska has state-listed species beyond those federally listed under the Endangered Species Act, and may prohibit take of those species through regulation, it should design an explicit "incidental take permit" to allow for take under specific circumstances. This would give developers some flexibility to move forward on critical projects that may result in incidental take, so long as they implement approved conservation measures and mitigate any potential impacts on protected species.

Nebraska should also consider shifting away from its SESA program towards a more targeted series of Conservation Agreements and Programmatic Conservation Benefit Agreements, so that it focuses on efficiently preventing the federal listing (and thus federal regulation) of at-risk species.

For more, see the general State Endangered Species Act recommendations on p. 23.

New Hampshire

State Environmental Policy Act

SEPA	Used Often	Includes Private Sector	Major Exemptions
No	_	-	-

Notes

New Hampshire does not have a SEPA.

Recommendations

N/A

Clean Air Act

PALs in SIP	PALs in Use	PAL Guidance	PBR/ Registration Permits	General Permits	Other
Yes	Yes*	No	Rock Crushers	Emergency Generators	_

Notes

New Hampshire has incorporated PALs into its SIP. The state's PAL language aligns closely with federal regulations and does not contain additional stringent permitting language.

There are currently no active PAL permits in New Hampshire. A PAL was previously issued to Batesville Casket Company, but the facility has since gone out of business.²⁰¹

²⁰¹ Representative of the New Hampshire Department of Environmental Services, phone conversation with author, August 22, 2024.

New Hampshire has a limited General State Permit program covering:²⁰²

Emergency Generators

The state has a Permit-by-Notification (similar to PBR) program for:

• Non-Metallic Mineral Processing Plants (Rock Crushers)

Recommendations

The New Hampshire legislature should direct the Department of Environmental Services (NHDES) to develop and publish comprehensive PAL guidance documents on its website, explaining the benefits and application process and referencing EPA's 2020 PAL guidance where relevant. NHDES should clarify the PAL renewal process, emphasizing that there is no automatic downward adjustment at renewal, which could alleviate industry concerns about future operational flexibility. The legislature should also mandate annual reporting from the NHDES on PAL implementation, including uptake rates and explanations for low adoption. By enacting these measures, legislators can promote more efficient permitting processes while maintaining environmental protections, making New Hampshire more attractive for industrial development.

New Hampshire should modify its PAL renewal language to provide greater certainty for regulated entities. Currently, federal PAL language states that if the emissions level is equal to or greater than 80 percent of the current PAL level, the Administrator "may renew" the PAL at the same level, or "may adjust" it based on various factors. This ambiguity has caused concern about the potential for "automatic ratcheting" of the PAL level upon renewal among regulated entities. To address this, New Hampshire should follow North Carolina's example and change the language from "may renew" to "shall renew" in its state regulations. This approach would offer regulated entities more certainty in the PAL renewal process.

For Minor NSR, the NHDES should be encouraged to expand its General State Permit and Permit-by-Notification program to cover additional industrial categories beyond emergency generators and non-metallic mineral processing plants (see Appendix I).



^{202 &}quot;Permit Guidance," New Hampshire Department of Environmental Services, accessed October 15, 2024, <u>https://www.des.nh.gov/air/industrial-sources/permit-guidance</u>.

Clean Water Act

Section 404 Assumption	NPDES Authority	Number of NPDES General Permits
No	No	12*

Notes

New Hampshire has not assumed the federal Section 404 permitting program, which remains under the jurisdiction of the U.S. Army Corps of Engineers and EPA. Notably, New Hampshire does not run its own NPDES program. Instead, EPA administers the NPDES program for the state, and has developed its own list of general permits.²⁰³

EPA has established the following general non-stormwater permits for New Hampshire:

- Publicly Owned Treatment Works General Permit
- Potable Water Treatment Facility General Permit
- Dewatering and Remediation General Permit
- Noncontact Cooling Water General Permit
- Hydroelectric Generating Facilities General Permit
- Pesticide General Permit
- Vessel General Permit
- Small Vessel General Permit
- Great Bay Total Nitrogen General Permit



^{203 &}quot;NPDES Permits and Compliance," New Hampshire Department of Environmental Services, accessed October 15, 2024, <u>https://www.des.nh.gov/waste/wastewater/npdes-permits-and-compliance</u>.

EPA has established the following general stormwater permits for New Hampshire:

- Multi-Sector General Permit (MSGP)
- Construction General Permit (CGP)
- Small MS4 General Permit (MS4)²⁰⁴

While the New Hampshire Department of Environmental Services (NHDES) is involved in water quality management, the NPDES permitting is handled directly by EPA. This arrangement is relatively uncommon, as most states have assumed NPDES authority.

The federal administration of the NPDES program in New Hampshire may result in a different regulatory dynamic compared to states that manage their own programs, potentially affecting the permitting process and the state's ability to tailor permits to local conditions.

Recommendations

For the main Section 404 recommendations, see p. 17.

New Hampshire should assume authority over the NPDES program. This would allow it to better tailor its permitting process to the specific needs of the state, develop general permits beyond those currently designed by EPA, and avoid the potential for triggering NEPA when issuing permits for "new sources."²⁰⁵

State Endangered Species Act

SESA	Consultation	Critical Habitat	Incidental Take
	Requirements	Designation	Permit
Yes	No	Yes	No

^{204 &}quot;Federal NPDES Permits," New Hampshire MS4 Resources, accessed October 15, 2024, <u>https://www.nhms4.des.nh.gov/federal-npdes-permits</u>.

^{205 &}quot;Federal Laws that Apply to the NPDES Permit Program," Environmental Protection Agency, accessed October 15, 2024, <u>https://www.epa.gov/npdes/federal-laws-apply-npdes-permit-program</u>.

Notes

New Hampshire has a SESA, called the Endangered Species Conservation Act. New Hampshire's SESA does not include formal consultation requirements in the same sense as the federal ESA. It *does* provide for the designation of critical habitat.²⁰⁶

New Hampshire prohibits take of state-listed species, with narrow exemptions. It does not offer incidental take permits, and its current state list covers species beyond those that are listed under the federal ESA.²⁰⁷

Recommendations

For critical habitat, New Hampshire should shift from a designation to an acquisition-only framework, whereby the state can *acquire* land for the purposes of species preservation, but not *designate* private land. This would restore property rights to landowners while still preserving a critical habitat mechanism for the state. Alternatively, New Hampshire could remove its critical habitat acquisition and designation authority in its entirety, aligning its state endangered species law with the majority of the country.

Given that New Hampshire has state-listed species beyond those federally listed under the Endangered Species Act, and prohibits take of those species, it should design an "incidental take permit" to allow for take under specific circumstances. This would give developers some flexibility to move forward on critical projects that may result in incidental take, so long as they implement approved conservation measures and mitigate any potential impacts on protected species.

New Hampshire should also consider shifting away from its SESA program towards a more targeted series of Conservation Agreements and Programmatic Conservation Benefit Agreements, so that it focuses on efficiently preventing the federal listing (and thus federal regulation) of at-risk species.

For more, see the general State Endangered Species Act recommendations on p. 23.



²⁰⁶ New Hampshire Rev. Stat. § 212-A:9 (2024).

^{207 &}quot;Threatened and Endangered Plants and Animals in New Hampshire's Forested Habitats," University of New Hampshire, accessed October 15, 2024, <u>https://extension.unh.edu/sites/default/files/migrated_unmanaged_files/Resource001060_Rep1242.pdf</u>.

North Carolina

State Environmental Policy Act

SEPA	Used Often	Includes Private Sector	Major Exemptions
Yes	Yes	Yes	Yes

Notes

North Carolina has a SEPA. Like NEPA, SEPA requires state agencies to evaluate the environmental impacts of proposed actions and to consider alternatives and mitigation measures. This process includes preparing Environmental Assessments (EAs) and Environmental Impact Statements (EISs) to ensure that environmental considerations are integrated into the decision-making process.²⁰⁸

SEPA has been broadly applied over the years, though the 2015 SEPA Reform led to the threshold for SEPA being raised significantly.²⁰⁹ Nevertheless, SEPA is still triggered for hundreds of projects every year, including solar projects, highway expansion projects, and various projects undertaken by the Department of Environmental Quality.

While North Carolina's SEPA theoretically does not apply to privately funded projects unless they involve the use of public lands, there are a number of important exceptions, particularly around energy infrastructure. Electric generating facilities such as solar projects require a state license, for example, which kicks off environmental review under SEPA.²¹⁰



^{208 &}quot;Review Process," North Carolina Department of Environmental Quality, accessed October 15, 2024, https://www.deq.nc.gov/accessdeq/state-environmental-policy-act-sepa/review-process.

^{209 &}quot;State Environmental Policy Act (SEPA)," North Carolina Department of Environmental Quality, accessed October 15, 2024, <u>https://www.deq.nc.gov/accessdeq/state-environmental-policy-act-sepa</u>.

^{210 &}quot;Docket SP-47688 Sub 0," North Carolina Utilities Commission, accessed October 15, 2024, <u>https://starw1.ncuc.gov/NCUC/page/docket-docs/PSC/DocketDetails.aspx?DocketId=11572e73-9f0c-440b-a3b7-d2f072fc02c2</u>; Gabe Rivin, "SEPA: An Environmental Law Up for Debate," *North Carolina Health News*, May 7, 2015, <u>https://www.northcarolinahealthnews.org/2015/05/07/sepa-an-environmental-law-up-for-debate/</u>; and "Docket SP-9270 Sub 0," North Carolina Utilities Commission, April 26, 2017, <u>https://starw1.ncuc.gov/NCUC/page/docket-docs/PSC/DocketDetails.aspx?DocketId=119b9897-e3d9-482a-a7c2-0cca684773f6</u>.

Similar to NEPA, insufficient consideration of environmental impact can be grounds for litigation under SEPA. Past SEPA lawsuits have covered bridge construction, steel mill permits, and forest sales, among other things.²¹¹

Recommendations

Just as NEPA imposes an enormous regulatory burden on federal agencies and infrastructure development, SEPA imposes an enormous regulatory burden on state agencies and state infrastructure development. Where possible, the North Carolina legislature should reform, create exclusions from, and raise the trigger threshold for SEPA. For example, the legislature could:

- 1. Significantly increase the threshold for triggering SEPA on state projects. The 2015 reform was a good start, but North Carolina should go further.
- 2. Expand exemptions, particularly in the energy and transportation sectors, to streamline private sector development. Indiana's and South Dakota's various state NEPA exemptions, from the issuance of permits to "actions of an environmental protective regulatory nature," are good examples of efforts to this end.²¹² Given SEPA's outsized impact on solar projects, the issuance of certificates of public convenience and necessity should be considered for an exemption.
- 3. Set a time limit on injunctive relief to reduce the ability of obstructionists to block projects.
- 4. Repeal SEPA in its entirety, aligning North Carolina's environmental regulatory requirements with the majority of the country.



²¹¹ Rebecca Martinez, "Hofmann Forest Gets A New Prospective Buyer; Lawsuit Remains in Appeals Court," *WUNC*, September 10, 2014, <u>https://www.wunc.org/environment/2014-09-10/hofmann-forest-gets-a-new-prospective-buyer-lawsuit-remains-in-appeals-court;</u> Mullin v. Skinner, 756 F. Supp. 904 (E.D.N.C. 1990), <u>https://casetext.com/case/mullin-v-skinner;</u> "Steel Mill Settlement Curbs Unbridled Development In NC," Environmental Defense Fund, April 5, 2000, <u>https://www.edf.org/media/steel-mill-settlement-curbs-unbridled-development-nc</u>.

²¹² S.D. Codified Laws § 34A-9-1 (2024).

Clean Air Act

PALs in SIP	PALs in Use	PAL Guidance	PBR/ Registration Permits	General Permits	Other
Yes	Yes	No	Yes	Yes	Renewable Permits

Notes

North Carolina has written a PAL into its SIP. The state's PAL language aligns closely with federal regulations, with one key exception. In the provision relating to PAL adjustment at renewal, in which new PAL conditions (and limits) may be set at the end of the a facility's 10-year PAL term, the state has opted not to incorporate the federal PAL language in 40 CFR 51.166(w)(10)(iv)(a).²¹³ The federal language states:

(a) If the emissions level calculated in accordance with paragraph (w)(6) of this section is equal to or greater than 80 percent of the PAL level, the reviewing authority may renew the PAL at the same level without considering the factors set forth in paragraph (w)(10)(iv)(b) of this section; or

(b) The reviewing authority may set the PAL at a level that it determines to be more representative of the source's baseline actual emissions, or that it determines to be appropriate considering air quality needs, advances in control technology, anticipated economic growth in the area, desire to reward or encourage the source's voluntary emissions reductions, or other factors as specifically identified by the reviewing authority in its written rationale.

Instead of giving the authority the option to set the PAL at a different level even when facility's emissions level is within 20 percent of its PAL level, North Carolina's rule states:

^{213 15}A N.C. Admin. Code 2D.0530 (2024).

(i) For the purposes of this Rule, 40 CFR 51.166(w)(10)
(iv)(a) shall read: "If the emissions level calculated in accordance with Paragraph (w)(6) of this Section is equal to or greater than 80 percent of the PAL level, the Director shall renew the PAL at the same level." 40 CFR 51.166(w)(10)(iv)(b) is not incorporated by reference.

In other words, North Carolina's PAL adjustment rules guarantee facilities that their PAL level will not be ratcheted down if their emissions are within 20 percent of the initial level. This decision was made in an effort to give facilities more certainty about their PAL terms and to encourage more PAL applications.²¹⁴

This is particularly notable given the fact that EPA's 2020 guidance on PALs identified concerns around renewal and "automatic ratcheting" as key stakeholder concerns surrounding the permit. North Carolina's efforts to assuage these concerns through less ambiguous PAL renewal language may explain why there are a number of PALs in the state.²¹⁵

PALs have been issued in North Carolina to facilities such as St. Johns Packaging's packaging plant, Duke Energy's combined cycle gas plant, and Sonoco-Hickory Inc.'s plastics factory.²¹⁶

North Carolina has a general permit program, which covers several facilities:²¹⁷

- Air Curtain Incinerator Units
- Emergency Generators

²¹⁴ Representative of the North Carolina Department of Environmental Quality, phone conversation with author, August 7, 2024.

²¹⁵ Environmental Protection Agency, *Memorandum on Guidance on Plantwide Applicability Limitation Provisions*.

²¹⁶ North Carolina Division of Air Quality, *Application Review for Air Quality Title V Operation Permit No.* 02221T20 (2023), <u>https://www.deq.nc.gov/media/42221/download?attachment;</u> Western North Carolina Regional Air Quality Agency, *Air Quality Title V Operation Permit No.* 11-628-21 (2022), <u>https:// www.buncombecounty.org/commoN/Asheville-buncombe-air-quality-agency/Duke%20Energy%20</u> <u>Draft%20Title%20V%20Permit.pdf;</u> and North Carolina Division of Air Quality, *Application Review for Air Quality Title V Operation Permit No.* 04691T31 (2021), <u>https://www.deq.nc.gov/air-quality/permits/</u> <u>public-communication/notices/draft-review/20211115sonocorevpdf/open</u>.

^{217 &}quot;Modifying or Applying for an Air Quality Permit," North Carolina Department of Environmental Quality, accessed October 16, 2024, <u>https://www.deq.nc.gov/about/divisions/air-quality/air-quality-permitting/modifying-or-applying-air-quality-permit</u>.

- Cotton Ginning
- Yarn Spinning Plants
- Concrete Batch Plants

The state also has a registration program, which is open to facilities with annual aggregate emissions between five and 25 tons per year of certain pollutants. It also exempts facilities from air quality permitting if their annual emissions are below five tons for individual pollutants and below 10 tons in aggregate for certain pollutants.²¹⁸

Finally, North Carolina offers a specialized registration program for exempt renewable energy facilities under Senate Bill 3 (SB3).²¹⁹ This program allows smaller renewable energy producers to register rather than obtain full air quality permits, provided they meet Best Available Control Technology (BACT) standards for certain pollutants. Unlike the broader registration program, which applies to facilities with emissions between five and 25 tons per year, the SB3 program doesn't specify emission thresholds. Instead, it focuses on BACT compliance, potentially allowing higher-emitting renewable facilities to qualify.

