

Environmental Justice: A 2023 Recap And 2024 Forecast

By **Erich Almonte, Michael Leslie and Douglas Henderson** (January 4, 2024, 6:18 PM EST)

As a concept, environmental justice has been around for more than 40 years. Beginning as a slogan at protests in Warren County, North Carolina, in 1982, it became the subject of a 1994 executive order by President Bill Clinton.

With the issuance of President Joe Biden's 2021 executive order, EJ is now a central tenet for all federal government activities, and new EJ guidance and policies by the U.S. Environmental Protection Agency and the U.S. Department of Justice seem to be issued on a monthly basis.

This article summarizes the key developments in EJ over the last year, and then looks ahead to the likely trends for 2024.

2023 Year in Review

In 2023, the Biden administration emphasized a whole-of-government approach to EJ, issuing Executive Order No. 14096 on April 21.[1] The executive order directed each federal agency to make EJ part of its mission, created performance metrics on achieving the order's goals, and dedicated staff and funding to EJ activities.

Under the executive order, the administration created a new White House Office of Environmental Justice in the Council on Environmental Quality, which published an Environmental Justice Scorecard,[2] a governmentwide assessment of federal agencies' efforts to advance EJ, and released a guidance document, called Strategic Planning to Advance Environmental Justice, to help in developing the plans required by the order.[3]

Within the whole-of-government approach, however, the EPA continued to be the lead agency for EJ.

For instance, on July 18, 2023, the EPA announced that it was opening stand-alone EJ offices in each region and updated its screening tool, EJScreen 2.2, to include Toxic Release Inventory data, among other changes. In addition, on Nov. 15, 2023, the EPA issued a draft revision to its Technical Guidance for Assessing Environmental Justice in Regulatory Analysis, whose purpose "is to outline analytical expectations and particular technical approaches and methods that can be used by Agency analysts...to evaluate EJ concerns for regulator actions." [4]



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And the EPA's Office of Environmental Justice and External Civil Rights and Office of Land and Emergency Management approved a policy formally incorporating EJ into emergency response preparedness and management.[5] The EPA also announced greater focus on EJ issues in warehouse construction and operations.[6] This is one of the clearest examples of the EPA injecting EJ into "ordinary" real estate transactions.

The administration also continues to allocate significant financial recourse to the agency, with the EPA announcing nearly \$1 billion in grant winners, as shown below, and opening the application process for billions more.

EPA's Government to Government[7] and Collaborative Problem-Solving Cooperative Agreement[8] Grants							
Aggregate Grant Totals							
State	Amount	State	Amount	State	Amount	State	Amount
Ala.	\$1,500,000	Ind.	\$1,500,000	Neb.	\$0	R.I.	\$3,444,618
Alaska	\$882,806	Iowa	\$2,500,328	Nev.	\$500,000	S.C.	\$1,000,000
Ariz.	\$2,966,666	Kan.	\$1,000,000	N.H.	\$0	S.D.	\$500,000
Ark.	\$0	Ky.	\$1,500,000	N.J.	\$4,827,900	Tenn.	\$1,488,215
Calif.	\$13,063,091	La.	\$3,149,999	N.M.	\$2,039,453	Texas	\$3,578,356
Colo.	\$3,550,000	Maine	\$3,536,014	N.Y.	\$6,118,516	Utah	\$2,000,000
Conn.	\$4,500,000	Md.	\$3,192,241	N.C.	\$2,000,000	Vt.	\$1,876,765
Del.	\$500,000	Mass.	\$4,150,000	N.D.	\$1,000,000	Va.	\$2,240,809
Fla.	\$1,150,000	Mich.	\$2,500,000	Ohio	\$2,000,000	Wash., D.C.	\$500,000

Ga.	\$1,500,000	Minn.	\$3,000,000	Okla.	\$881,709	Wash.	\$8,244,085
Hawaii	\$2,000,000	Miss.	\$1,000,000	Ore.	\$3,857,209	W.Va.	\$1,000,000
Idaho	\$770,133	Mo.	\$3,500,000	Pa.	\$5,328,827	Wis.	\$1,500,00
Ill.	\$1,749,705	Mont.	\$2,903,897	Puerto Rico	\$2,478,353	Wyo.	\$0

Also, in partnership with the U.S. Department of Energy,[7] the EPA announced[8] the selection of Environmental Justice Thriving Communities Technical Assistance Centers, or EJ TCTACs, to receive \$177 million in grants of at least \$10 million each.[9]

The TCTACs, in turn, will train and assist other organizations in applying for and managing grant funding.[10] The TCTACs will also assist organizations' outreach efforts in EJ communities and create and manage communications channels with EJ communities.

