

# features

## Navigating Environmental Justice Issues in Federal Permitting

Lauren Bachtel, Kerry McGrath, Andrew Turner, and John Bobka

**F**ederal agencies are becoming laser focused on environmental justice (EJ) in federal permitting. This emphasis—part of the Biden administration’s “whole of government” EJ strategy—is a key component of the administration’s energy and environmental agenda. Projects across the country will experience changes in, among other things, design and planning, public outreach and engagement, agencies’ permitting considerations and environmental reviews, and litigation. Companies, government entities, and other organizations should act now to plan for an increased EJ focus on both current and future projects that require federal permits, authorizations, or reviews.

This article addresses (1) key actions the Biden administration is likely to take to address EJ; (2) early steps organizations should take to review existing and planned projects; (3) proactive procedures and engagement strategies for specific projects and operations; and (4) methods for identifying and evaluating both adverse and beneficial impacts for EJ communities.

### Environmental Justice at the Federal Level

The U.S. Environmental Protection Agency (EPA) defines EJ as the fair treatment and meaningful involvement of all people, regardless of race, color, national origin, or income, with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies. See EPA, *Environmental Justice* (2021). Fair treatment means that no group of people, including racial, ethnic, or socioeconomic groups, should “bear a disproportionate share of the

negative environmental consequences resulting from industrial, municipal, and commercial operations or the execution of federal, state, local, and tribal programs and policies.” EJ has two components: (1) environmental equity, i.e., ensuring that environmental risks and harms are shared proportionally, and (2) community-based public engagement and consultation, i.e., ensuring that all people have an equal voice. The preferred nomenclature for communities affected by EJ issues has changed over time (e.g., frontline, disadvantaged, overburdened, underserved, minority, low-income, communities of color), and EJ leaders continue to evaluate appropriate terminology. See, e.g., White House Env’t Justice Advisory Council, *Draft Recommendations on: Justice40 Climate & Econ. Justice Screening Tool & Exec. Order 12898 Revisions 3* (May 2021). For purposes of this article, we use the term “environmental justice communities” to mean communities that qualify under EPA’s definition.

Although no federal statute expressly requires consideration of EJ principles, the EJ movement gained an increased legal foothold in the 1990s when President Clinton signed Executive Order 12,898, entitled Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations. 59 Fed. Reg. 7629 (Feb. 16, 1994). Executive Order 12,898 requires federal agencies to identify and address “disproportionately high and adverse human health or environmental effects of [their] programs, policies, and activities on minority populations and low-income populations.” It also provides for access to information and public participation of EJ communities in federal decision-making processes.

The National Environmental Policy Act (NEPA) and its regulations require consideration of actions that affect “the quality of the human environment,” 42 U.S.C. § 4332, including aesthetic, historic, cultural, economic, social, and health effects. 40 C.F.R. § 1508.1(g). The White House Council on Environmental Quality (CEQ) and EPA, in particular, have issued guidance on incorporating EJ goals into federal agency actions, including NEPA reviews. See, e.g., CEQ, *Environmental Justice; Guidance Under the National Environmental Policy Act* (Dec. 1997); EPA, *Final Guidance for Incorporating Environmental Justice Concerns in EPA’s NEPA Compliance Analyses* (Apr. 1998). CEQ’s recent statements indicate it may propose adding provisions to its NEPA regulations that directly require consideration of EJ in NEPA reviews. See Stephen Lee, *Project Reviews May Include Env’t Justice*, *CEQ Head Says*, *Bloomberg Law News* (May 19, 2021).

Recent legal challenges to permits demonstrate an increased EJ focus on NEPA reviews and other federal permitting actions. For instance, in the NEPA context, in *Sierra Club v. FERC*, plaintiffs claimed the Federal Energy Regulatory Commission’s (FERC) NEPA review of the Sabal Trail pipeline did not adequately evaluate EJ issues, but the D.C. Circuit ultimately found FERC’s EJ analysis took the requisite “hard look” under NEPA. 867 F.3d 1357, 1368–71 (D.C. Cir. 2017). Challenges to project-specific EJ are not limited to NEPA reviews and have arisen in other permitting contexts, such as under the Clean Water Act (CWA). In January 2020, environmental groups filed a challenge to an Army Corps CWA section 404 permit for a proposed Formosa plastics plant in Louisiana. That challenge involved claims premised on concerns for EJ communities near the proposed plant site. Among other things, the groups claimed that the Corps’ CWA alternatives analysis was insufficient, prompting the Corps to seek a voluntary remand to revisit its permit analysis. See *Ctr. for Biological Diversity v. U.S. Army Corps of Eng’rs*, No. 20-cv-00103 (D.D.C. Jan. 1, 2021) (memorandum opinion and order remanding matter and dismissing case).