Three counties in North Carolina have their own air programs: Buncombe, Forsyth, and Mecklenburg.²²⁰

Recommendations

The North Carolina legislature should direct the North Carolina Department of Environmental Quality to develop and publish comprehensive PAL guidance documents on its website, explaining the benefits and application process and referencing EPA's 2020 PAL guidance where relevant. The Department should clarify the PAL renewal process, emphasizing that there is no automatic downward adjustment at renewal, which could alleviate industry concerns about future operational flexibility. The legislature should also mandate annual

^{218 &}quot;Permit Application, Permit Exemption, and Registration for Small Facilities," North Carolina Department of Environmental Quality," accessed October 16, 2024, <u>https://www.deq.nc.gov/about/</u> <u>divisions/air-quality/air-quality-permitting/modifying-or-applying-air-quality-permit/permit-application-</u> <u>permit-exemption-and-registration-small-facilities</u>.

^{219 &}quot;General Permit Application Form for Emergency Generators," North Carolina Department of Environmental Quality," accessed October 16, 2024, <u>https://www.deq.nc.gov/air-quality/permits/sb3registrationformpdf/download?attachment</u>.

^{220 &}quot;Local Air Programs," North Carolina Department of Environmental Quality," accessed October 16, 2024, <u>https://www.deq.nc.gov/about/divisions/air-quality/about-air-quality/daq-organizational-structure/regional-offices/local-air-programs</u>.

reporting from the Department on PAL implementation, including uptake rates and explanations for low adoption. By enacting these measures, legislators can promote more efficient permitting processes while maintaining environmental protections, making North Carolina more attractive for industrial development.

For Minor NSR, the Department of Environmental Quality should be directed to expand general permitting options wherever possible for low-impact projects and specific industry categories to reduce the administrative burden (see Appendix I).

Clean Water Act

Section 404 Assumption	NPDES Authority	Number of NPDES General Permits
No	Yes	10

Notes

North Carolina has not assumed the federal Section 404 permitting program, which remains under the jurisdiction of the U.S. Army Corps of Engineers and EPA. North Carolina has had NPDES authority since 1975 and has established a set of general permits under its water quality programs.

North Carolina has established the following non-stormwater general permits:²²¹

- Non-contact cooling water discharges
- Petroleum-based groundwater remediation
- Sand dredging
- Seafood packaging
- Domestic discharges from single-family residences
- Pesticide



^{221 &}quot;Permitting Process," North Carolina Department of Environmental Quality, accessed October 16, 2024, <u>https://www.deq.nc.gov/about/divisions/water-resources/permitting/npdes-wastewater/permitting-process#General_Permits</u>.

- Conjunctive Water Uses
- Water Treatment Plant Dischargers

For stormwater activities, North Carolina has established general permits for:²²²

- Construction Activities (CGP)
- Twenty-one industry-specific stormwater permits including:
 - Mining Activities
 - Metal Fabrication
 - Apparel, Printing, Leather, Rubber
 - Food and Kindred
 - Stone, Clay, and Glass
 - Transit and Transportation
 - Paints and Varnishes
 - Used Motor Vehicles
 - Treatment Works
 - Landfills
 - Non-metal Waste and Scrap
 - Ready-Mixed Concrete
 - Airports
 - Asphalt Paving Mixtures, Blocks
 - Textile Mill



^{222 &}quot;General Industrial Permits," North Carolina Department of Environmental Quality," accessed October 16, 2024, <u>https://www.deq.nc.gov/about/divisions/energy-mineral-and-land-resources/stormwater/</u> stormwater-program/npdes-industrial-program/general-industrial-permits.

- Furniture Manufacture
- Marinas and Shipbuilding
- Scrap Metal
- Timber Products
- Composting Operations

Unlike many states that use a single Multi-Sector General Permit (MSGP) for industrial stormwater, North Carolina has developed 21 separate industryspecific general permits for industrial stormwater discharges. This approach allows for more tailored permit conditions based on the specific needs and impacts of different industries, but it also means that certain non-covered industries must go through individual permitting.²²³

Notably, North Carolina does not currently have a general permit for Municipal Separate Storm Sewer Systems (MS4s). Instead, NC DEQ has decided to issue individual permits for MS4s in the state.²²⁴

Recommendations

For the main Section 404 recommendations, see p. 17.

For NPDES, North Carolina should expand its general permit program to other commonly covered facilities and operations (see Appendix II).

State Endangered Species Act

SESA	Consultation	Critical Habitat	Incidental Take
	Requirements	Designation	Permit
Yes	No	No*	No*

^{223 &}quot;NPDES Industrial Program," North Carolina Department of Environmental Quality," accessed October 16, 2024, <u>https://www.deq.nc.gov/about/divisions/energy-mineral-and-land-resources/stormwater/</u> <u>stormwater-program/npdes-industrial-program</u>.

^{224 &}quot;Permittees and Permit Requirements," North Carolina Department of Environmental Quality," accessed October 16, 2024, <u>https://www.deq.nc.gov/about/divisions/energy-mineral-and-land-resources/stormwater/stormwater-program/npdes-ms4-0</u>.

Notes

North Carolina has a SESA.²²⁵ North Carolina's SESA does not include formal consultation requirements in the same sense as the federal ESA. While it does not directly provide for critical habitat designation, critical habitat areas may be recommended by advisory committees.

North Carolina prohibits take of state-listed species—which it defines as the capturing, killing, pursuing, hunting, or otherwise harming of animals—with narrow exemptions.²²⁶ It does not offer incidental take permits for animals, though it does offer them for plants for non-commercial activities.²²⁷ North Carolina's current state list covers species beyond those that are listed under the federal ESA.²²⁸

Recommendations

Given that North Carolina has state-listed species beyond those federally listed under the Endangered Species Act, and prohibits take of those species, it should design an "incidental take permit" for animals to allow for take under specific circumstances. This would give developers some flexibility to move forward on critical projects that may result in incidental take, so long as they implement approved conservation measures and mitigate any potential impacts on protected species.

North Carolina should also consider shifting away from its SESA program towards a more targeted series of Conservation Agreements and Programmatic Conservation Benefit Agreements, so that it focuses on efficiently preventing the federal listing (and thus federal regulation) of at-risk species.

For more, see the general State Endangered Species Act recommendations on p. 23.



²²⁵ N.C. Gen. Stat. § 113-331 (2024).

²²⁶ North Carolina Gen Stat. § 113-130 (2023).

²²⁷ North Carolina Gen Stat. § 106-202.19 (2023).

^{228 &}quot;Protected Wildlife Species of North Carolina," North Carolina Wildlife Resources Commission, October 1, 2021, <u>https://www.ncwildlife.org/protected-wildlife-species-north-carolina/open</u>.

North Dakota

State Environmental Policy Act

SEPA	Used Often	Includes Private Sector	Major Exemptions
No	_	-	-

Notes

North Dakota does not have a SEPA.

Recommendations

N/A

Clean Air Act

PALs in SIP	PALs in Use	PAL Guidance	PBR/ Registration Permits	General Permits	Other
Yes	Yes	No	Oil & Gas	Yes	-

Notes

North Dakota has written a PAL into its SIP. The state's PAL language aligns closely with federal regulations and does not contain additional stringent permitting language.²²⁹

A PAL has been issued to one facility in the state: the Dakota Gasification Company.²³⁰ Given that North Dakota has a significant presence of heavy



²²⁹ N.D. Admin. Code § 33.1-15-15-01.2 (2019).

²³⁰ Representative of the North Dakota Department of Environmental Quality, phone conversation with author, July 17, 2024.
industry, this level of PAL uptake is quite low.

North Dakota has a registration program for oil and gas.²³¹ It also has a general permit program, which covers the following facilities:²³²

- Asphalt Plants
- Dry Cleaners
- Grain Elevators
- Incinerators & Crematoriums
- Rock, Sand, & Gravel Plants
- Portable Sources

Recommendations

The North Dakota legislature should direct the North Dakota Department of Environmental Quality (DEQ) to develop and publish comprehensive PAL guidance documents on its website, explaining the benefits and application process and referencing EPA's 2020 PAL guidance where relevant. The DEQ should clarify the PAL renewal process, emphasizing that there is no automatic downward adjustment at renewal, which could alleviate industry concerns about future operational flexibility. The legislature should also mandate annual reporting from the DEQ on PAL implementation, including uptake rates and explanations for low adoption. By enacting these measures, legislators can promote more efficient permitting processes while maintaining environmental protections, making North Dakota more attractive for industrial development.

North Dakota should modify its PAL renewal language to provide greater certainty for regulated entities. Currently, federal PAL language states that if the emissions level is equal to or greater than 80 percent of the current PAL level, the Administrator "may renew" the PAL at the same level, or "may adjust" it based on various factors. This ambiguity has caused concern about the potential for "automatic ratcheting" of the PAL level upon renewal among regulated entities. To address this, North Dakota should follow North Carolina's



^{231 &}quot;Oil & Gas Well Registrations," North Dakota Department of Environmental Quality, accessed October 2024, <u>https://deq.nd.gov/aq/oilgas/OilGasRegistration.aspx</u>.

^{232 &}quot;Operating Permits," North Dakota Department of Environmental Quality, accessed October 2024, <u>https://www.deq.nd.gov/AQ/permitting/operating.aspx</u>.

example and change the language from "may renew" to "shall renew" in its state regulations. This approach would offer regulated entities more certainty in the PAL renewal process.

For Minor NSR, the DEQ should be directed to expand general permitting options wherever possible for low-impact projects and specific industry categories to reduce the administrative burden (see Appendix I).

Clean Water Act

Section 404 Assumption	NPDES Authority	Number of NPDES General Permits
No	Yes	10

Notes

North Dakota has not assumed the federal Section 404 permitting program, which remains under the jurisdiction of the U.S. Army Corps of Engineers and EPA. North Dakota has had NPDES authority since 1975, which it implements through the North Dakota Pollutant Discharge Elimination System (NDPDES) program. The state has established a set of general permits under its water quality programs, covering both wastewater and stormwater discharges.

North Dakota has established the following general permits under its stormwater program:²³³

- Construction General Permit (CGP)
- Industrial Stormwater Permit (Multi-Sector General Permit MSGP)
- Municipal Separate Storm Sewer Systems (MS4)
- Mining, Extraction, and Paving Materials (MEPM) Permit



^{233 &}quot;Stormwater Permits," North Dakota Department of Environmental Quality, accessed October 2024, <u>https://deq.nd.gov/WQ/2_NDPDES_Permits/7_Stormwater/StW.aspx</u>.

North Dakota has established the following general permits under its nonstormwater program:²³⁴

- Wastewater Stabilization Ponds Discharge
- Domestic Wastewater Treatment Facilities
- Water Treatment Plants and Potable Distribution Systems
- Pretreatment for Metal Finishing Industries
- Pesticide
- Temporary Discharge (hydrostatic testing, disinfection of potable water lines, construction dewatering, treatment of contaminated groundwater, groundwater wells)²³⁵

The state's wastewater permits address different types of treatment facilities, including wastewater stabilization ponds, domestic wastewater treatment facilities, and water treatment plants. The Pretreatment General Permit for Metal Finishing Industries is noteworthy, as it is described as a "gray area" in terms of its NDPDES status.

North Dakota has also historically implemented a PBR system for metal finishing operations, which appears to be in transition. As of September 2023, the state is in the process of moving PBR facilities onto the metal finisher general permit. This transition is intended to provide facilities with a better understanding of regulatory expectations compared to the PBR system.²³⁶

Recommendations

For the main Section 404 recommendations, see p. 17.

For NPDES, North Dakota should expand its general permit program to other commonly covered facilities and operations (see Appendix II).

^{234 &}quot;Municipal/Industrial Discharge Permits," North Dakota Department of Environmental Quality, accessed October 2024, <u>https://deq.nd.gov/WQ/2_NDPDES_Permits/3_Municipal_Industrial/MI.aspx</u>.

^{235 &}quot;Temporary Discharge Permits," North Dakota Department of Environmental Quality, accessed October 2024, <u>https://deq.nd.gov/WQ/2_NDPDES_Permits/8_TempDischarges/TD.aspx</u>.

²³⁶ Representative of the North Dakota Department of Environmental Quality, phone conversation with author, September 11, 2024.

State Endangered Species Act

SESA	Consultation	Critical Habitat	Incidental Take
	Requirements	Designation	Permit
Yes	No	No	No

Notes

North Dakota has a SESA.²³⁷ North Dakota's SESA does not include formal consultation requirements in the same sense as the federal ESA, nor does it provide for critical habitat designation.

North Dakota does *not* prohibit take of state-listed species. Its current state list also does not cover species beyond those that are listed under the federal ESA.²³⁸

Recommendations

North Dakota should consider shifting away from its SESA program towards a more targeted series of Conservation Agreements and Programmatic Conservation Benefit Agreements, so that it focuses on efficiently preventing the federal listing (and thus federal regulation) of at-risk species.

For more, see the general State Endangered Species Act recommendations on p. 23.



²³⁷ North Dakota Cent. Code § 20.1-01-02 (2023).

^{238 &}quot;Threatened and Endangered Species," North Dakota Game and Fish Department, accessed October 16, 2024, <u>https://gf.nd.gov/wildlife/endangered#:~:text=North%20Dakota%20has%20twelve%20</u> <u>species,via%20the%20Endangered%20Species%20Act</u>.

Ohio

State Environmental Policy Act

SEPA	Used Often	Includes Private Sector	Major Exemptions
No	_	-	-

Notes

Ohio does not have a SEPA.

Recommendations

N/A

Clean Air Act

PALs in SIP	PALs in Use	PAL Guidance	PBR/ Registration Permits	General Permits	Other
Yes	Yes	No	Yes	Yes	-

Notes

Ohio has incorporated PALs into its SIP. The state's PAL language aligns closely with federal regulations and does not contain additional stringent permitting language.²³⁹

Ohio has issued at least one PAL permit. Ford's Ohio Assembly Plant in Avon Lake is operating under a PAL. $^{\rm 240}$



²³⁹ Ohio Admin. Code 3745-31-32 (2023).

^{240 &}quot;Key Accomplishments," Ohio Environmental Protection Agency, accessed October 16, 2024, <u>https://epa.ohio.gov/about/50th-anniversary</u>.

Ohio has a PBR program covering various facility types and operations, including: $^{\rm 241}$

- Emergency electrical generators, pumps and compressors
- Resin injection/compression molding equipment
- Small crushing and screening plants
- Remediation projects for soil-vapor extraction
- Remediation projects for soil-liquid extraction
- Auto body refinishing shops
- Gas stations with Stage I vapor controls
- Gas stations with Stage I and II vapor controls
- Natural gas fired boilers and heaters
- Small printing facilities
- Mid-size printing facilities
- Unpaved roadways and parking areas (12,000-30,000 square feet)
- Paved roadways and parking areas (45,000-90,000 square feet)

Ohio has a general permit program covering multiple categories:²⁴²

- Aggregate Processing
- Boilers
- Diesel Engines (Compression Ignition Internal Combustion Engine)
- Digester Operations
- Dry Cleaning Operations



^{241 &}quot;Permit-by-Rule (PBR)," Ohio Environmental Protection Agency, accessed October 16, 2024, <u>https://epa.ohio.gov/divisions-and-offices/air-pollution-control/permitting/permit-by-rule-pbr</u>.

^{242 &}quot;General Permit Program," Ohio Environmental Protection Agency, accessed October 16, 2024, <u>https://epa.ohio.gov/divisions-and-offices/air-pollution-control/permitting/general-permit-program</u>.