Making good on a promise from earlier in the year, on Dec. 20, 2023, the Biden administration announced \$600 million in Inflation Reduction Act funding for the EPA's new Environmental Justice Thriving Communities Grantmaking, or EJ TCGM, program.[11]

EPA's Feb. 23, 2023, press release stated that the "new program advances the Biden-Harris Administration's whole-of-government commitment to achieving environmental justice by building early, meaningful, and sustained partnerships with communities." [12] The EJ TCGM program will fund 11 entities to serve as grantmakers to community-based projects that reduce pollution.

The EPA intends to award each grantmaker \$50 million to \$100 million. The agency anticipates grantmakers will begin awarding subgrants to community-based organizations by summer 2024. The selected grantmakers are instructed to simplify the grant process to allow more funding to organizations that historically have faced barriers to receiving federal grants for addressing environmental harms and risks.

The U.S. Department of Transportation, meanwhile, issued over \$1 billion in grants under a program with EJ implications.[13] Along with this, the DOE's Inflation Reduction Act grant and loan programs[14] give substantial weight to applicants' community benefits plans[15] and demonstrations of conformity with EJ principles and goals. These EJ provisions of the IRA are now being rolled out.

While 2021 and 2022 saw a proliferation of EJ guidance documents that relied on existing statutes and regulations to further the administration's EJ goals and with no EJ statute on the horizon, in 2023 federal agencies began to incorporate EJ into regulations, including proposed revisions to regulatory actions governing air quality. The most important of these is the new National Environmental Policy Act regulations.

On July 31, 2023, the Council on Environmental Quality released proposed Phase 2 NEPA regulations

governing how federal agencies implement NEPA that, among other things, stress the consideration of EJ in the environmental review process.

EJ was not without controversy in 2023. Among many lawsuits and enforcement actions, the DOJ secured an agreement to address the Jackson, Mississippi, water crisis and on Feb. 28, 2023, sued to limit air emissions at a facility in Louisiana U.S. v. Denka Performance Elastomer LLC, filed in the U.S. District Court for the Eastern District of Louisiana.[16]

On March 21, 2023, in Louisiana, citizens groups filed a novel lawsuit in the same court, against a parish government's land use program, Inclusive Louisiana v. St. James Parish. On Nov. 16, 2023, the court dismissed the case, finding plaintiffs lacked standing and/or the asserted claims were time-barred. However, in doing so, the court stated it could not "say that their claims lack a basis in fact or rely on a meritless legal theory."

On Aug. 21, 2023, in Colorado, citizens groups filed a lawsuit in the Denver County District Court, Green Latinos v. Colorado Air Quality Control Commission, attempting to force Colorado agencies to significantly increase EJ assessments in environmental permitting. And there's a growing trend toward EJ litigation over air quality and other EJ impacts from warehouses.

On the other hand, on May 24, 2023, in State of Louisiana v. U.S. EPA, the state of Louisiana sued the EPA in the U.S. District Court for the Western District of Louisiana, arguing that the EPA's attempt to impose a disparate impact analysis requirement on the state's environmental permitting decisions exceeds the EPA's authority under Title VI of the Civil Rights Act.

As these examples show, even if courts trim the EPA's EJ sails or there is a change in presidential administration, EJ will remain a focus of environmental nongovernmental organizations, or environmental NGOs, and citizens groups.

What to Expect in 2024

2024 will see a continued focus on EJ by the administration and community groups, with the following trends likely to shape the EJ landscape.

Increased Focus on EJ Across Federal Agencies

The EPA has led the administration's EJ efforts thus far. The Biden executive order's directive to dedicate staff to EJ and to develop plans and metrics to assess progress, and CEQ's issuance of EJ strategic guidance to agencies, suggests that other federal agencies will prioritize EJ going forward.

That focus will likely manifest itself, in part, through heightened EJ scrutiny in agency NEPA reviews. Notably, CEQ is responsible for ensuring federal agencies comply with NEPA. The order's creation of the Office of Environmental Justice within CEQ, and the requirement that agencies report their EJ plans' effectiveness to CEQ, strongly suggests that NEPA may play an increasingly large role in the administration's EJ efforts.

Accordingly, regulated entities may have to undertake comprehensive EJ analyses to obtain permits and other approvals from a growing list of agencies, and may face an increase in enforcement actions relating to alleged EJ and civil rights impacts stemming from their operations.

