

How Gov't Enviro Justice Push May Affect Developers

By **Elizabeth Dawson, Eryn Howington and Byron Brown**

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The Biden administration is applying a whole-of-government approach to environmental justice as it pushes out billions of federal dollars with the promise to protect and advance historically overburdened and disadvantaged communities.

This article surveys and contextualizes recent actions, from U.S. Environmental Protection Agency guidance on incorporating EJ concerns into permitting decisions, to U.S. Department of Energy requests for input on how to achieve Justice40 and EJ goals through its grant-making programs, and highlights the practical applications and implications of these events.

Why Industry Should Care

The Inflation Reduction Act[1] is the single largest investment in energy and climate in American history, intended to put the U.S. on a pathway to achieving the Biden administration's clean energy and climate goals. The administration now has powerful fiscal tools at its disposal.

Project proponents seeking to participate in these initiatives must be aware of the administration's goals, including advancing environmental justice.

The EPA's decision to issue multiple guidance documents that cover similar, but not identical, ground increases the potential for a permit applicant to miss the agency's evolving interpretations, which in turn increases the likelihood of permitting delays and additional costs.

Moreover, this guidance further empowers other stakeholders to scrutinize the EJ implications of federally supported projects.

The IRA: Advancing EJ and Justice40 With the Energy Transition

The Biden administration has a daunting task. It needs to move quickly to meet its ambitious climate goals by the deadlines set by Congress for doling out federal dollars appropriated under the IRA and other recent statutes, and it needs to do so while avoiding the disproportionately



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negative effects that rapid development can have on traditionally disadvantaged and underrepresented groups.

Recent funding and implementation announcements from federal agencies attempt to pursue these twin aims. Examples include the DOE's requests for public input on how to award grants that facilitate the siting of new and upgraded high-capacity transmission lines and its simultaneous request for proposals for transmission facilitation program funding.

Although improving the electric grid has not always been an animating concern of the EJ movement, the DOE's recent application guidance and request for information identify equity and EJ as key priorities in administering both programs, and make the award of transmission facilitation funding contingent on submission of a community benefits plan demonstrating how the proposed project advances the administration's equity and EJ goals.

These programmatic priorities align with the administration's Justice40 initiative, which requires that 40% of the overall benefits of certain federal investments flow to disadvantaged communities.[2] The DOE is now asking how it can use this program to further that initiative.

If project developers can pinpoint how their proposals will advance the policy priorities the administration seeks to advance through Justice40, they may have an advantage; in fact, certain programs make eligibility contingent on fulsome and demonstrable investments in environmental justice.

The DOE is not the only agency grappling with the juxtaposition of dramatically enhanced grant-making power with expanded stakeholder obligations. To the contrary, the EPA may be the agency most affected by this tension.

The EPA's mission radically expanded with the enactment of the IRA. Formerly an agency known primarily for the regulations it issues, it now has \$27 billion[3] under the Infrastructure Investment and Jobs Act[4] — almost three times its annual appropriation from Congress — to support programs that reduce greenhouse gas emissions, including \$7 billion earmarked for low-income and disadvantaged communities.

For instance, the EPA's November 2022 requests for information[5] on its clean ports and clean heavy-duty vehicles programs seek stakeholder feedback on how the EPA can ensure that the programs benefit low-income and disadvantaged communities.

Indeed, the EPA now has both regulatory and fiscal mechanisms to pursue its goals, and it can be expected to use both levers to achieve its mission of protecting human health and the environment.

From Grant to Groundbreaking: New EJ Guidance

Even before Justice40, the EPA sought to emphasize and incorporate environmental justice in its mission.[6] The Biden administration has since elevated this effort.

Two recent publications exemplify this push. These publications emphasize to both permitting authorities and permittees the importance of considering environmental justice at the beginning of the permitting process, urge changes to the permitting process that enable EJ communities to participate

more fully, and highlight existing legal authorities that can require would-be permittees to fully address EJ issues.

Environmental Justice in Air Permitting

According to the first guidance[7] document, issued by the EPA's Office of Air and Radiation in December 2022, state and local air regulators will be expected to incorporate several EJ considerations to fully engage and analyze potential impacts as part of their air permitting actions.