- Human Crematories
- Mineral Extraction
- Miscellaneous Metal Parts and Products Coating Lines
- Natural Gas Compressor Stations
- Oil and Gas Well-site Production Operations
- Paved and Unpaved Roadways and Parking Areas
- Ready Mix Concrete Batch Plants
- Storage Piles
- Tub Grinder

Recommendations

The Ohio legislature should direct the Ohio Environmental Protection Agency (Ohio EPA) to develop and publish comprehensive PAL guidance documents on its website, explaining the benefits and application process and referencing EPA's 2020 PAL guidance where relevant. Ohio EPA should clarify the PAL renewal process, emphasizing that there is no automatic downward adjustment at renewal, which could alleviate industry concerns about future operational flexibility. The legislature should also mandate annual reporting from Ohio EPA on PAL implementation, including uptake rates and explanations for low adoption. By enacting these measures, legislators can promote more efficient permitting processes while maintaining environmental protections, making Ohio more attractive for industrial development.

Ohio should modify its PAL renewal language to provide greater certainty for regulated entities. Currently, federal PAL language states that if the emissions level is equal to or greater than 80 percent of the current PAL level, the Administrator "may renew" the PAL at the same level, or "may adjust" it based on various factors. This ambiguity has caused concern about the potential for "automatic ratcheting" of the PAL level upon renewal among regulated entities. To address this, Ohio should follow North Carolina's example and change the language from "may renew" to "shall renew" in its state regulations. This approach would offer regulated entities more certainty in the PAL renewal process.

For Minor NSR, Ohio EPA should be encouraged to expand its flexible permit programs to cover additional industrial categories (see Appendix I).

Clean Water Act

Section 404 Assumption	NPDES Authority	Number of NPDES General Permits
No	Yes	17

Notes

Ohio has not assumed the federal Section 404 permitting program, which remains under the jurisdiction of the U.S. Army Corps of Engineers and EPA. Ohio has had NPDES authority since 1974 and has established a set of general permits under its water quality programs.²⁴³

Ohio has established the following general permits under its non-stormwater program:

- Bridge Maintenance Wastewater
- Coal Surface Mining Activities
- Household Sewage Treatment Systems
- Hydrostatic Test Water
- Maumee Watershed Total Phosphorus
- Non-contact Cooling Water
- Pesticide Application Discharges
- Bulk Fuel Storage Facilities
- Petroleum-related Corrective Actions
- Small Sanitary Discharges
- Small Sanitary Discharges That Cannot Meet BADCT Standards
- Temporary Wastewater Discharges
- Water Treatment Plants

^{243 &}quot;NPDES General Permits," Ohio Environmental Protection Agency, accessed October 16, 2024, <u>https://epa.ohio.gov/divisions-and-offices/surface-water/permitting/npdes-general-permits</u>.

Ohio has established the following general permits under its stormwater program:

- Construction Site Stormwater
- Industrial Stormwater
- Stormwater Discharges Associated with Industrial Activity From Marinas
- Small MS4 Stormwater

Recommendations

For the main Section 404 recommendations, see p. 17.

For NPDES, Ohio should expand its general permit program to other commonly covered facilities and operations (see Appendix II).

State Endangered Species Act

SESA	Consultation	Critical Habitat	Incidental Take
	Requirements	Designation	Permit
Yes	No	No	No

Notes

Ohio has a SESA.²⁴⁴ Ohio's SESA does not include formal consultation requirements in the same sense as the federal ESA, nor does it provide for critical habitat designation.

Ohio's SESA does not explicitly prohibit take of state-listed species, but it does authorize rules to prohibit take. It does not offer incidental take permits. Ohio's current state list covers species beyond those that are listed under the federal ESA.²⁴⁵



²⁴⁴ Ohio Rev. Code § 1531.25 (2024).

^{245 &}quot;State Listed Species," Ohio Department of Natural Resources, accessed October 16, 2024, <u>https://ohiodnr.gov/discover-and-learn/safety-conservatioN/About-ODNR/wildlife/state-listed-species</u>.

Recommendations

Given that Ohio has state-listed species beyond those federally listed under the Endangered Species Act, and has authorized rules to prohibit take of those species, it should design an "incidental take permit" to allow for take under specific circumstances. This would give developers some flexibility to move forward on critical projects that may result in incidental take, so long as they implement approved conservation measures and mitigate any potential impacts on protected species.

Ohio should also consider shifting away from its SESA program towards a more targeted series of Conservation Agreements and Programmatic Conservation Benefit Agreements, so that the program focuses on efficiently preventing the federal listing (and thus federal regulation) of at-risk species.

For more, see the general State Endangered Species Act recommendations on p. 23.

Oklahoma

State Environmental Policy Act

SEPA	Used Often	Includes Private Sector	Major Exemptions
No	_	-	-

Notes

Oklahoma does not have a SEPA.

Recommendations

N/A

Clean Air Act

PALs in SIP	PALs in Use	PAL Guidance	PBR/ Registration Permits	General Permits	Other
Yes	Yes	No	Yes	Yes	-

Notes

Oklahoma has written PALs into its SIP. The state's PAL language aligns closely with federal regulations and does not contain additional stringent permitting language.²⁴⁶

Oklahoma has at least one facility operating under a PAL: International Paper's Valliant Paper Mill.²⁴⁷

²⁴⁶ Okla. Admin. Code § 252:100-8-38 (2024).

²⁴⁷ Phillip Martin, Oklahoma Department of Environmental Quality, *Evaluation of Permit Application No.* 2013-0465-C (2024), <u>https://applications.deq.ok.gov/permitspublic/storedpermits/8701.pdf</u>.

Oklahoma has a PBR program covering various facility types:²⁴⁸

- Cotton Gins
- Emergency Engine Facilities
- Gasoline Dispensing Facilities
- Grain Elevators
- Minor Oil and Natural Gas Facilities
- Particulate Matter Emission
- VOC Storage and Loading Facilities

The state also has a General Permits program covering several categories:

- Air Curtain Incinerators
- Area Source NESHAP & Small NSPS Facilities
- Chromium Electroplating & Anodizing
- Dry Cleaning
- Halogenated Solvent Degreasing
- Hot Mix Asphalt
- Non-Metallic Mineral Processing
- Oil & Gas Facilities
- Printing, Packaging, Publishing

Oklahoma has permit exemptions for facilities with actual emissions less than 40 tons per year of each regulated pollutant and potential emissions below major source thresholds. This exemption applies to facilities not subject to certain federal standards and not operated in conjunction with another source requiring an Air Quality permit, and includes facilities such as cement batch

^{248 &}quot;General Permits and Permits by Rule," Oklahoma Department of Environmental Quality, accessed October 16 2024, <u>https://www.deq.ok.gov/air-quality-divisioN/Air-permits/general-permits-and-pbr/</u>.

plants, sand and gravel plants, and crematoria.²⁴⁹

Recommendations

The Oklahoma legislature should direct the Department of Environmental Quality (DEQ) to develop and publish comprehensive PAL guidance documents on its website, explaining the benefits and application process and referencing EPA's 2020 PAL guidance where relevant. The DEQ should clarify the PAL renewal process, emphasizing that there is no automatic downward adjustment at renewal, which could alleviate industry concerns about future operational flexibility. The legislature should also mandate annual reporting from the DEQ on PAL implementation, including uptake rates and explanations for low adoption. By enacting these measures, legislators can promote more efficient permitting processes while maintaining environmental protections, making Oklahoma more attractive for industrial development.

Oklahoma should modify its PAL renewal language to provide greater certainty for regulated entities. Currently, federal PAL language states that if the emissions level is equal to or greater than 80 percent of the current PAL level, the Administrator "may renew" the PAL at the same level, or "may adjust" it based on various factors. This ambiguity has caused concern about the potential for "automatic ratcheting" of the PAL level upon renewal among regulated entities. To address this, Oklahoma should follow North Carolina's example and change the language from "may renew" to "shall renew" in its state regulations. This approach would offer regulated entities more certainty in the PAL renewal process.

For Minor NSR, the DEQ should be encouraged to continue expanding its general permit and PBR programs to cover additional low-impact projects and specific industry categories (see Appendix I).

^{249 &}quot;Advice for Obtaining 'Permit Exempt' Applicability Determinations," Oklahoma Department of Environmental Quality, accessed October 16, 2024, <u>https://www.deq.ok.gov/wp-content/uploads/air-division/PG_Permit_Exempt_Applicability_Determination_Advice.pdf</u>.

Clean Water Act

Section 404 Assumption	NPDES Authority	Number of NPDES General Permits
No	Yes	16

Notes

Oklahoma has not assumed the federal Section 404 permitting program, which remains under the jurisdiction of the U.S. Army Corps of Engineers and EPA. Oklahoma has had NPDES authority since 1996 and has established a set of general permits under its water quality programs.

Oklahoma has established the following general permits under its non-stormwater program: $^{\rm 250}$

- Surface Coal Strip Mine General Permit
- Concrete Batch Plant General Permit
- Mobile Concrete Batch Plant General Permit
- Hydrostatic Test General Permit
- Medical Marijuana Wastewater Permit
- Vehicle Wash Facility General Permit
- Underground Storage Tank Cleanup General Permit
- Rock, Sand, and Gravel Quarry General Permit
- Class III Total Retention Impoundment General Permit
- General Permit to Discharge Filter Backwash Wastewater
- General Permit to Discharge Lagoon Wastewater



 ^{250 &}quot;Industrial Permitting," Oklahoma Department of Environmental Quality, accessed October 16, 2024, https://www.deq.ok.gov/water-quality-division/wastewater-stormwater/industrial-permitting/;
 "Municipal Permitting," Oklahoma Department of Environmental Quality, accessed October 16, 2024, https://www.deq.ok.gov/water-quality-division/wastewater-stormwater/industrial-permitting/;
 "Municipal Permitting," Oklahoma Department of Environmental Quality, accessed October 16, 2024, https://www.deq.ok.gov/municipal-permitting/

- General Permit to Discharge Splashpad Wastewater
- Pesticide General Permit²⁵¹

It has also established the following general permits under its stormwater program:²⁵²

- Construction General Permit (CGP)
- Industrial General Permit (MSGP)
- Small MS4 General Permit (MS4)

Recommendations

For the main Section 404 recommendations, see p. 17.

For NPDES, Oklahoma should expand its general permit program to other commonly covered facilities and operations (see Appendix II).

State Endangered Species Act

SESA	Consultation	Critical Habitat	Incidental Take
	Requirements	Designation	Permit
Yes	No	No	No

Notes

Oklahoma has a SESA.²⁵³ Oklahoma's SESA does not include formal consultation requirements in the same sense as the federal ESA, nor does it provide for critical habitat designation.

Oklahoma prohibits take of state-listed species—which it defines as the possessing, hunting, chasing, harassing, capturing, shooting at, wounding

²⁵¹ Oklahoma Department of Agriculture, Food, and Forestry, *Pesticide General Permit For Discharges from the Application of Pesticides in Oklahoma* (2023), <u>https://ag.ok.gov/wp-content/uploads/2020/11/2023-2028-AgPDES-Pesticide-Final-General-Permit.pdf</u>.

^{252 &}quot;Stormwater Permitting," Oklahoma Department of Environmental Quality, accessed October 16, 2024, <u>https://www.deq.ok.gov/stormwater-permitting/</u>.

²⁵³ Okla. Stat. Ann. 29 § 2-109 (2023).

or killing, taking, or trapping of animals—with narrow exemptions.²⁵⁴ It does not offer incidental take permits. Oklahoma's current state list covers species beyond those that are listed under the federal ESA.²⁵⁵

Recommendations

Given that Oklahoma has state-listed species beyond those federally listed under the Endangered Species Act, and prohibits take of those species, it should design an "incidental take permit" to allow for take under specific circumstances. This would give developers some flexibility to move forward on critical projects that may result in incidental take, so long as they implement approved conservation measures and mitigate any potential impacts on protected species.

Oklahoma should also consider shifting away from its SESA program towards a more targeted series of Conservation Agreements and Programmatic Conservation Benefit Agreements, so that it focuses on efficiently preventing the federal listing (and thus federal regulation) of at-risk species.

For more, see the general State Endangered Species Act recommendations on p. 23.



²⁵⁴ Okla. Stat. § 29-5-412 (2023).

^{255 &}quot;Threatened and Endangered Species," Oklahoma Department of Wildlife Conservation, accessed October 16, 2024, <u>https://www.wildlifedepartment.com/wildlife/threatened-and-endangered</u>.

Pennsylvania

State Environmental Policy Act

SEPA	Used Often	Includes Private Sector	Major Exemptions
No	_	-	-

Notes

Pennsylvania does not have a SEPA.

Recommendations

N/A

Clean Air Act

PALs in SIP	PALs in Use	PAL Guidance	PBR/ Registration Permits	General Permits	Other
Yes*	Yes	No	No	Yes	-

Notes

Pennsylvania has written a PAL into its SIP. However, the state's PAL language for nonattainment NSR (that is, for areas of the state that do not meet the NAAQS) is more stringent than federal regulations, as the result of its decision in 2007 that EPA's PAL provisions were not sufficiently protective of the state's air quality needs.²⁵⁶

Pennsylvania's NNSR PAL language is more stringent than federal



^{256 &}quot;Rules and Regulations," Environmental Quality Board, May 19, 2007, <u>https://www.pacodeandbulletin.</u> gov/Display/pabull?file=/secure/pabulletin/data/vol37/37-20/924.html.

requirements in three key ways:

- <u>Baseline Emissions Calculation:</u> The federal approach allows any consecutive 24-month period within the previous 10 years. In contrast, Pennsylvania's approach allows any consecutive 24-month period within the preceding *five years*, though it may allow a different 24-month period within the last 10 years upon written determination. In short, Pennsylvania's default look-back period is shorter than necessary.
- <u>Emission Controls on New Units Under PAL</u>: Under the federal approach, new units do not need best available control technology (BACT) if the PAL is not exceeded. Under Pennsylvania's approach, new units must use the "best available technology." Pennsylvania's requirement for additional controls for new units make this provision more stringent.
- <u>Projected Actual Emissions</u>: The federal approach requires tracking for five years (or 10 years for capacity increases) and assumes that increases after five years are not associated with the changes. Pennsylvania's approach requires projected actual emissions to be incorporated into the permit as an enforceable emission limit, ensuring that emissions from modifications are legally enforceable and adding an extra layer of regulatory compliance.

PALs have been issued in the state to numerous facilities in the state, including Novipax, a packaging manufacturing company, and Merck & Co., a chemical manufacturing plant.²⁵⁷

Pennsylvania has a general permit program, which covers the following facilities:²⁵⁸

- Gas and No. 2 Oil Fired Small Combustion Units
- Storage Tanks for Volatile Organic Liquids
- Portable Nonmetallic Mineral Processing Plants



²⁵⁷ Pennsylvania Department of Environmental Protection, *Novipax RACT Plan Approval No. 06-05036C* (2017), <u>https://downloads.regulations.gov/EPA-R03-OAR-2020-0189-0007/attachment_1.pdf;</u> Pennsylvania Department of Environmental Protection, *TITLE V Permit No: 49-00007* (2023), <u>https://files.dep.state.pa.us/Air/AirQuality/AQPortalFiles/Permits/PermitDocuments/1421926[49-00007]_Issued_v1.pdf</u>.

^{258 &}quot;General Permits," Pennsylvania Department of Environmental Protection, accessed October 16, 2024, <u>https://www.dep.pa.gov/Business/Air/BAQ/Permits/Pages/GeneralPermits.aspx</u>.