EJ claims may also arise in permit challenges under state law. For example, in *Friends of Buckingham v. State Air Pollution Control Board*, a group of Virginia residents challenged a state air permit to build and operate a natural gas compressor station in their predominately African American community. 947 F.3d 68 (4th Cir. 2020). Based on Virginia-specific EJ requirements, the Fourth Circuit found that the state permitting authority failed to adequately consider the health impacts on the community and the “suitability of the site” for the proposed compressor station and vacated the permit. *Id.* at 86. In looking at a similar issue in an air permit for a compressor station in Massachusetts, however, the First Circuit found that the project did not implicate Massachusetts state EJ policy, and, therefore, upheld the permit. *Weymouth v. Mass. Dep’t of Env’t Prot.*, 961 F.3d 24 (1st Cir. 2020).

Separately from federal permitting challenges, EJ issues can also arise in administrative complaints under Title VI of the Civil Rights Act of 1964. Title VI prohibits recipients of federal financial assistance (e.g., states, local governments) from discriminating based on race, color, or national origin in their

programs or activities. For instance, a state agency receiving funds from EPA to run a clean air program cannot discriminate based on race, color, or national origin under Title VI when engaging in clean air enforcement activities. Such a case arose in North Carolina in 2014, when environmental groups challenged the North Carolina Department of Environmental Quality’s (NCDEQ) general permit for large-scale hog farming operations. There, plaintiffs alleged that the permit disparately impacted communities of color, which resulted in a settlement agreement under which NCDEQ agreed to revamp its permitting framework. Settlement Agreement between North Carolina Environmental Justice Network, Rural Empowerment Association for Community Help, and Waterkeeper Alliance, Inc., NCDEQ (May 3, 2018). More recently, in response to a complaint alleging that the Missouri Department of Natural Resources (MoDNR) violated Title VI in extending an operating permit for a fuel transport site and, more generally, in its public participation policies and processes, EPA issued a preliminary finding that MoDNR failed to implement policies and procedures to ensure meaningful access to MoDNR’s programs and activities for individuals with limited English proficiency or disabilities. Partial Preliminary Findings for EPA Compl. No. 01RNO-20-R7: Non-Compliance (Mar. 30, 2021).

... plaintiffs alleged that the permit disparately impacted communities of color, which resulted in a settlement agreement under which NCDEQ agreed to revamp its permitting framework.

Although there is no private cause of action to sue under Title VI, see *Alexander v. Sandoval*, 532 U.S. 275 (2001), and Executive Order 12,898 expressly creates no right to judicial review, an agency’s consideration of EJ can arise in litigation under the Administrative Procedure Act (APA) arbitrary and capricious standard in connection with the agency’s review of overall environmental effects, consideration of public comments, or a specific EJ analysis. See, e.g., *Cmtys. Against Runway Expansion v. FAA*, 355 F.3d 678, 688–89 (D.C. Cir. 2004).

### Biden Administration Hits the Ground Running on Environmental Justice

The Biden administration has announced and already begun to implement a variety of actions to emphasize and address EJ. In his first week in office, President Biden signed Executive Order 14,008, Tackling the Climate Crisis at Home and Abroad, which states that “[a]gencies shall make achieving

environmental justice part of their missions by developing programs, policies, and activities to address the disproportionately high and adverse human health, environmental, climate-related and other cumulative impacts on disadvantaged communities, as well as the accompanying economic challenges of such impacts.” 86 Fed. Reg. 7619, 7629 (Feb. 1, 2021). The administration’s early focus on EJ is reflected in its personnel too, with President Biden appointing several high-ranking officials across EPA, CEQ, and Department of Justice, and within the White House with strong EJ backgrounds, including advocacy on behalf of EJ communities. Executive Order 14,008 also establishes a White House Environmental Justice Interagency Council (Interagency Council), to be led by the CEQ chair and comprised of federal agency representatives; and a White House Environmental Justice Advisory Council (Advisory Council), composed of 26 environmental leaders from across the country that will advise the Interagency Council. The executive order directs the Interagency Council, in consultation with the Advisory Council, to develop a strategy to address current and historical environmental injustice, develop clear performance metrics and scorecard, and recommend updates to Executive Order 12,898 regarding consideration of EJ issues in agency decision-making. These efforts are underway but still in their early stages.

In addition to actions already underway, EPA and other agencies will likely place greater emphasis on environmental justice in NEPA and other environmental reviews . . .