The guidance, which covers EJ in air permitting, provides "a framework of principles and practices to assist each EPA region to promote environmental justice and equity through air permitting programs" using existing Clean Air Act and other discretionary authorities, along with federal civil rights laws and state laws, "to mitigate potential adverse and disproportionate effects of a permitting action."

The OAR's guidance implements recommendations from the National Environmental Justice Advisory Council and the White House Environmental Justice Advisory Council to consider EJ and cumulative impacts as part of agency actions. In addition, the guidance recommends permitting authorities engage with affected communities and encourage their participation in assessing cumulative impacts in all phases of the permitting process.

The OAR guidance outlines eight key principles for considering cumulative impacts and other EJ considerations as part of the Clean Air Act permitting process, from identifying communities with potential EJ concerns and engaging with them early on, to conducting a fit-for-purpose EJ analysis, to minimizing and mitigating any disproportionately high and adverse effects associated with a permit.

An accompanying memorandum[8] by OAR acting Air Chief Joseph Goffman to the Air and Radiation Division directors in regions 1-10 explained that the overarching goal of these principles is

to improve and consistently practice meaningful stakeholder involvement and fair treatment at all stages of the permitting process, promote issuance of air permits containing terms that are appropriately protective of public health and the environment ... and improve transparency in the permitting process.

The guidance also encourages regulators to consider all existing relevant statutory and regulatory authorities and points to other EPA documents, such as a May 2022 document covering legal tools to advance EJ.[9]

Lastly, the guidance also recognizes the importance of ensuring that permitting decisions comport with Title VI of the Civil Rights Act, of which compliance is mandatory for EPA funding recipients "and represents an important enforcement tool for achieving environmental justice."

Assessing Cumulative Impacts

The second EPA guidance document,[10] issued by the EPA Office of General Counsel on Jan. 11, outlines how the EPA and other regulators can consider the cumulative impacts consistent with existing legal authorities.

This document supplements an environmental justice legal toolkit issued by the EPA in May 2022. While

the addendum itself does not have legally binding effect, it explains that the authority to address cumulative impacts

permeates the full breadth of the Agency's activities — including, for example, standard-setting, permitting, cleanup, emergency response, funding, planning, state program oversight, and other decision-making.

The addendum falls short of specifying any particular methodologies to be used during a cumulative impacts risk assessment or how the agency should undertake specific actions. It states that, in some contexts, the "EPA may be able to factor the combined exposures to stressors into its decision when the Agency has authority or a mandate to take public health and welfare into account."

However, the addendum acknowledges that in other contexts, the "EPA may only be able to address a part of that combined exposure" or may even need to address cumulative impact of environmental stressors on a community "outside the context of EPA's immediate decision, through a separate, coordinated application of other authorities across program activities."

As such, the addendum is intended to be used exclusively as a reference tool for EPA decision makers, along with state, tribal and local stakeholders, to incorporate the consideration of cumulative impacts to the extent possible consistent with the EPA's statutory authorities.

It is worth noting that both OAR's guidance and the addendum are separate from the highly anticipated and long-awaited cumulative risk assessment guidance[11] from the EPA's Office of Research and Development, which is expected to provide a structure for conducting and evaluating cumulative risk assessments within the EPA, specifically to prevent discriminatory effects and disproportionate environmental burdens on EJ communities.

Additionally, while both of the above documents are substantive, they only encourage application of the above-listed principles and associated practices and provide legal context for assessing cumulative impacts.

Both guidance documents nonetheless provide important pillars that private parties may look to when seeking to focus their EJ efforts.

A December 2022 settlement[12] between the environmentalist group Concerned Citizens of Cook County and wood pellet manufacturer Spectrum Energy Georgia LLC demonstrates how activists and EJ communities can leverage the principles espoused in the guidance. The settlement includes measures similar to those in the EPA documents, including requirements for Spectrum to:

- Monitor and disclose its monthly emissions;
- Hold public forums twice a year to hear from the public about ongoing operational concerns;
- Take steps to limit noise, traffic and pollution; and
- Pay \$25,000 for every demonstrated violation of its air pollution commitments.