- Burn-Off Ovens
- Natural Gas Compression Stations, Processing Facilities and Well Pads
- Unconventional Natural Gas Well Site Operations and Remote Pigging Stations
- Petroleum Dry Cleaning Process
- Sheet-fed Offset Lithographic Printing Press
- Powder Metal Sintering Furnaces
- Diesel or No.2 Fuel-Fired IC Engines
- Non-Heatset Web Offset Lithographic Printing Press
- Nonroad Engines
- Fugitive Dust Sources and Diesel Fired IC Engines at Coal and Coal Refuse Preparation Plants
- Hot Mix Asphalt Plants
- Human or Animal Crematories
- Feed Mills
- Dry Abrasive Blasting Operations
- Natural Gas-Fired Combined Heat and Power Facilities
- Coal-Mine Methane Enclosed Flare
- Landfill Gas-Fired Simple Cycle Turbine(s)
- Pharmaceutical & Specialty Chemical Production

Of note is that Allegheny County and Philadelphia County are responsible for their own air permitting programs, each with their own rules. Those rules are beyond the scope of this playbook.

Recommendations

Pennsylvania should revise its PAL language to align with federal requirements, removing the additional stringent language around baseline emissions calculation, projected actual emissions, and, most importantly, best available control technology. This will require a revision to Pennsylvania's SIP.

The Pennsylvania legislature should direct the Department of Environmental Protection (DEP) to develop and publish comprehensive PAL guidance documents on its website, explaining the benefits and application process and referencing EPA's 2020 PAL guidance where relevant. The DEP should clarify the PAL renewal process, emphasizing that there is no automatic downward adjustment at renewal, which could alleviate industry concerns about future operational flexibility. The legislature should also mandate annual reporting from the DEP on PAL implementation, including uptake rates and explanations for low adoption. By enacting these measures, legislators can promote more efficient permitting processes while maintaining environmental protections, making Pennsylvania more attractive for industrial development.

Pennsylvania should modify its PAL renewal language to provide greater certainty for regulated entities. Currently, federal PAL language states that if the emissions level is equal to or greater than 80 percent of the current PAL level, the Administrator "may renew" the PAL at the same level, or "may adjust" it based on various factors. This ambiguity has caused concern about the potential for "automatic ratcheting" of the PAL level upon renewal among regulated entities. To address this, Pennsylvania should follow North Carolina's example and change the language from "may renew" to "shall renew" in its state regulations. This approach would offer regulated entities more certainty in the PAL renewal process.

For Minor NSR, the DEP should be encouraged to continue expanding its general permit program to cover additional low-impact projects and specific industry categories (see Appendix I).

Clean Water Act

Section 404 Assumption	NPDES Authority	Number of NPDES General Permits
No	Yes	13

Notes

Pennsylvania has not assumed the federal Section 404 permitting program, which remains under the jurisdiction of the U.S. Army Corps of Engineers and EPA. Pennsylvania has had NPDES authority since 1978 and has established a

set of general permits under its water quality programs.²⁵⁹

Pennsylvania has established the following general permits under its stormwater program:

- Construction Stormwater General Permit (CGP)²⁶⁰
- Stormwater Associated with Industrial Activities (MSGP)
- Small Municipal Separate Storm Sewer Systems (MS4)

Pennsylvania has established general permits for the following facilities and/or operations under its non-stormwater program:

- Small Flow Sewage Treatment Facilities
- Petroleum Contaminated Groundwater Systems
- Combined Sewer Systems
- Beneficial Use of Exceptional Quality Biosolids
- Beneficial Use of Biosolids
- Beneficial Use of Residential Septage
- Hydrostatic Testing of Tanks and Pipelines
- Aquatic Animal Production Facilities
- Concentrated Animal Feeding Operations
- Application of Pesticides

Recommendations

For the main Section 404 recommendations, see p. 17.

For NPDES, Pennsylvania should expand its general permit program to other commonly covered facilities and operations (see Appendix II).



^{259 &}quot;NPDES and WGM Permitting Programs," Pennsylvania Department of Environmental Protection, accessed October 16, 2024, <u>https://www.dep.pa.gov/Business/Water/CleanWater/WastewaterMgmt/</u> <u>Pages/NPDESWQM.aspx</u>.

^{260 &}quot;Construction Stormwater," Pennsylvania Department of Environmental Protection, accessed October 16, 2024, <u>https://www.dep.pa.gov/Business/Water/CleanWater/StormwaterMgmt/Stormwater%20</u> <u>Construction/Pages/default.aspx</u>.

State Endangered Species Act

SESA	Consultation	Critical Habitat	Incidental Take
	Requirements	Designation	Permit
Yes	No	No	No

Notes

Pennsylvania has a SESA.²⁶¹ Pennsylvania's SESA does not include formal consultation requirements in the same sense as the federal ESA, nor does it provide for critical habitat designation.

Pennsylvania prohibits take of state-listed species—which it defines as the harassing, pursuing, hunting, shooting, wounding, killing, trapping, capturing, possessing, or collecting of animals—with narrow exemptions. It does not offer incidental take permits. Pennsylvania's current state list covers species beyond those that are listed under the federal ESA.²⁶²

Pennsylvania also has a SESA-equivalent for plants, called the Wild Resource Conservation Act.

Recommendations

Given that Pennsylvania has state-listed species beyond those federally listed under the Endangered Species Act, and prohibits take of those species, it should design an "incidental take permit" to allow for take under specific circumstances. This would give developers some flexibility to move forward on critical projects that may result in incidental take, so long as they implement approved conservation measures and mitigate any potential impacts on protected species.

Pennsylvania should also consider shifting away from its SESA program towards a more targeted series of Conservation Agreements and Programmatic Conservation Benefit Agreements, so that it focuses on efficiently preventing the federal listing (and thus federal regulation) of at-risk species.

For more, see the general State Endangered Species Act recommendations on p. 23.



^{261 34} Pennsylvania C.S. § 102 (2024).

²⁶² Pennsylvania Code § 133.1-133.7 (2024).

South Carolina

State Environmental Policy Act

SEPA	Used Often	Includes Private Sector	Major Exemptions
No	_	-	-

Notes

South Carolina does not have a SEPA.

Recommendations

N/A

Clean Air Act

PALs in SIP	PALs in Use	PAL Guidance	PBR/ Registration Permits	General Permits	Other
Yes*	Yes	No	Yes	Yes	_

Notes

South Carolina has written a PAL into its SIP.²⁶³ The state's PAL language generally aligns with federal regulations, with one exception: in South Carolina, PAL applications must be reviewed under the state's minor source permitting program.²⁶⁴ This makes the PAL application process more stringent than necessary, adding an additional layer of regulatory oversight.



²⁶³ South Carolina Code, § 48-1-10 (2024).

²⁶⁴ Legislative Council of the South Carolina General Assembly, *South Carolina State Register vol. 28, Issue 11* (2004), <u>https://www.scstatehouse.gov/state_register.php?first=FILE&pdf=1&file=Sr28-11.pdf</u>.

A PAL has been issued to at least one facility in the state: Michelin Inc.'s tire manufacturing plant.²⁶⁵ Given that South Carolina has a significant presence of heavy industry, this level of PAL uptake is quite low.

South Carolina has general permits and registration permits covering a wide range of facility sizes and processes.²⁶⁶ Organized by type of flexible permit, these include:

General State Operating

- Concrete Plants
- Nonmetallic Mineral Processing Plants
- Sawmill Operations
- Surface Finishing Operations
- Textile Operations

General Minor NSR Construction

Concrete Plants

Registration Permits

- Autobody Refinishing Shop
- Cotton Ginning Operations
- Crematory Operations
- Fuel Combustion Operations
- Gasoline Dispensing Facilities
- Surface Finishing Operations
- Temporary Crushing and Screening Operations
- Wood Working Operations

^{266 &}quot;General and Registration Permits (Air Quality)," South Carolina Department of Environmental Services, accessed October 17, 2024, <u>https://des.sc.gov/programs/bureau-air-quality/air-quality-permits/</u> <u>general-and-registration-permits-air-quality</u>.



²⁶⁵ South Carolina Department of Health and Environmental Control, *Bureau of Air Quality Title V Operating Permit* (2020), <u>https://pubdoc.dhec.sc.gov/AirPermitCoverage/1200-0039.pdf</u>.

General Synthetic Minor Construction

- Asphalt Plants
- Concrete Plants

General Title V

- Fiber Reinforced Plastic Boat Manufacturing
- Municipal Solid Waste Landfills

General Conditional Major

- Asphalt Plants
- Concrete Plants
- Fuel Combustion Operations
- Nonmetallic Mineral Processing Plants
- Petroleum Distribution Operations
- Surface Finishing Operations
- Textile Operations

Recommendations

South Carolina should revise its PAL language to align with federal requirements, removing the requirement that PAL applications be reviewed under the minor source permitting program.

The South Carolina legislature should direct the Department of Environmental Services (SCDES) to develop and publish comprehensive PAL guidance documents on its website, explaining the benefits and application process and referencing EPA's 2020 PAL guidance where relevant. The SCDES should clarify the PAL renewal process, emphasizing that there is no automatic downward adjustment at renewal, which could alleviate industry concerns about future operational flexibility. The legislature should also mandate annual reporting from the SCDES on PAL implementation, including uptake rates and explanations for low adoption. By enacting these measures, legislators can promote more efficient permitting processes while maintaining environmental protections, making South Carolina more attractive for industrial development. South Carolina should modify its PAL renewal language to provide greater certainty for regulated entities. Currently, federal PAL language states that if the emissions level is equal to or greater than 80 percent of the current PAL level, the Administrator "may renew" the PAL at the same level, or "may adjust" it based on various factors. This ambiguity has caused concern about the potential for "automatic ratcheting" of the PAL level upon renewal among regulated entities. To address this, South Carolina should follow North Carolina's example and change the language from "may renew" to "shall renew" in its state regulations. This approach would offer regulated entities more certainty in the PAL renewal process.

For Minor NSR, SCDES should be encouraged to continue expanding its flexible permit program to cover additional low-impact projects and specific industry categories (see Appendix I).

Clean Water Act

Section 404 Assumption	NPDES Authority	Number of NPDES General Permits
No	Yes	14

Notes

South Carolina has not assumed the federal Section 404 permitting program, which remains under the jurisdiction of the U.S. Army Corps of Engineers and EPA. South Carolina has had NPDES authority since 1975 and has established a set of general permits under its water quality programs.

South Carolina has established the following general permits under its stormwater program:²⁶⁷

- Stormwater Discharges from Construction Activities (CGP)
- Industrial Stormwater General Permit (MSGP)
- MS4 Phase II (MS4)



^{267 &}quot;Design Aids and Technical Documents," South Carolina Department of Environmental Services, accessed October 17, 2024, <u>https://des.sc.gov/programs/bureau-water/stormwater/design-aids-and-technical-documents</u>.

South Carolina has also established general permits for the following facilities and/or operations under its non-stormwater program:²⁶⁸

- Bulk Petroleum Storage Activities
- Discharges from the Application of Pesticides
- Hydrostatic Test Water Discharges from New & Used Oil and Gas Lines & Tanks
- Discharges Associated with Nonmetal Mineral Mining Facilities
- Land Application Associated with Nonmetal Mineral Mining
- Petroleum Contaminated Groundwater Discharges
- Potable Water Treatment Plants
- Domestic Wastewater Treatment Plant Dischargers
- Utility Water Discharges
- Vehicle Wash Waters
- Discharges Associated with Hydroelectric Generating Facilities

Recommendations

For the main Section 404 recommendations, see p. 17.

For NPDES, South Carolina should expand its general permit program to other commonly covered facilities and operations (see Appendix II).



^{268 &}quot;General NPDES Permits," South Carolina Department of Environmental Services, accessed October 17, 2024, <u>https://des.sc.gov/programs/bureau-water/general-npdes-permits-non-stormwater</u>.

State Endangered Species Act

SESA	Consultation	Critical Habitat	Incidental Take
	Requirements	Designation	Permit
Yes	No	No	No

Notes

South Carolina has a SESA, called the South Carolina Nongame and Endangered Species Conservation Act. South Carolina's SESA does not include formal consultation requirements in the same sense as the federal ESA, nor does it provide for critical habitat designation.

South Carolina prohibits take of state-listed species—which it defines as the harassing, hunting, capturing, or killing of animals—with narrow exemptions.²⁶⁹ It does not offer incidental take permits. South Carolina's current state list covers species beyond those that are listed under the federal ESA.²⁷⁰

Recommendations

Given that South Carolina has state-listed species beyond those federally listed under the Endangered Species Act, and prohibits take of those species, it should design an "incidental take permit" to allow for take under specific circumstances. This would give developers some flexibility to move forward on critical projects that may result in incidental take, so long as they implement approved conservation measures and mitigate any potential impacts on protected species.

South Carolina should also consider shifting away from its SESA program towards a more targeted series of Conservation Agreements and Programmatic Conservation Benefit Agreements, so that it focuses on efficiently preventing the federal listing (and thus federal regulation) of at-risk species.

For more, see the general State Endangered Species Act recommendations on p. 23.



²⁶⁹ South Carolina Code § 50-15-10 (2023).

^{270 &}quot;Wildlife Management Guide," South Carolina Department of Natural Resources, accessed October 16, 2024, <u>https://www.dnr.sc.gov/wildlife/publications/pdf/endangered.pdf</u>.

South Dakota

State Environmental Policy Act

SEPA	Used Often	Includes Private Sector	Major Exemptions
Yes	No	No	Yes

Notes

South Dakota enacted its Environmental Policy Act (SDEPA), modeled after NEPA, in 1974.²⁷¹ However, it is extremely rare that SDEPA is triggered, given the law's list of exemptions, which includes "actions of an environmental protective regulatory nature."²⁷² This exemption, in addition to the fact that the language of the law states that agencies "may" (rather than "shall") prepare an Environmental Impact Statement (EIS), means that it is extremely rare that an EIS is required under state law. State officials have suggested that one SDEPA review or fewer is required each year.²⁷³

Recommendations

South Dakota's implementation of SDEPA does not create significant drag on the state economy or government projects. That said, the fact that the law has not been repealed creates the possibility that the law will be "remembered" in the future. The best course of action for South Dakota, then, is to simply repeal the law in its entirety.

²⁷¹ Council on Environmental Quality, *Introducing Federal National Environmental Policy Act Practitioners to the South Dakota Environmental Policy Act*, accessed October 16, 2024. <u>https://ceq.doe.gov/docs/</u> <u>laws-regulations/state_information/SD_NEPA_Comparison_27May2015.pdf</u>.

²⁷² SD Codified Law § 34A-9 (2024).

²⁷³ Representative of the South Dakota Department of Agriculture and Natural Resources, phone conversation with author, July 15, 2024.

Clean Air Act

PALs in SIP	PALs in Use	PAL Guidance	PBR/ Registration Permits	General Permits	Other
Yes	No	No	No	Yes	-

Notes

South Dakota has incorporated PALs into its SIP. The state's PAL language aligns closely with federal regulations and does not contain additional stringent permitting language.²⁷⁴ There are, however, zero PALs in use in the state.²⁷⁵

South Dakota has a general permit program which covers four categories of facility:²⁷⁶

- Asphalt Plants
- Rock Crushers
- Concrete Plants
- Grain Elevators

The state does not have a registration or PBR program.

Recommendations

The South Dakota legislature should direct the South Dakota Department of Agriculture and Natural Resources (DANR) to develop and publish comprehensive PAL guidance documents on its website, explaining the benefits and application process and referencing EPA's 2020 PAL guidance where relevant. The DANR should clarify the PAL renewal process, emphasizing that there is no automatic downward adjustment at renewal,



²⁷⁴ South Dakota Admin. Code r. 74:36:10:05 (2024).

²⁷⁵ Representative of the South Dakota Department of Agriculture and Natural Resources, email correspondence with author, August 28, 2024.

²⁷⁶ South Dakota Department of Agriculture and Natural Resources, "Air Quality in South Dakota," accessed October 16, 2024, <u>https://danr.sd.gov/Environment/AirQuality/PermitForms/default.aspx</u>.

which could alleviate industry concerns about future operational flexibility. The legislature should also mandate annual reporting from the DANR on PAL implementation, including uptake rates and explanations for low adoption. By enacting these measures, legislators can promote more efficient permitting processes while maintaining environmental protections, making South Dakota more attractive for industrial development.