In addition, Executive Order 14,008 issues directives to specific agencies. For example, the order directs EPA to “strengthen enforcement of environmental violations with disproportionate impact on underserved communities through the Office of Enforcement and Compliance Assurance” and “create a community notification program to monitor and provide real-time data to the public on current environmental pollution . . . in frontline and fenceline communities.” 86 Fed. Reg. at 7631. EPA has already begun to take various actions to focus on and advance EJ. For example, in April 2021, EPA announced that it will be updating its Toxics Release Inventory program by adding new chemicals, facilities, and tools to advance EJ, improve transparency, and increase access to information. EPA Press Office, EPA Announces Plan to Update Toxics Release Inventory to Advance Environmental Justice (Apr. 29, 2021). In addition, in May, EPA Administrator Michael Regan stepped

into the permitting process for a metal shredding plant slated for Chicago’s Southeast Side. That process was halted following Regan’s letter to the city’s mayor urging her not to issue permits for the facility. Letter from Michael S. Regan, EPA Admin., to Lori E. Lightfoot, Mayor of Chicago (May 7, 2021).

Executive Order 14,008 also directs the CEQ chair to create a more detailed and effective “geospatial Climate and Economic Justice Screening Tool,” which will build upon EPA’s EJSCREEN tool, identify disadvantaged communities, and “annually publish interactive maps highlighting [those] communities.” 86 Fed. Reg. at 7631.

In addition to actions already underway, EPA and other agencies will likely place greater emphasis on EJ in NEPA and other environmental reviews, such as National Historic Preservation Act section 106 consultation, public interest and alternatives analysis for CWA section 404 permits, consideration of legacy impacts as part of the Superfund process, siting and permitting landfills and hazardous waste sites under the Resource Conservation Recovery Act, and the FERC certificate review for interstate natural gas pipelines and related infrastructure. For example, in February 2021, FERC issued a notice of inquiry seeking stakeholder input on whether (and, if so, how) FERC should adjust its approach to analyzing impacts of a proposed project on EJ communities. 86 Fed. Reg. at 11,268 (Feb. 24, 2021).

### Proactive Efforts Project Proponents Should Consider

Companies, government organizations, and other entities with new projects and existing operations subject to federal environmental permitting requirements should take actions now to increase their awareness and consideration of EJ issues and prioritize active EJ engagement as early as possible in a project’s life cycle. To ensure that project proponents are adequately addressing EJ issues, they should consider (1) proactively incorporating EJ considerations into their internal structures and (2) implementing procedural and engagement strategies for specific projects.

### Proactive Consideration of Environmental Justice in Internal Planning

Early and active engagement should start with project proponents proactively understanding and internally operationalizing EJ policies and goals in their plans and policies for ensuring compliance with federal permit requirements and related laws, and to address EJ in applications for new federal permits. To understand how EJ currently influences a project proponent’s decisions and where changes or updates are necessary to implement EJ policies and goals, a project proponent could conduct a comprehensive EJ audit.

First, the audit could review the project proponent’s EJ policy, and, where necessary, the policy should be updated or newly established. At a minimum, a project proponent’s EJ policy should clearly define key EJ terms, such as “environmental justice,” “disproportionate impact,” “minority or low-income communities,” and “meaningful involvement.” EJ is a multifaceted concept that has been understood in different ways for

decades. Although many people are aware of the general terms used to define or frame EJ, these terms are unclear and ambiguous, which can create barriers to successfully implementing an EJ policy in practice. Among other things, the policy's definitions could reiterate or build upon the federal or state definitions. The audit should also identify the project proponent's EJ guidelines and goals. These should contemplate the tools and methods for proactively identifying decisions or projects that may have a disproportionate impact on EJ communities; integrating EJ into the project proponent's decision-making process; and working cooperatively with communities to ensure that the project proponent is transparently and consistently working to address those communities' concerns.

To implement EJ policies, project proponents could review and, where necessary, update (or establish) an EJ governance structure. If they do not have one already, project proponents should consider establishing an EJ liaison, director, other internal position—perhaps within an environment, health, and safety or EMS-type department, or even as a stand-alone. This EJ liaison would primarily, if not exclusively, focus on updating (or establishing) and implementing the project proponent's EJ policy. This may include, among other things, spearheading the EJ audit and outreach initiatives, training personnel on the EJ policy, and analyzing and informing project-specific environmental analysis.