Additionally, if Spectrum cannot fulfill its obligations, it may not proceed to a second planned phase of operations.

Companies that operate in EJ communities might look to Spectrum's private agreement as exemplifying steps they might voluntarily take to proactively implement EJ principles and thereby hopefully avoid similar lawsuits, regulatory enforcement action or adverse publicity.

Going forward, regulated entities, and specifically air permit applicants, should anticipate the EPA and state, tribal and local stakeholders to inquire about the steps the company is actively taking to identify and meaningfully engage with any communities potentially affected by a proposed action.

Even prior to submitting an application, air permit applicants seeking to get ahead of the curve might preemptively consider alternatives to, and mitigation measures for, actions that might add to the environmental stressors on EJ communities.

In light of these clarifications from both agencywide and air permitting authorities about cumulative impacts, regulated entities should contemplate how anticipating EJ concerns can insulate projects from agency challenges to approvals down the line.

The EPA's decision to issue multiple guidance documents covering similar — but not identical — ground increases the potential for a permit applicant to miss the agency's evolving interpretations, and therefore increases the likelihood of permitting delays and additional costs.

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[1] Pub. L. No. 117-169 (2022).

[2] The White House, "Justice40 Whole-Of-Government Initiative," available at <https://www.whitehouse.gov/environmentaljustice/justice40/>.

[3] See U.S. Env't. Prot. Agency, Greenhouse Gas Reduction Fund, www.epa.gov, last accessed Jan. 26, 2023, <https://www.epa.gov/inflation-reduction-act/greenhouse-gas-reduction-fund>.

[4] Pub. L. No. 117-58 (2021).

[5] Tyler O'Conner and Felicia Isaac, "EPA Seeks Comment on IRA Clean Ports Program," Environment & Natural Resources Law Alert (January 3, 2023), available at <https://www.crowell.com/NewsEvents/AlertsNewsletters/all/EPA-Seeks-Comment-on-IRA-Clean->

Ports-Program.

[6] U.S. Env't. Prot. Agency, "Environmental Justice 2020 Action Agenda," (October 2016), available at https://www.epa.gov/sites/default/files/2016-05/documents/052216_ej_2020_strategic_plan_final_0.pdf.

[7] U.S. Environmental Protection Agency Office of Air and Radiation, "EJ in Air Permitting: Environmental Justice Concerns in Air Permitting," (December 2022), available at <https://www.epa.gov/system/files/documents/2022-12/Attachment%20-%20EJ%20in%20Air%20Permitting%20Principles%20.pdf>.

[8] Joseph Goffman, "Memorandum: Principles for Addressing Environmental Justice in Air Permitting," (December 22, 2022), available at <https://www.epa.gov/system/files/documents/2022-12/EJ%20in%20Air%20Permitting%20Memo.pdf>.

[9] U.S. Env't. Prot. Agency, "EPA Legal Tools to Advance Environmental Justice," (May 2022), available at <https://www.epa.gov/system/files/documents/2022-05/EJ%20Legal%20Tools%20May%202022%20FINAL.pdf>.

[10] U.S. Env't. Prot. Agency, "EPA Legal Tools to Advance Environmental Justice: Cumulative Impacts Addendum," (January 2023), available at <https://www.epa.gov/system/files/documents/2022-12/bh508-Cumulative%20Impacts%20Addendum%20Final%202022-11-28.pdf>.

[11] Elliott Laws, et al., "EPA's Anticipated Cumulative Risk Assessment Guidelines Will Guide EJ Enforcement," Environment & Natural Resources Law Alert, (December 6, 2021), available at <https://www.crowell.com/NewsEvents/AlertsNewsletters/all/EPAs-Anticipated-Cumulative-Risk-Assessment-Guidelines-Will-Guide-EJ-Enforcement>.

[12] Settlement and Cooperation Agreement, Concerned Citizens of Cook County and Spectrum Energy Georgia, LLC, dated Dec. 24, 2022.