South Dakota should modify its PAL renewal language to provide greater certainty for regulated entities. Currently, federal PAL language states that if the emissions level is equal to or greater than 80 percent of the current PAL level, the Administrator "may renew" the PAL at the same level, or "may adjust" it based on various factors. This ambiguity has caused concern about the potential for "automatic ratcheting" of the PAL level upon renewal among regulated entities. To address this, South Dakota should follow North Carolina's example and change the language from "may renew" to "shall renew" in its state regulations. This approach would offer regulated entities more certainty in the PAL renewal process.

For Minor NSR, the DANR should be directed to expand its general permit program wherever possible for low-impact projects and specific industry categories to reduce the administrative burden (see Appendix I).

Clean Water Act

Section 404 Assumption	NPDES Authority	Number of NPDES General Permits
No	Yes	13

Notes

South Dakota has not assumed the federal Section 404 permitting program, which remains under the jurisdiction of the U.S. Army Corps of Engineers and EPA. South Dakota has had NPDES authority since 1993 and has established a set of general permits under its water quality programs.



South Dakota has established the following general permits under its stormwater program:²⁷⁷

- Construction General Permit
- Industrial General Permit
- Small MS4

It has also established the following general permits under its non-stormwater program:²⁷⁸

- General Water Pollution Control Permit for Concentrated Animal Feeding Operations
- No Discharge General Permit
- 9, 10 General Permit
- Temporary Discharge General Permit
- Water Treatment and Distribution General Permit
- Pesticide General Permit
- Animal Pest Pesticide General Permit
- Biosolids General Permit
- General Permit for Metal Finishing Industrial Users
- Non-Discharging Interstate Rest Areas

Recommendations

For the main Section 404 recommendations, see p. 17.

For NPDES, South Dakota should expand its general permit program to other commonly covered facilities and operations (see Appendix II).

^{277 &}quot;Stormwater in South Dakota," South Dakota Department of Agriculture and Natural Resources, accessed October 16, 2024, <u>https://danr.sd.gov/OfficeOfWater/SurfaceWaterQuality/stormwater/default.aspx</u>.

²⁷⁸ South Dakota Department of Agriculture and Natural Resources, email correspondence with author in response to public records request, September 27, 2024.

State Endangered Species Act

SESA	Consultation	Critical Habitat	Incidental Take
	Requirements	Designation	Permit
Yes	No	No	No

Notes

South Dakota has a SESA.²⁷⁹ South Dakota's SESA does not include formal consultation requirements in the same sense as the federal ESA, nor does it provide for critical habitat designation.

South Dakota prohibits take of state-listed species, with narrow exemptions. It does not offer incidental take permits. South Dakota's current state list covers species beyond those that are listed under the federal ESA.²⁸⁰

Recommendations

Given that South Dakota has state-listed species beyond those federally listed under the Endangered Species Act, and prohibits take of those species, it should design an "incidental take permit" to allow for take under specific circumstances. This would give developers some flexibility to move forward on critical projects that may result in incidental take, so long as they implement approved conservation measures and mitigate any potential impacts on protected species.

South Dakota should also consider shifting away from its SESA program towards a more targeted series of Conservation Agreements and Programmatic Conservation Benefit Agreements, so that it focuses on efficiently preventing the federal listing (and thus federal regulation) of at-risk species.

For more, see the general State Endangered Species Act recommendations on p. 23.



²⁷⁹ S.D. Codified Laws Ann. § 34A-8-1 (2024).

^{280 &}quot;Federal and State Listed Threatened and Endangered Species in South Dakota," South Dakota Public Utilities Commission, accessed October 16, 2024, <u>https://puc.sd.gov/commission/dockets/</u> <u>HydrocarbonPipeline/2014/HP14-002/revisedspecies.pdf</u>.

Tennessee

State Environmental Policy Act

SEPA	Used Often	Includes Private Sector	Major Exemptions
No	-	-	-

Notes

Tennessee does not have a SEPA.

Recommendations

N/A

Clean Air Act

PALs in SIP	PALs in Use	PAL Guidance	PBR/ Registration Permits	General Permits	Other
Yes	Yes	No	Yes	Yes	-

Notes

Tennessee has written a PAL into its SIP. The state's PAL language aligns closely with federal regulations and does not contain additional stringent permitting language.²⁸¹

²⁸¹ Tenn. Comp. R. & Regs. 1200-03-09-.01 (2024).

Tennessee has four facilities with active PAL permits:²⁸²

- Packaging Corporation of America's two (2) packaging plants in Counce
- General Motors' automotive plant in Spring Hill
- Arconic US LLC's aluminum plant in Alcoa

It also has one facility with a draft PAL (Nissan North America) and one facility with an incomplete PAL application (Bridgestone).

Tennessee has a PBR program which covers three facility categories:²⁸³

- Gasoline Dispensing Facilities (GDFs)
- Stationary Emergency Internal Combustion (IC) Engines
- Auto Body Refinishing

Tennessee has a general permit program which covers three facility categories:²⁸⁴

- Dry Cleaners (Perchloroethylene and Petroleum Solvent)
- Concrete Batch Plants
- Nonmetallic Mineral Crushing and Sizing Operations

Recommendations

The Tennessee legislature should direct the Tennessee Department of Environment and Conservation (TDEC) to develop and publish comprehensive PAL guidance documents on its website, explaining the benefits and application process and referencing EPA's 2020 PAL guidance where relevant. TDEC should clarify the PAL renewal process, emphasizing that there is no automatic downward adjustment at renewal, which could alleviate industry

²⁸² Tennessee Department of Environmental Conservation, Air Pollution Control Permits and Inspections Data Viewer (filtered for PAL permits), accessed October 17, 2024, <u>https://dataviewers.tdec.tn.gov/</u> <u>dataviewers/f?p=19031:34001</u>.

^{283 &}quot;Permit by Rule," Tennessee Department of Environment and Conservation, accessed October 16, 2024, <u>https://www.tn.gov/environment/permit-permits/air-permits/permit-by-rule.html</u>.

^{284 &}quot;Air Quality General Permits," Tennessee Department of Environment and Conservation, accessed October 16, 2024, <u>https://www.tn.gov/environment/permits/air-permits/general.html</u>.

concerns about future operational flexibility. The legislature should also mandate annual reporting from TDEC on PAL implementation, including uptake rates and explanations for low adoption. By enacting these measures, legislators can promote more efficient permitting processes while maintaining environmental protections, making Tennessee more attractive for industrial development.

Tennessee should modify its PAL renewal language to provide greater certainty for regulated entities. Currently, federal PAL language states that if the emissions level is equal to or greater than 80 percent of the current PAL level, the Administrator "may renew" the PAL at the same level, or "may adjust" it based on various factors. This ambiguity has caused concern about the potential for "automatic ratcheting" of the PAL level upon renewal among regulated entities. To address this, Tennessee should follow North Carolina's example and change the language from "may renew" to "shall renew" in its state regulations. This approach would offer regulated entities more certainty in the PAL renewal process.

For Minor NSR, TDEC should be directed to expand general permitting and PBR options wherever possible for low-impact projects and specific industry categories (see Appendix I).

Clean Water Act

Section 404 Assumption	NPDES Authority	Number of NPDES General Permits
No	Yes	7

Notes

Tennessee has not assumed the federal Section 404 permitting program, which remains under the jurisdiction of the U.S. Army Corps of Engineers and EPA. Tennessee has had NPDES authority since 1977 and has established a set of general permits under its water quality programs.


Tennessee has established the following general permits for wastewater:²⁸⁵

- Hydrostatic Test Water
- Application of Pesticides
- Ready Mixed Concrete
- Underground Storage Tank Remediation

For stormwater, Tennessee has established:²⁸⁶

- Construction General Permit (CGP)
- Tennessee Multi Sector Permit (TMSP, aka MSGP) for industrial activities
- Small MS4 General Permit (MS4)

The state has implemented a unique program called the Tennessee Qualifying Local Program (QLP) for managing stormwater runoff from construction activities. Under the QLP, if a municipality's program meets or exceeds state standards, construction sites within that jurisdiction only need to follow local requirements, eliminating the need for separate state permitting. This streamlined approach can potentially reduce the administrative burdens and improve efficiency in stormwater management.²⁸⁷

Recommendations

For the main Section 404 recommendations, see p. 17.

For NPDES, Tennessee should expand its general permit program to other commonly covered facilities and operations (see Appendix II).



^{285 &}quot;National Pollutant Discharge Elimination System (NPDES) Permit," Tennessee Department of Environment and Conservation, accessed October 16, 2024, <u>https://www.tn.gov/environment/permit-permits/water-permits1/npdes-permits1/national-pollutant-discharge-elimination-system--npdes--permit.html</u>.

^{286 &}quot;NPDES Stormwater Permitting System," Tennessee Department of Environment and Conservation, accessed October 16, 2024, <u>https://www.tn.gov/environment/permits/water-permits1/npdes-permits1/npdes-stormwater-permitting-program.html</u>.

^{287 &}quot;Tennessee Qualifying Local Program," Tennessee Department of Environment and Conservation, accessed October 16, 2024, <u>https://www.tn.gov/content/tn/environment/permits/water-</u> <u>permits1/npdes-permits1/npdes-stormwater-permitting-program/tennessee-qualifying-local-program.</u> <u>html</u>.

State Endangered Species Act

SESA	Consultation	Critical Habitat	Incidental Take
	Requirements	Designation	Permit
Yes	No	No	No

Notes

Tennessee has a SESA, called the Tennessee Nongame & Endangered or Threatened Wildlife Species Conservation Act of 1974. Tennessee's SESA does not include formal consultation requirements in the same sense as the federal ESA, nor does it provide for critical habitat designation.

Tennessee prohibits take of state-listed species—which it defines as the harassing, hunting, capturing, or killing of animals—with narrow exemptions.²⁸⁸ It does not offer incidental take permits. Tennessee's current state list covers species beyond those that are listed under the federal ESA.²⁸⁹

Recommendations

Given that Tennessee has state-listed species beyond those federally listed under the Endangered Species Act, and prohibits take of those species, it should design an "incidental take permit" to allow for take under specific circumstances. This would give developers some flexibility to move forward on critical projects that may result in incidental take, so long as they implement approved conservation measures and mitigate any potential impacts on protected species.

Tennessee should also consider shifting away from its SESA program towards a more targeted series of Conservation Agreements and Programmatic Conservation Benefit Agreements, so that it focuses on efficiently preventing the federal listing (and thus federal regulation) of at-risk species.

For more, see the general State Endangered Species Act recommendations on p. 23.

²⁸⁸ TN Code § 70-8-103 (2023) <u>https://law.justia.com/codes/tennessee/title-70/chapter-8/part-1/</u> section-70-8-103/

²⁸⁹ Mike Organ, "Which Species Could Become Endangered in Tennessee?" *The Tennessean*, accessed October 16, 2024, <u>https://www.tennessean.com/story/sports/2017/07/18/endangered-species-animals-tennessee/485427001/</u>.

Texas

State Environmental Policy Act

SEPA	Used Often	Includes Private Sector	Major Exemptions
No	_	-	-

Notes

Texas does not have a SEPA.

Recommendations

N/A

Clean Air Act

PALs in SIP	PALs in Use	PAL Guidance	PBR/ Registration Permits	General Permits	Other
Yes	Yes	Yes	Yes	Yes	RAPs, Flexible Permits

Notes

Texas has incorporated PALs into its SIP. The state's PAL language aligns closely with federal regulations and does not contain additional stringent permitting language.

PALs are being used in the state, with examples including White Stallion Energy Center LLC's coal facility, ExxonMobil's Baytown Refinery, and NRG Energy's natural gas electric generating station. Texas provides PAL guidance through the Texas Commission on Environmental Quality (TCEQ) website, including a detailed memo on PAL implementation.²⁹⁰

Texas has an extensive PBR program with 105 permits total, covering 21 subcategories:²⁹¹

- Domestic and comfort heating and cooling
- Analysis and testing
- Aggregate and pavement
- Animal confinement
- Combustion
- Manufacturing
- Food preparation and processing
- Facilities in general
- Feed, fiber, and fertilizer
- Metallurgy
- Mixers, blenders, and packaging
- Oil and gas
- Plant operations
- Plastics and rubber
- Service industries
- Surface coating



²⁹⁰ Texas Commission on Environmental Quality, *Clean Plant-Wide Applicability Limit Reference Document*, accessed October 15, 2024, <u>https://www.tceq.texas.gov/assets/public/permitting/air/memos/pal_memo1.pdf</u>.

^{291 &}quot;Indexes to Air Permits by Rule," Texas Commission on Environmental Quality, accessed October 15, 2024, <u>https://www.tceq.texas.gov/permitting/air/permitbyrule/air_pbr_index.html</u>.

- Surface preparation
- Tanks, storage, and loading
- Thermal control devices
- Turbines and engines
- Waste processes and remediation

Readily Available Permits (RAPs) are a streamlined NSR permitting process for specific facility types that meet certain criteria. RAPs are case-by-case NSR permits, but with pre-developed permit conditions for well-understood facility types. This allows for faster technical review and a consolidated public notice process. While similar to general permits in their goal of streamlining, RAPs still involve individual permit review and are more flexible than typical general permits.²⁹²

The state has a General Operating Permit (GOP) program which provides a streamlined permitting process for similar operations under Title V of the Clean Air Act.²⁹³ GOPs are available for:

- Oil and Gas operations in specific counties
- Municipal Solid Waste Landfills
- Air Curtain Incinerators

Unlike PBRs or standard permits, GOPs are federal operating permits that simplify the Title V process for certain source categories.

Texas also offers Standard Permits for 21 specific source categories:

- Air Quality Pollution Control Projects
- Anhydrous Ammonia Storage and Distribution Operations
- Animal Carcass Incinerators



^{292 &}quot;Readily Available Permits: Air New Source Review," Texas Commission on Environmental Quality, accessed October 15, 2024, <u>https://www.tceq.texas.gov/permitting/air/guidance/newsourcereview/rap/ra-permitting.html</u>.

^{293 &}quot;General Operating Permit (GOP) Information," Texas Commission on Environmental Quality, accessed October 15, 2024, <u>https://www.tceq.texas.gov/permitting/air/titlev/generalpermits/gop_permtable.</u> <u>html</u>.

- Boilers
- Concrete Batch Plants with Enhanced Controls
- Cotton Gin Facilities and Cotton Burr Tub Grinders
- Dry Bulk Fertilizer Handling Operations
- Electric Generating Units
- Feedmills, Portable Augers, and Hay Grinders
- Grain Elevator/Grain Handling Operations and Portable Grain Augers
- Marine Loading Operations
- Municipal Solid Waste Landfills
- Oil and Gas Handling and Production Facilities
- Peanut-Handling Operations
- Permanent Hot Mix Asphalt Plants
- Permanent Rock and Concrete Crushers
- Sawmills
- Temporary Hot Mix Asphalt Plants
- Temporary Rock and Concrete Crushers
- Temporary and Permanent Polyphosphate Blenders
- Concrete Batch Plants

Standard Permits are similar to general permits in other states, providing pre-approved conditions for common types of facilities. They differ from PBRs in that they typically cover larger or more complex operations and may have more stringent requirements.²⁹⁴



^{294 &}quot;Standard Air Permits," Texas Commission on Environmental Quality, accessed October 15, 2024, <u>https://www.tceq.texas.gov/permitting/air/nav/standard.html</u>.

Unique to Texas is the Flexible Permit program, which allows facilities to operate under an overall emissions cap or individual emission limitations, providing more operational flexibility than traditional permits.

Flexible Permits offer more comprehensive operational flexibility than PALs. They allow facilities to manage emissions across multiple units or even entire sites under a single cap or set of caps. This can include the ability to add new units or modify existing ones without triggering New Source Review, as long as the overall emissions remain under the cap. Flexible Permits can also include multiple pollutants under different caps within the same permit, allowing for more complex operational scenarios.