Second, a project proponent can conduct a comprehensive review of current and planned activities, projects, and facilities to determine whether they are in compliance with federal EJ laws and regulations, as well as the project proponent's internal EJ policy, and to identify goals for addressing EJ considerations in connection with those activities, projects, or facilities. Before conducting the review, the project proponent should determine the tools and methodologies to be used to complete the review, the scope of the review, the internal reviewing team, and how the findings of the review are to be documented or communicated within the proponent's organization. Regarding the review team, the project proponent would benefit from utilizing individuals who are intimately familiar with the projects' details and the local communities, and the EJ liaison, who is intimately familiar with the federal and state EJ laws and the project proponent's EJ policy.

## Environmental Justice in Project Life Cycles under Environmental Statutes

Recognizing that EJ considerations will undoubtedly play a more significant and prominent role in environmental reviews for new projects and permit reviews, project proponents can take early action to ensure that EJ considerations and issues are sufficiently and efficiently identified and addressed in the permitting process. Here are a few examples of such proactive considerations and actions.

First, for new projects, proponents should identify and consider EJ communities in evaluating potential sites or routes, using EPA's EJSCREEN tool as a starting point. Some states have similar tools, such as California's CalEnviroScreen.

Second, project proponents should increase public outreach to and engagement with EJ communities including,

where possible, during the site or route selection process. This starts by ensuring that the impacted communities are receiving notices of proposed projects in an accessible and culturally appropriate manner. Project proponents can work with permitting agencies to ensure that public notices are tailored to the relevant communities through (1) Multiple methods: Agency notices should be made available in multiple fora, including in local publications such as newspapers or newsletters. It should not be assumed that all interested persons and communities will have access to online content; (2) Multilingual communications and interpreters: If appropriate for the relevant communities, notices and communications should be made available in multiple languages. For public hearings and meetings, interpreters should be provided as needed; and (3) Inclusive location and timing of public meetings or hearings: Public meetings or hearings should be held at accessible locations, such as community centers, school gymnasiums, or church campuses, including locations near public transportation. In setting meeting and hearing dates and times, project proponents should account for individuals that may not work 9-to-5 jobs.

Third, project proponents should consider opportunities for meetings and site visits with EJ community representatives or organizations. Outreach will be most fruitful when it involves representatives or organizations that are intimately familiar with the concerns of the local community and can provide the company with an enhanced understanding of the environmental and health-related issues at the community level. The earlier in the project life cycle that project proponents can identify and form working relationships with community representatives, the more effective they can be in identifying and addressing community concerns.

Fourth, informed by outreach efforts, project proponents can proactively tailor project designs, alternatives, and mitigation plans to avoid, minimize, or mitigate effects to EJ communities.

Fifth, project proponents should work with federal agencies to develop robust EJ analyses and records to support their permitting decisions. That analysis, which should be informed by community outreach, should include discussion of the EJ communities that may be impacted by the proposed project, including whether that impact would be disproportionately borne by those communities. The analysis should also address project benefits for surrounding communities, such as new jobs, affordable energy, or secondary tax base. Existing agency guidance provides some best practices, although the specific issues to be addressed in an EJ analysis may vary depending on the project. *See Fed. Interagency Working Grp on Env't. Just. & NEPA Comm., Promising Practices for EJ Methodologies in NEPA Reviews* (Mar. 2016).

Sixth, project proponents should plan for a lengthier permit process to account for community outreach and agency EJ analysis. Based on current EPA guidance, the agency's EJ analysis includes, among other things, consideration of demographic, geographic, economic, and human health factors to determine potential exposures and risks associated with environmental hazards; and determination of whether EJ communities have

been given adequate opportunities for involvement in the process. EPA, *Final Guidance for Incorporating Environmental Justice Concerns in EPA's NEPA Compliance Analyses*, ex. 3 (Apr. 1998).

Finally, project proponents should continue outreach with communities during and following project construction. This ongoing dialogue will help ensure that project proponents stay informed about the local communities' environmental and health-related concerns and issues and that communities are informed about the project.

## Conclusion

For project proponents, EJ is a serious consideration from governance and compliance perspectives. It is also an

opportunity for proponents to better engage with and consider the communities within which they operate. Early and thoughtful engagement and consideration of potential EJ impacts will be critical for major projects and operations. These proactive efforts can lead to better decisions, more efficient permitting, lower legal risk, and stronger community relationships. ♻️

---

*Ms. Bachtel is a counsel in Mayer Brown's New York office. Ms. McGrath is a partner in Hunton's Washington, D.C., office. Mr. Turner is a partner in Hunton's Washington, D.C., office. Mr. Bobka is an associate in Hunton's Washington, D.C., office. They may be reached at lbachtel@mayerbrown.com, kmcgrath@huntonak.com, aturner@huntonak.com, and jbobka@huntonak.com, respectively.*