In terms of source size, Flexible Permits can be applied to a wider range of source sizes. They can be used for both major and minor sources, and can even combine grandfathered, existing permitted, and new facilities under a single permit. This makes them particularly useful for complex industrial sites with a mix of old and new units.²⁹⁵

Recommendations

Texas should modify its PAL renewal language to provide greater certainty for regulated entities. Currently, federal PAL language states that if the emissions level is equal to or greater than 80 percent of the current PAL level, the Administrator "may renew" the PAL at the same level, or "may adjust" it based on various factors. This ambiguity has caused concern about the potential for "automatic ratcheting" of the PAL level upon renewal among regulated entities. To address this, Texas should follow North Carolina's example and change the language from "may renew" to "shall renew" in its state regulations. This approach would offer regulated entities more certainty in the PAL renewal process.

While its flexible permit program is quite comprehensive, Texas should also consider expanding its flexible permit program to cover a wider variety of commonly covered sources (see Appendix I).



^{295 &}quot;Flexible Permits," Texas Commission on Environmental Quality, accessed October 15, 2024, <u>https://www.tceq.texas.gov/permitting/air/newsourcereview/flexible_permit.html</u>.

Clean Water Act

Section 404 Assumption	NPDES Authority	Number of NPDES General Permits
No	Yes	17

Notes

Texas has not assumed the federal Section 404 permitting program, which remains under the jurisdiction of the U.S. Army Corps of Engineers and EPA. Texas has had NPDES authority since 1998 and operates its program under the name Texas Pollutant Discharge Elimination System (TPDES). It has established a set of general permits.²⁹⁶

Texas has established the following general permits under its stormwater program:

- Municipal Separate Storm Sewer System (MS4)
- Multi-Sector General Permit (MSGP)
- Construction General Permit (CGP)

Texas has established the following general permits under its non-stormwater program:

- Concrete Production Facilities
- Aquaculture Production
- Oil and Gas Extraction
- Petroleum Bulk Stations and Terminals
- Quarries in John Graves Scenic Riverway
- Conventional Water Treatment Plant
- Hydrostatic Test Water



^{296 &}quot;Available Water Quality General Permits," Texas Commission on Environmental Quality, accessed October 15, 2024, <u>https://www.tceq.texas.gov/permitting/wastewater/general</u>.

- Petroleum Fuel or Petroleum Substances
- Pesticides
- Concentrated Animal Feeding Operations (CAFO)
- Wastewater Evaporation
- Livestock Manure Compost Operations
- Oil and Gas Outer Continental Shelf
- Harris County On-site Wastewater

Recommendations

For the main Section 404 recommendations, see p. 17.

For NPDES, Texas should expand its general permit program to other commonly covered facilities and operations (see Appendix II).

State Endangered Species Act

SESA	Consultation	Critical Habitat	Incidental Take
	Requirements	Designation	Permit
Yes	No	No	No

Notes

Texas has a SESA.²⁹⁷ Texas's SESA does not include formal consultation requirements in the same sense as the federal ESA, nor does it provide for critical habitat designation.

Texas prohibits take of state-listed species—which it defines as the capturing, trapping, taking, or killing of animals—with narrow exemptions.²⁹⁸ It does not offer incidental take permits. Texas's current state list covers species beyond those that are listed under the federal ESA.²⁹⁹



²⁹⁷ Tex. Parks and Wildlife Code Ann. § 68.001 (2023).

²⁹⁸ Texas Parks & Wildlife Code § 68.014 (2023).

^{299 &}quot;Threatened and Endangered Species," Texas Parks and Wildlife Department, accessed October 15, 2024, <u>https://tpwd.texas.gov/landwater/land/habitats/cross_timbers/endangered_species/</u>.

Recommendations

Given that Texas has state-listed species beyond those federally listed under the Endangered Species Act, and prohibits take of those species, it should design an "incidental take permit" to allow for take under specific circumstances. This would give developers some flexibility to move forward on critical projects that may result in incidental take, so long as they implement approved conservation measures and mitigate any potential impacts on protected species.

Texas should also consider shifting away from its SESA program towards a more targeted series of Conservation Agreements and Programmatic Conservation Benefit Agreements, so that it focuses on efficiently preventing the federal listing (and thus federal regulation) of at-risk species.

For more, see the general State Endangered Species Act recommendations on p. 23.

Utah

State Environmental Policy Act

SEPA	Used Often	Includes Private Sector	Major Exemptions
No	-	-	-

Notes

Utah does not have a SESA.

Recommendations

N/A

Clean Air Act

PALs in SIP	PALs in Use	PAL Guidance	PBR/ Registration Permits	General Permits	Other
Yes	Yes	No	Oil & Gas	No	-

Notes

Utah has written a PAL into its SIP. The state's PAL language aligns closely with federal regulations and does not contain additional stringent permitting language.³⁰⁰

A PAL has been issued to two facilities, both coal-fired plants and both belonging to PacifiCorp.³⁰¹ Given that Utah has a significant presence of heavy industry, this level of PAL uptake is quite low.

³⁰⁰ Utah Admin. Code r. 307-405-21 (2024).

³⁰¹ Representative of the Utah Department of Environmental Quality, phone conversation with author, July 17, 2024.

Utah has NSR exemptions for activities such as replacing a unit with an identical unit and adding equipment that reduces air pollutants. The state has a PBR program for oil and gas and is considering expanding PBR to certain sand and gravel operations.³⁰² The state does not have a general permit program.

Recommendations

The Utah legislature should direct the Utah Department of Environmental Quality (DEQ) to develop and publish comprehensive PAL guidance documents on its website, explaining the benefits and application process and referencing EPA's 2020 PAL guidance where relevant. The DEQ should clarify the PAL renewal process, emphasizing that there is no automatic downward adjustment at renewal, which could alleviate industry concerns about future operational flexibility. The legislature should also mandate annual reporting from the DEQ on PAL implementation, including uptake rates and explanations for low adoption. By enacting these measures, legislators can promote more efficient permitting processes while maintaining environmental protections, making Utah more attractive for industrial development.

Utah should modify its PAL renewal language to provide greater certainty for regulated entities. Currently, federal PAL language states that if the emissions level is equal to or greater than 80 percent of the current PAL level, the Administrator "may renew" the PAL at the same level, or "may adjust" it based on various factors. This ambiguity has caused concern about the potential for "automatic ratcheting" of the PAL level upon renewal among regulated entities. To address this, Utah should follow North Carolina's example and change the language from "may renew" to "shall renew" in its state regulations. This approach would offer regulated entities more certainty in the PAL renewal process.

Utah DEQ should also be directed to expand its PBR program to other commonly covered facilities (see Appendix I).



^{302 &}quot;Permit By Rule (PBR) Registration," Utah Department of Environmental Quality, accessed October 15, 2024, <u>https://daqpermitting.utah.gov/PBRRegistration</u>.

Clean Water Act

Section 404 Assumption	NPDES Authority	Number of NPDES General Permits
No	Yes	10

Notes

Utah has not assumed the federal Section 404 permitting program, which remains under the jurisdiction of the U.S. Army Corps of Engineers and EPA. Utah has had NPDES authority, known as the Utah Pollutant Discharge Elimination System (UPDES) in the state, since 1987 and has established a set of general permits under its water quality programs.³⁰³

Utah has established the following general permits under its stormwater program:

- Storm Water General Permit for Construction Activities (CGP)
- General Multi-Sector Industrial Storm Water Permit (MSGP)
- Small Municipal Separate Storm Sewer Systems (MS4)

Utah has also established general permits for the following facilities and/or operations:

- Coal Mining
- Concentrated Animal Feeding Operations (CAFOs)
- Construction Dewatering or Hydrostatic Testing
- Aquatic Animal Feeding Operations
- Drinking Water Treatment Plants
- Application of Pesticides
- Treated Ground Water



^{303 &}quot;Current Permits and Forms: UPDES Permitting Program," Utah Department of Environmental Quality, last updated October 9, 2024, <u>https://deq.utah.gov/water-quality/current-permits-and-forms-updes-permitting-program</u>.

Recommendations

For the main Section 404 recommendations, see p. 17.

For NPDES, Utah should expand its general permit program to other commonly covered facilities and operations (see Appendix II).

State Endangered Species Act

SESA	Consultation	Critical Habitat	Incidental Take
	Requirements	Designation	Permit
No*	No	No	No

Notes

Utah has some laws relating to endangered species. However, Utah's endangered species legislation has no statutory provisions other than penalties for the destruction of said species, and it otherwise abides by the ESA.

Utah's Division of Wildlife Resources has been given the primary objective of maintaining wildlife and their habitat to avoid ESA listing,³⁰⁴ and has entered into several Conservation Agreements with the express goal of precluding the need for federal listing.³⁰⁵ The state keeps a list of sensitive species, but does not prohibit their take.³⁰⁶ Utah otherwise abides by the federal ESA.

Recommendations

Utah has done a strong job of limiting the regulatory burden of its state endangered species law and should continue to use targeted Conservation Agreements and Programmatic Conservation Benefit Agreements, so that it focuses on efficiently preventing the federal listing (and thus federal regulation) of at-risk species.

For more, see the general State Endangered Species Act recommendations on p. 23.

^{304 &}quot;Threatened, Endangered, and Sensitive Species," Wasatch Front Regional Council, accessed October 15, 2024, <u>https://www.wfrc.org/new_wfrc/crmp/threatened-endangered-sensitive-species/</u>.

³⁰⁵ U.S. Department of Agriculture, *Utah's State Listed Species by County*, last updated February 27, 2004, https://efotg.sc.egov.usda.gov/references/Delete/2004-8-28/sscounty_20040227.pdf.

³⁰⁶ U.S. Fish and Wildlife Service, Division of Wildlife Resources, *Endangered and Threatened Animals of Utah* (1998), <u>https://digitalcommons.usu.edu/cgi/viewcontent.cgi?article=1120&context=govdocs</u>.

Virginia

State Environmental Policy Act

SEPA	Used Often	Includes Private Sector	Major Exemptions
Yes	Yes	Yes*	Yes

Notes

Virginia's Environmental Impact Review (EIR) program functions similarly to a State Environmental Policy Act, although it is not formally designated as such. The EIR primarily applies to major state projects costing \$500,000 or more. While focused on state actions, the process extends to the private sector through specific regulatory channels.³⁰⁷

The EIR process requires state agencies, boards, authorities, and commissions to prepare and submit an environmental impact report to the Department of Environmental Quality (DEQ) for each major state project. These reports must include the environmental impact of the project, including effects on wildlife habitat, any unavoidable adverse environmental effects, measures proposed to minimize the project's impact, alternatives to the proposed construction, and any irreversible environmental changes. When applicable, a record of consultation with federally recognized Tribal Nations is also required.³⁰⁸

Meanwhile, the State Corporation Commission (SCC) requires environmental reviews for private energy projects, including electric power and power line projects. This applies to facilities with capacities of 50 MW or less (but greater than 5 MW), and renewable energy facilities up to 100 MW.³⁰⁹ The environmental impact analysis for SCC-reviewed projects must address a wide range of factors. These include air and water permits, wetlands impacts, waste management, endangered species, cultural resources, and many others. This

^{307 &}quot;State Projects," Virginia Department of Environmental Quality, accessed October 15, 2024, <u>https://www.deq.virginia.gov/our-programs/environmental-impact-review/state-projects</u>.

³⁰⁸ Va. Code Ann. § 10.1-1188 (2024).

^{309 20} Va. Admin. Code § 5-302-25 (2024).

means that even relatively small energy projects are subject to significant environmental review in Virginia.

The Department of Aviation also mandates reviews for airport projects, and an environmental impact assessment is required for drilling in tidewater. Virginia's EIR process exempts most local government projects (except large highway projects) and maintenance and repair work.³¹⁰

While there is limited data on how many EIRs are required each year, there were comment deadlines for 19 EIRs in the month of September alone.³¹¹ Data on overall VA EIR processing times is even more limited, but while the official DEQ processing time is 10 business days for sufficiency review plus 60 days for coordinated environmental review, electricity providers in the state suggest that the true agency review timeline for projects ranges from one to two years.³¹²

VA EIR does not explicitly create a private right of action for citizen suits. However, the Virginia Administrative Process Act does allow for judicial review of agency decisions.³¹³

Recommendations

Just as NEPA imposes an enormous regulatory burden on federal agencies and infrastructure development, the VA EIR imposes an enormous regulatory burden on state agencies and state infrastructure development. Where possible, the Virginia legislature should reform, create exclusions from, and raise the trigger threshold for the VA EIR. For example, the legislature could:

1. Significantly increase the threshold for triggering environmental review on state projects. The current \$500,000 threshold is a good start, but should be

³¹⁰ Virginia Department of Environmental Quality, *Procedures Manual: Environmental Impact Review of Major State Facilities* (2021), <u>https://www.deq.virginia.gov/home/showpublisheddocument/9297/637586620558470000</u>.

^{311 &}quot;Current Reviews," Virginia Department of Environmental Quality, accessed October 15, 2024, <u>https://www.deq.virginia.gov/our-programs/environmental-impact-review/current-reviews</u>.

^{312 &}quot;Virginia State Corporation Commission Approval Process," Appalachian Power, accessed October 15, 2024, <u>https://www.aeptransmission.com/virginia/docs/SCC_Approval_Process-NEW.pdf;</u> "The Transmission Line Approval Process," Dominion Energy, accessed October 15, 2024, <u>https://www. dominionenergy.com/-/media/pdfs/global/projects-and-facilities/electric-projects/power-line-projects/ rappahannock-river/scc-approval-process/scc-process-map.pdf.</u>

³¹³ Mary Renae Carter, "Standards of Judicial Review in the Virginia Administrative Process Act," *University of Richmond Law Review* (1996), vol. 30, iss. 3, art. 8, <u>https://scholarship.richmond.edu/cgi/viewcontent.cgi?article=2193&context=lawreview</u>.

significantly higher. Similar reforms have already been carried out in North Carolina (in 2015)³¹⁴ and Georgia (in 2016)³¹⁵ with a great deal of success.

- 2. Expand exemptions, particularly in the energy and transportation sectors, to streamline private sector development. Indiana's and South Dakota's various state NEPA exemptions, from the issuance of permits to "actions of an environmental protective regulatory nature," are good examples of efforts to this end.³¹⁶
- 3. Repeal VA EIR in its entirety, aligning Virginia's environmental regulatory requirements with the majority of the country.

Clean Air Act

PALs in SIP	PALs in Use	PAL Guidance	PBR/ Registration Permits	General Permits	Other
Yes	Yes	No	No	Yes	Exemptions, Renewable PBR

Notes

Virginia has incorporated PALs into its SIP. The state's PAL language aligns closely with federal regulations and does not contain additional stringent permitting language.³¹⁷

The first and only PAL in Virginia was issued in 2022 to O'Sullivan Films Inc., a performance polymer and printing facility.³¹⁸ Virginia has also issued guidance around PALs.³¹⁹

- 315 S.B. 346, 2015-2016 Ga. Reg. Sess. (2016).
- 316 S.D. Codified Laws § 34A-9-1 (2024).
- 317 9 Va. Admin. Code § 5-85-55 (2024).
- 318 Representative of the Virginia Department of Environmental Quality, email correspondence with author, October 2, 2024.

^{314 2015} N.C. Sess. Laws 90.

³¹⁹ Virginia Department of Planning and Budget, *Air Permitting Guidelines: New and Modified PSD Sources* (2015), <u>https://townhall.virginia.gov/L/GetFile.cfm?File=C:/TownHall/docroot/GuidanceDocs/440/GDoc_DEQ_5172_v2.pdf</u>.

Virginia has a general permit program, which covers four categories of facility:³²⁰

- Non-Metallic Mineral Processing
- Biomass Pilot Test Facilities
- Voluntary Demand Response Generators
- Emergency Generators

The state does not have a registration or air PBR program, though it does have a list of exemptions which include certain gasoline dispensing facilities, vehicle customizing coating operations, and natural gas-fired boilers.³²¹

Finally, Virginia has a unique PBR program for small renewable energy projects, which consolidates air, endangered species, cultural resources, and state NEPA review into one streamlined permitting process.³²² Though this is not an air permitting program, it does include consideration of the NAAQS. While the PBR was a promising development, recent activity by the VA legislature with HB206 in 2022 has added more onerous permitting requirements for renewable facilities, such as mitigation requirements and land set-asides.³²³

Recommendations

The Virginia legislature should direct the Virginia Department of Environmental Quality (DEQ) to develop and publish comprehensive PAL guidance documents on its website, explaining the benefits and application process and referencing EPA's 2020 PAL guidance where relevant. The DEQ should clarify the PAL renewal process, emphasizing that there is no automatic



^{320 &}quot;Air," Virginia Department of Environmental Quality, accessed October 15, 2024, <u>https://www.deq.</u> <u>virginia.gov/permits/air</u>.

^{321 9} Va. Admin. Code § 5-80-1105 (2024).

³²² Va. Code Ann. § 10.1-1197.6 (2024).

³²³ Robert Lawrence, "Virginia Proposes to Amend the Permit by Rule Regulations for Small Solar Projects," *JD Supra*, June 13, 2019, <u>https://www.jdsupra.com/legalnews/virginia-proposes-to-amend-the-permit-14238/;</u> Ivy Main, "DEQ's effort to end the solar wars ends up making lemons out of lemonade," *Virginia Mercury*, June 12, 2024, <u>https://virginiamercury.com/2024/06/12/deqs-effort-to-end-the-solar-wars-ends-up-making-lemons-out-of-lemonade/;</u> and "HB206 Small Renewable Energy Projects Impact on Natural Resources," Virginia Department of Environmental Quality, accessed October 15, 2024, <u>https://www.deq.virginia.gov/our-programs/air/renewable-energy/hb-206-renewable-energy-natural-resources</u>.

downward adjustment at renewal, which could alleviate industry concerns about future operational flexibility. The legislature should also mandate annual reporting from the DEQ on PAL implementation, including uptake rates and explanations for low adoption. By enacting these measures, legislators can promote more efficient permitting processes while maintaining environmental protections, making Virginia more attractive for industrial development.

Virginia should modify its PAL renewal language to provide greater certainty for regulated entities. Currently, federal PAL language states that if the emissions level is equal to or greater than 80 percent of the current PAL level, the Administrator "may renew" the PAL at the same level, or "may adjust" it based on various factors. This ambiguity has caused concern about the potential for "automatic ratcheting" of the PAL level upon renewal among regulated entities. To address this, Virginia should follow North Carolina's example and change the language from "may renew" to "shall renew" in its state regulations. This approach would offer regulated entities more certainty in the PAL renewal process.

For Minor NSR, DEQ should be directed to expand its general permit program wherever possible for low-impact projects and specific industry categories to reduce the administrative burden (see Appendix I).

Clean Water Act

Section 404 Assumption	NPDES Authority	Number of NPDES General Permits
No	Yes	15

Notes

Virginia has not assumed the federal Section 404 permitting program, which remains under the jurisdiction of the U.S. Army Corps of Engineers and EPA. Virginia has had NPDES authority, known as the Virginia Pollutant Discharge Elimination System (VPDES) in the state, since 1975 and has established a comprehensive set of general permits under its water quality programs.³²⁴



^{324 &}quot;Agency Overview," Virginia Permit Transparency, accessed October 15, 2024, <u>https://permits.virginia.gov/Agency/DEQ;</u> "Discharge to Surface Waters - Virginia Pollutant Discharge Elimination System," Virginia Department of Environmental Quality, accessed October 15, 2024, <u>https://www.deq.virginia.gov/permits/water/surface-waters-vpdes</u>.

For stormwater, Virginia has established the following general permits:

- Construction General Permit (CGP)
- Stormwater Discharges Associated With Industrial Activity (MSGP)
- Small MS4 General Permit (MS4)

Virginia has established the following general non-stormwater permits:

- Domestic Sewage Discharges of Less than or Equal to 1,000 Gallons per Day
- Seafood Processing Facilities
- Remediation of Contaminated Sites and Hydrostatic Tests
- Discharges of Stormwater Associated with Industrial Activity
- Non-Metallic Mineral Mining
- Concentrated Animal Feeding Operations
- Concrete Products Facilities
- Vehicle Wash and Laundry Facilities
- Non-Contact Cooling Water Discharges
- Pesticides Discharges
- Watershed Permit for Total Nitrogen and Total Phosphorus Discharges and Nutrient Trading in the Chesapeake Bay Watershed
- Potable Water Treatment Plants

Recommendations

For the main Section 404 recommendations, see p. 17.

For NPDES, Virginia should expand its general permit program to other commonly covered facilities and operations (see Appendix II).

State Endangered Species Act

SESA	Consultation	Critical Habitat	Incidental Take
	Requirements	Designation	Permit
Yes	No*	No	Yes*

Notes

Virginia has a SESA.³²⁵ Virginia's SESA does not include formal consultation requirements in the same sense as the federal ESA, although it does require state agencies to "cooperate" to carry out the intentions of the statute.³²⁶ It does not provide for critical habitat designation.

Virginia prohibits take of state-listed species, with narrow exemptions. It offers incidental take permits, but only for two species of bat, and its current state list covers species beyond those that are listed under the federal ESA.³²⁷

Recommendations

Given that Virginia has state-listed species beyond those federally listed under the Endangered Species Act, and prohibits take of those species, it should design a broader "incidental take permit" to allow for take under specific circumstances. This would give developers some flexibility to move forward on critical projects that may result in incidental take, so long as they implement approved conservation measures and mitigate any potential impacts on protected species.

Virginia should also consider shifting away from its SESA program towards a more targeted series of Conservation Agreements and Programmatic Conservation Benefit Agreements, so that it focuses on efficiently preventing the federal listing (and thus federal regulation) of at-risk species.

For more, see the general State Endangered Species Act recommendations on p. 23.

³²⁵ Va. Code § 29.1-563 (2023).

³²⁶ Va. Code Ann. § 29.1-570 (2024).

³²⁷ Jennifer Gagnon et al., "Guide to Threatened and Endangered Species on Private Lands in Virginia," Virginia Cooperative Extension, 2024, <u>https://www.pubs.ext.vt.edu/CNRE/cnre-24/cnre-24.html</u>; 4 Va. Admin. Code § 15-20-130 (2024).

West Virginia

State Environmental Policy Act

SEPA	Used Often	Includes Private Sector	Major Exemptions
No	_	-	-

Notes

West Virginia does not have a SEPA.

Recommendations

N/A

Clean Air Act

PALs in SIP	PALs in Use	PAL Guidance	PBR/ Registration Permits	General Permits	Other
Yes	No	No	No	Yes	-

Notes

West Virginia has written a PAL into its SIP. The state's PAL language aligns closely with federal regulations and does not contain additional stringent permitting language.³²⁸

However, there is not a single PAL in use in the state.³²⁹ Given that West Virginia has a significant presence of heavy industry, this suggests either a



³²⁸ W. Va. Code R. § 45-14-25 (2024).

³²⁹ Representative of the West Virginia Department of Environmental Protection, phone conversation with author, July 19, 2024.

lack of industry awareness or a lack of clear guidance from the West Virginia Department of Environmental Protection about the benefits of PALs.

West Virginia does not have a PBR program. West Virginia has a general permit program, which covers a range of facilities:³³⁰

- Coal Preparation Plants
- Hot Mix Asphalt Plants
- Natural Gas Compressor Stations
- Nonmetallic Minerals Processing Plants
- Concrete Batch Plants
- Emergency Generators
- Natural Gas Production Facilities

Recommendations

The West Virginia legislature should direct the West Virginia Department of Environmental Protection (DEP) to develop and publish comprehensive PAL guidance documents on its website, explaining the benefits and application process and referencing EPA's 2020 PAL guidance where relevant. The DEP should clarify the PAL renewal process, emphasizing that there is no automatic downward adjustment at renewal, which could alleviate industry concerns about future operational flexibility. The legislature should also mandate annual reporting from the DEP on PAL implementation, including uptake rates and explanations for low adoption. By enacting these measures, legislators can promote more efficient permitting processes while maintaining environmental protections, making West Virginia more attractive for industrial development.

West Virginia should modify its PAL renewal language to provide greater certainty for regulated entities. Currently, federal PAL language states that if the emissions level is equal to or greater than 80 percent of the current PAL level, the Administrator "may renew" the PAL at the same level, or "may adjust" it based on various factors. This ambiguity has caused concern about the potential for "automatic ratcheting" of the PAL level upon renewal among regulated entities. To address this, West Virginia should follow North



^{330 &}quot;General Permit Registration," West Virginia Department of Environmental Protection, accessed October 15, 2024, <u>https://dep.wv.gov/daq/permitting/Pages/airgeneralpermit.aspx</u>.

Carolina's example and change the language from "may renew" to "shall renew" in its state regulations. This approach would offer regulated entities more certainty in the PAL renewal process.

For Minor NSR, DEP should be directed to expand its general permit program wherever possible for low-impact projects and specific industry categories to reduce the administrative burden (see Appendix I).

Clean Water Act

Section 404 Assumption	NPDES Authority	Number of NPDES General Permits
No	Yes	13

Notes

West Virginia has not assumed the federal Section 404 permitting program, which remains under the jurisdiction of the U.S. Army Corps of Engineers and EPA. West Virginia has had NPDES authority since 1982 and has established a set of general permits under its water quality programs.

West Virginia has established the following general permits under its stormwater program:³³¹

- Construction Stormwater General Permit (CGP)
- Multi-Sector Stormwater General Permit (MSGP)
- Municipal Separate Storm Sewer Systems (MS4)
- Oil & Gas Construction Stormwater General Permit



^{331 &}quot;Stormwater Program," West Virginia Department of Environmental Protection, accessed October 15, 2024, <u>https://dep.wv.gov/WWE/PROGRAMS/STORMWATER/Pages/sw_home.aspx</u>.

West Virginia has also established general permits for the following facilities and/or operations under its non-stormwater program:³³²

- Car Wash Establishments
- Groundwater Remediation
- Home Aeration Unit (HAU)
- Hydrostatic Testing
- Sewage Sludge Land Application and Disposal to a POTW
- Sewage Less than 50,000 GDP
- Water Treatment Plants
- Wastewater Disposal from Highway or Municipal Maintenance Facility
- Pesticide General Permit

Recommendations

For the main Section 404 recommendations, see p. 17.

For NPDES, West Virginia should expand its general permit program to other commonly covered facilities and operations (see Appendix II).

State Endangered Species Act

SESA	Consultation	Critical Habitat	Incidental Take
	Requirements	Designation	Permit
No	-	-	-

Notes

West Virginia does not have a SESA.

Recommendations

N/A



^{332 &}quot;Non-Stormwater General Permits," West Virginia Department of Environmental Protection, accessed October 15, 2024, <u>https://dep.wv.gov/WWE/PERMIT/GENERAL/Pages/default.aspx</u>.

Wisconsin

State Environmental Policy Act

SEPA	Used Often	Includes Private Sector	Major Exemptions
Yes	Yes	Yes	No

Notes

Wisconsin has a SEPA, known as WEPA. Like NEPA, WEPA requires state agencies to evaluate the environmental impacts of proposed actions and to consider alternatives and mitigation measures. This process includes preparing Environmental Assessments (EAs) and Environmental Impact Statements (EISs) to ensure that environmental considerations are integrated into the decision-making process.³³³

While agencies have a reasonable degree of discretion in determining whether to pursue an EIS, an EA, or neither, WEPA has been broadly applied, and is often triggered for energy projects.³³⁴ In FY2023, Wisconsin's Public Service Commission prepared 12 EAs, nine of which were for solar and two of which were for electric transmission.³³⁵ There is limited information on WEPA processing times, but available solar projects documents have shown a timeline of more than one year between application submission and final



³³³ William Krentz and Benjamin Kranner, "Wisconsin Environmental Policy Act," Wisconsin Legislative Council, November 2023, <u>https://docs.legis.wisconsin.gov/misc/lc/issue_briefs/2023/environment_and_natural_resources/ib_wepa_2023_11_27</u>.

³³⁴ Wisconsin Legislative Reference Bureau Digital Collections, search results for "Wisconsin Environmental Policy Act (WEPA)," accessed October 15, 2024, <u>https://cdm16831.contentdm.oclc.org/digital/collection/p16831coll6/search/searchterm/Wisconsin%20Environmental%20Policy%20</u> <u>Act%20(WEPA)/field/subjec/mode/exact/conN/And</u>.

³³⁵ Public Service Commission of Wisconsin, *Environmental assessments Prepared between July 1, 2022* and June 30, 2023: Report to the Legislature (2023), <u>https://cdm16831.contentdm.oclc.org/digital/</u> <u>collection/p16831coll6/id/3919/rec/2</u>.

agency decision.³³⁶ Unlike some states, Wisconsin does not have a central agency or commission responsible for implementing WEPA.³³⁷ This results in varied implementation across different state agencies. However, most agencies complete annual reports detailing the projects for which they have completed WEPA review, providing some transparency to the process.

WEPA is a procedural statute that requires agencies to take a "hard look" at environmental effects but does not dictate final decision-making. It includes various public hearing requirements, with agencies such as the Department of Natural Resources (DNR) setting minimum comment periods for draft EISs.³³⁸

Legal challenges regarding compliance with WEPA have been relatively infrequent. Over the past 15-20 years, challenges to the DNR's compliance with WEPA have been in the single digits.³³⁹ However, several foundational cases in the 1970s established key interpretations of WEPA. These cases established standing to sue under WEPA for individuals and environmental organizations, affirmed the requirement for agencies to describe alternatives in writing, and established a two-part test for judicial review of decisions not to prepare an EIS.³⁴⁰

More recently, the 2021 Wisconsin Supreme Court case Applegate-Bader Farm, LLC v. Wisconsin Department of Revenue expanded the ability of individuals to challenge an agency's WEPA procedures. This case clarified that an agency must consider both direct *and* indirect effects of an action when determining if it significantly affects the quality of the human environment.

Recommendations

Just as NEPA imposes an enormous regulatory burden on federal agencies and infrastructure development, WEPA imposes an enormous regulatory burden



^{336 &}quot;Portage Solar Project," Public Service Commission of Wisconsin, accessed October 15, 2024, <u>https://psc.wi.gov/Pages/CommissionActions/CasePages/PortageSolarProject.aspx;</u> "Saratoga Solar Project," Public Service Commission of Wisconsin, accessed October 15, 2024, <u>https://psc.wi.gov/Pages/CommissionActions/CasePages/SaratogaSolarProject.aspx</u>.

³³⁷ Representative of the Wisconsin Department of Natural Resources, email correspondence with author, August 20, 2024.

³³⁸ William Krentz and Benjamin Kranner, "Wisconsin Environmental Policy Act."

³³⁹ Representative of the Wisconsin Department of Natural Resources, email correspondence with author, October 1, 2024.

^{340 &}quot;Wisconsin's Environmental Decade Legacy Cases," Clean Wisconsin, accessed October 15, 2024, <u>https://www.cleanwisconsin.org/our-work/legal-action/wisconsins-environmental-decade-legacy-cases/</u>.

on state agencies and state infrastructure development. Where possible, the Wisconsin legislature should reform, create exclusions from, and raise the trigger threshold for WEPA. For example, the legislature could:

- Significantly increase the threshold for triggering MEPA on state projects. Similar reforms have already been carried out in North Carolina (in 2015)³⁴¹ and Georgia (in 2016)³⁴² with a great deal of success.
- 2. Expand exemptions, particularly in the energy and transportation sectors, to streamline private sector development. Indiana's and South Dakota's various state NEPA exemptions, from the issuance of permits to "actions of an environmental protective regulatory nature," are good examples of efforts to this end.³⁴³
- 3. Set a time limit on injunctive relief to reduce the ability of obstructionists to block projects.
- 4. Repeal WEPA in its entirety, aligning Wisconsin's environmental regulatory requirements with the majority of the country.

Clean Air Act

PALs in SIP	PALs in Use	PAL Guidance	PBR/ Registration Permits	General Permits	Other
Yes	Yes	No	Yes	Yes	-

Notes

Wisconsin has written a PAL into its SIP. The state's PAL language aligns closely with federal regulations and does not contain additional stringent permitting language.³⁴⁴

^{341 2015} N.C. Sess. Laws 90.

³⁴² S.B. 346, 2015-2016 Ga. Reg. Sess. (2016).

³⁴³ S.D. Codified Laws § 34A-9-1 (2024).

³⁴⁴ Wis. Admin. Code NR § 405.18 (2024).

In 2018, Wisconsin issued its first PAL to Bemis Company Inc., a plastic packaging manufacturing company.³⁴⁵

Wisconsin has a registration program, which is set by emissions level, and also has a carveout for printing operations.

It also has a general permit program,³⁴⁶ which covers two facility categories:

- Rock Crushing Plants
- Hot Mix Asphalt Plants

Recommendations

The Wisconsin legislature should direct its Department of Natural Resources (DNR) to develop and publish comprehensive PAL guidance documents on its website, explaining the benefits and application process and referencing EPA's 2020 PAL guidance where relevant. The DNR should clarify the PAL renewal process, emphasizing that there is no automatic downward adjustment at renewal, which could alleviate industry concerns about future operational flexibility. The legislature should also mandate annual reporting from the DNR on PAL implementation, including uptake rates and explanations for low adoption. By enacting these measures, legislators can promote more efficient permitting processes while maintaining environmental protections, making Wisconsin more attractive for industrial development.

Wisconsin should modify its PAL renewal language to provide greater certainty for regulated entities. Currently, federal PAL language states that if the emissions level is equal to or greater than 80 percent of the current PAL level, the Administrator "may renew" the PAL at the same level, or "may adjust" it based on various factors. This ambiguity has caused concern about the potential for "automatic ratcheting" of the PAL level upon renewal among regulated entities. To address this, Wisconsin should follow North Carolina's example and change the language from "may renew" to "shall renew" in its state regulations. This approach would offer regulated entities more certainty in the PAL renewal process.

^{345 &}quot;Foley Advises S&P 400 Company on Wisconsin's First Plant-Wide Applicability Limit Permit," Foley & Lardner LLP, July 31, 2018, <u>https://www.foley.com/news/2018/07/foley-advises-sp-400-company-on-wisconsins-first-p/</u>.

^{346 &}quot;Air Permit Options," Wisconsin Department of Natural Resources," accessed October 15, 2024, https://dnr.wisconsin.gov/topic/AirPermits/Options.html.

For Minor NSR, the DNR should be directed to expand its general permit and PBR programs wherever possible for low-impact projects and specific industry categories to reduce the administrative burden (see Appendix I).

Clean Water Act

Section 404 Assumption	NPDES Authority	Number of NPDES General Permits
No	Yes	28

Notes

Wisconsin has not assumed the federal Section 404 permitting program, which remains under the jurisdiction of the U.S. Army Corps of Engineers and EPA. Wisconsin has had NPDES authority since 1974 and has established a set of general permits under its water quality programs.

Wisconsin has established the following non-stormwater general permits:³⁴⁷

- Ballast Water Discharge
- Carriage and Interstitial Water from Dredging Operations
- Concrete Products Operations
- Contaminated Groundwater from Remedial Action Operations
- Dewatering Operations
- Domestic Wastewater to a Subsurface Soil Absorption System
- Industrial Liquid Waste to a Subsurface Soil Absorption System
- Landspreading of By-Product Solids
- Landspreading of Industrial Sludge
- Landspreading of Industrial Liquid Wastes



^{347 &}quot;Wastewater General Permits," Wisconsin Department of Natural Resources," accessed October 15, 2024, <u>https://dnr.wisconsin.gov/topic/Wastewater/GeneralPermits.html</u>.

- Low-Impact Discharge
- Mineral (Nonmetallic) Mining and/or Processing
- Non-Contact Cooling Water, or Condensate and Boiler Blowdown
- Operation and Maintenance of Industrial Potable and Non-Potable Water Systems and Hydrostatic Testing of Petroleum Systems
- Operation and Maintenance of Municipal Water Systems
- Pesticide Pollutant Discharges
- Petroleum Contaminated Water
- Satellite Sewage Collection Systems
- Storage of Domestic Septage
- Swimming Pool Facilities
- Water Treatment and Conditioning

For stormwater, Wisconsin has established:³⁴⁸

- Construction Site Storm Water Runoff General Permit (CGP)
- Industrial Storm Water General Permit (MSGP)³⁴⁹
 - Tier 1 (for "heavy" manufacturers)
 - Tier 2 (for "light" industries)
- MS4 General Permit (MS4)
- WisDOT Transportation Separate Storm Sewer System (TS4) General Permit
- Recycling of Scrap and Waste Materials



^{348 &}quot;Storm Water Runoff Permits," Wisconsin Department of Natural Resources," accessed October 15, 2024, <u>https://dnr.wisconsin.gov/topic/Stormwater</u>.

^{349 &}quot;Industrial Storm Water Permit Overview," Wisconsin Department of Natural Resources," accessed October 15, 2024, <u>https://dnr.wisconsin.gov/topic/Stormwater/industrial/overview.html</u>.

- Dismantling of Vehicles for Parts Selling and Salvage
- Mineral (Nonmetallic) Mining and/or Processing General Permit

Recommendations

For the main Section 404 recommendations, see p. 17.

For NPDES, Wisconsin should expand its general permit program to other commonly covered facilities and operations (see Appendix II).

State Endangered Species Act

SESA	Consultation	Critical Habitat	Incidental Take
	Requirements	Designation	Permit
Yes	Yes	No	Yes

Notes

Wisconsin has a SESA.³⁵⁰ Wisconsin's SESA has formal consultation requirements. It does not provide for critical habitat designation.

Wisconsin prohibits take of state-listed species, with narrow exemptions. Its current state list covers species beyond those that are listed under the federal ESA.³⁵¹ Wisconsin offers incidental take permits, though its standards are uniquely stringent, requiring not only consideration of state-listed species and their habitat but also "the whole plant-animal community of which the species is a part."³⁵²

Recommendations

Wisconsin should align the language of its incidental take permit, and substantive requirements for state agency action, with other state SESAs to reduce the administrative burden and provide regulatory clarity.



³⁵⁰ Wis. Stat. § 29.604 (2023).

^{351 &}quot;Wisconsin's Endangered and Threatened Species Laws," Wisconsin Department of Natural Resources," accessed October 15, 2024, <u>https://dnr.wisconsin.gov/topic/endangeredresources/laws</u>.

³⁵² Robert L. Fischman et al., *State Imperiled Species Legislation*, Maurer School of Law (2018), <u>https://www.repository.law.indiana.edu/cgi/viewcontent.cgi?article=3664&context=facpub</u>.

Wisconsin's consultation requirements under its SESA also impose an enormous regulatory burden on agencies. This state-level requirement is very unusual; of the 32 states surveyed here, Nebraska is the only other state to have formal consultation as part of its SESA process, a process that takes an average of 145 days in the state. Consultation is ultimately a procedural, rather than a substantive, process, and creates regulatory delays despite many of the species in the state's SESA not being at high risk of becoming federally listed. Wisconsin should strongly consider removing the formal consultation requirement, aligning itself with the majority of the country.

Wisconsin should also consider shifting away from its SESA program towards a more targeted series of Conservation Agreements and Programmatic Conservation Benefit Agreements, so that it focuses on efficiently preventing the federal listing (and thus federal regulation) of at-risk species.

For more, see the general State Endangered Species Act recommendations on p. 23.

Wyoming

State Environmental Policy Act

SEPA	Used Often	Includes Private Sector	Major Exemptions
No	-	-	-

Notes

Wyoming does not have a SEPA.

Recommendations

N/A

Clean Air Act

PALs in SIP	PALs in Use	PAL Guidance	PBR/ Registration Permits	General Permits	Other
Yes	Yes	No	No	No*	-

Notes

Wyoming has written a PAL into its SIP. The state's PAL language aligns closely with federal regulations and does not contain additional stringent permitting language.

Wyoming has issued several PALs to various PacifiCorp coal facilities in the state, including the Wyodak, Dave Johnston, Jim Bridger, and Naughton facilities.³⁵³



^{353 &}quot;Wyodak Power Plant: Chapter 6, Section 2 Construction Permit Application," PacifiCorp, March 2008, <u>https://www.pacificorp.com/content/dam/pcorp/documents/en/pacificorp/environment/environmental-compliance/Wyodak_Pollution_Control_Permit_Application_3_11_08.pdf</u>.

The state does not have any flexible permitting programs for Minor NSR,³⁵⁴ although their rules do specifically provide for the creation of general permits.³⁵⁵

Recommendations

The Wyoming legislature should direct its Department of Environmental Quality (DEQ) to develop and publish comprehensive PAL guidance documents on its website, explaining the benefits and application process and referencing EPA's 2020 PAL guidance where relevant. The DEQ should clarify the PAL renewal process, emphasizing that there is no automatic downward adjustment at renewal, which could alleviate industry concerns about future operational flexibility. The legislature should also mandate annual reporting from the DEQ on PAL implementation, including uptake rates and explanations for low adoption. By enacting these measures, legislators can promote more efficient permitting processes while maintaining environmental protections, making Wyoming more attractive for industrial development.

Wyoming should modify its PAL renewal language to provide greater certainty for regulated entities. Currently, federal PAL language states that if the emissions level is equal to or greater than 80 percent of the current PAL level, the Administrator "may renew" the PAL at the same level, or "may adjust" it based on various factors. This ambiguity has caused concern about the potential for "automatic ratcheting" of the PAL level upon renewal among regulated entities. To address this, Wyoming should follow North Carolina's example and change the language from "may renew" to "shall renew" in its state regulations. This approach would offer regulated entities more certainty in the PAL renewal process.

For Minor NSR, the DEQ should be directed to make use of its authority to create general permits to create a general permit program for commonly covered facilities (see Appendix I).



³⁵⁴ Representative of the Wyoming Department of Environmental Quality, phone conversation with author, August 21, 2024.

³⁵⁵ Mary A. Throne, A Guide to Air Quality Operating Permits in Wyoming," *Land and Water Law Review* (1996), vol. 31, iss. 2, art. 20, <u>https://scholarship.law.uwyo.edu/cgi/viewcontent.cgi?article=2033&context=land_water</u>.

Clean Water Act

Section 404 Assumption	NPDES Authority	Number of NPDES General Permits
No	Yes	9

Notes

Wyoming has not assumed the federal Section 404 permitting program, which remains under the jurisdiction of the U.S. Army Corps of Engineers and EPA. Wyoming has had NPDES authority, known as the Wyoming Pollution Discharge Elimination System (WYPDES) in the state, since 1975, and has established a set of general permits.

However, Wyoming's general permit program is currently in a state of transition. Several previously existing wastewater general permits have expired, including those for Pilot Plants, Sewage Collection Facilities, Small Wastewater Systems, and Water Distribution Facilities.³⁵⁶ The Wyoming Department of Environmental Quality (DEQ) has indicated that they are in the process of developing and issuing new general permits for these facility types, which are typically renewed every five years.

Despite the expired permits, Wyoming maintains active general wastewater permits in the following categories:

- Ground Water Well Pump Testing and Development³⁵⁷
- Ground Water Remediation³⁵⁸
- Temporary Discharge Involving Construction Activities (Non-Contaminated Groundwater Construction Dewatering; Potable Water Line Disinfection;

^{356 &}quot;General Permits", Wyoming Department of Environmental Quality, accessed October 15, 2024, <u>https://deq.wyoming.gov/water-quality/water-wastewater/permitting/general-permits/</u>.

^{357 &}quot;Fact Sheet: General Permit for Temporary Discharge – Ground Water Well Pump Testing and Development," Wyoming Department of Environmental Quality, 2022, <u>https://drive.google.com/file/</u> <u>d/1MR2wriSYFUfh62u8ugk0ZYA_i306SrzL/view</u>.

^{358 &}quot;Fact Sheet: Ground Water Remediation General Permit for Temporary Discharges," Wyoming Department of Environmental Quality, 2022, <u>https://drive.google.com/file/d/1n0ek5YajdoBLg7Wo7nCO</u> <u>mtWpS3IBdtTK/view</u>.
and/or Pipe, Tank or Other Similar Vessel Hydrostatic Testing)³⁵⁹

• Pesticide General Permit³⁶⁰

Wyoming also has the following general permits for stormwater:³⁶¹

- Large Construction General Permit (CGP)
- Small Construction General Permit (CGP)
- General Industrial Stormwater Permit (MSGP)
- MS4 General Permit (MS4)
- General Mineral Mining Stormwater Permit (covering mineral mining and processing and associated activities such as mobile hot plants, concrete batch plants, and stockpiles)

Recommendations

For the main Section 404 recommendations, see p. 17.

For NPDES, Wyoming should expand its general permit program to other commonly covered facilities and operations (see Appendix II).

State Endangered Species Act

SESA	Consultation	Critical Habitat	Incidental Take
	Requirements	Designation	Permit
No	-	-	-

^{359 &}quot;General Permit for Temporary Discharge Involving Construction Activities," Wyoming Department of Environmental Quality, 2022, <u>https://drive.google.com/file/d/1TrOUEgRZVg2sdXCrOqv8ekjHvmuqwPym/view</u>.

^{360 &}quot;Pesticide Permitting," Wyoming Department of Environmental Quality, accessed October 15, 2024, <u>https://deq.wyoming.gov/water-quality/wypdes/discharge-permitting/pesticide-permitting/</u>.

^{361 &}quot;Storm Water Permitting," Wyoming Department of Environmental Quality, accessed October 15, 2024, <u>https://deq.wyoming.gov/water-quality/wypdes/discharge-permitting/storm-water-permitting/</u>.

Notes

Wyoming does not have a SESA.

Recommendations

N/A

FA

Appendices

Appendix I: Common Flexible Air Permit Categories (In Use in 3+ States)

- Abrasive Cleaning
- Aggregate Processing
- Air Curtain Incinerators
- Asphalt Plants
- Auto Body Refinishing
- Boilers and Combustion Devices
- Bulk Gasoline Facilities
- Chrome Plating
- Coal Operations
- Concrete Batch Plants
- Cotton Gins
- Crematories
- Crushing and Screening Operations
- Degreasing Operations

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- Dry Cleaning
- Dust Control
- Emergency Generators
- Fuel Dispensing
- Grain Operations
- Incinerators
- Internal Combustion Engines
- Landfills
- Mineral Processing
- Oil and Gas Facilities
- Printing Operations
- Remediation Projects
- Surface Coating
- Wood Processing



Appendix II: Common NPDES General Permit Categories (In Use in 3+ States)

STORMWATER

- Construction General Permit (CGP)
- Industrial Stormwater General Permit (MSGP)
- Municipal Separate Storm Sewer System (MS4) General Permit

NON-STORMWATER

- Aquaculture Facilities / Fish Farms
- Asphalt Plants
- Concentrated Animal Feeding Operations (CAFO)
- Concrete Batch Plants
- Dewatering Activities
- Dredging Operations
- Hydroelectric Facilities
- Hydrostatic Testing Discharges
- Landfills
- Mining and Mineral Processing
- Non-Contact Cooling Water Discharges
- Oil and Gas Facilities
- Pesticide

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- Petroleum Remediation
- Sand and Gravel Operations
- Seafood Processing
- Small Sewage Treatment Plants
- Swimming Pools
- Temporary Discharges (various types)
- Vehicle Wash Facilities
- Water Treatment Plants

FA

About the Author



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