Time will tell if the administration's instructions to coordinate across agencies will bring some cohesiveness or consistency to the various agencies' approaches to EJ, but the EPA's inclusion of EJ in its technical guidance suggests that EJ will factor into more EPA agency actions, including rulemaking, similar to the increased activity in air pollution regulations in 2023.

Increased EJ Funding

In addition to the funds distributed in 2023, on Nov. 21, 2023, the administration announced \$2 billion in EPA Community Change grants.[17]

The EPA describes the grants as "the single largest investment in environmental justice going directly to communities in history," with 100% of the funding going to disadvantaged communities.[18] The Community Change Grant program also sets aside \$200 million for technical assistance to grant applicants and recipients.

The EPA identified five target investment areas for \$200 million of the \$2 billion funding, including Tribal communities; Indian Tribes in Alaska; U.S. territories; rural areas; and U.S./Mexican border communities.

The EPA intends the grants to fund activities in several categories, among them:

- Climate resiliency and adaptation;
- Climate and health risks from heat and fire;
- Air, water and waste pollution monitoring, prevention and remediation;
- Low and zero-emission technologies and infrastructure;
- Workforce development supporting the reduction of greenhouse gas emissions and air pollutants;
- Indoor toxics and air pollution; and
- Facilitating the meaningful engagement of disadvantaged communities in public processes.

The EPA will accept applications on a rolling basis through Nov. 21, 2024.[19]

And, the DOT plans to award \$1.5 billion in RAISE grants in 2024, with applications due at the end of February and awardees to be announced June 27, 2024.[20]

The DOT notes that half that funding will go to projects in rural areas and at least \$15 million will fund projects located in areas of persistent poverty or historically disadvantaged communities, and that projects "located in these areas will be eligible for up to 100 percent federal cost share, as directed by Congress in the Bipartisan Infrastructure Law." [21]

Increasing Risk for EJ Disputes

The expansion of EJScreen and other EJ screening tools, along with the EJ funding awarded in 2023 and to be awarded in 2024, will fuel new environmental permit application challenges for new and for reissued permits, government enforcement actions and citizen lawsuits.

For example, the inclusion of Toxic Release Inventory data and data on facilities out of compliance in EJScreen 2.2 will provide information that may foster allegations of negative health or environmental effects by specific facilities located in EJ communities, raising the risk of permit challenges and personal injury and environmental litigation. Similarly, the funding to community groups and environmental NGOs will assist them in monitoring environmental impacts, training them to effectively assert EJ issues, and likely empower them to mount more EJ challenges to permits and operations.

Indeed, environmental NGOs are increasingly raising EJ-related concerns in legal challenges to various projects requiring permits or other forms of governmental approval. Notably, industrial projects of all types — including clean and renewable energy projects that seek to lower overall carbon emissions but may be situated in close proximity to EJ communities with some attendant impacts — may be targeted for opposition by environmental NGOs.

In addition to permit challenges, citizens groups are likely to continue to file EJ lawsuits to prompt action at the state and local level, such as those filed in Louisiana and Colorado. As the EPA itself has suggested, agencies and environmental NGOs are expected to increase their focus on the role of hazardous air pollutants in EJ communities.

But some states are expected to push back on EPA's EJ policies, given Louisiana's success in challenging EPA's use of the Civil Rights Act. One example is the state of Texas. On Oct. 20, 2023, the Texas Commission on Environmental Quality withdrew from negotiations with the EPA concerning EPA's investigation of TCEQ's permitting of a chemical plant and concrete batch plants in EJ communities,[22] which may portend future litigation.

Increased Enforcement in EJ Communities

EJ is featured heavily in the EPA's National Enforcement and Compliance Initiatives, announced Aug. 17, 2023.[23] Although EJ is not a specific NECI, the EPA's memo states that all of the NECI's incorporate EJ, and one need barely scratch the surface to find an EJ thread connecting them.

Carryover priorities include reducing air toxics in overburdened communities, increasing compliance with drinking water standards, and chemical accident risk reduction. The new priorities — climate change, coal ash contamination and PFAS — will continue to be a focus of advocates and local communities.

Implications

With the administration's mandate that EJ be a central tenet for all federal actions, EJ will increasingly surface in all areas of law and regulation, from technically challenging matters such as reissuance of a 30-year Title V of the Clean Air Act permit for a plant that has not changed operations, to seemingly ordinary matters such as construction of a warehouse with potentially increased traffic as an EJ impact.

The EJ focus will continue to extend beyond the federal government, as well, with increasingly informed, funded and active environmental NGOs and citizens' groups raising the possibility of EJ disputes. While much remains uncertain in this rejuvenated and rapidly developing landscape, it is without doubt that 2024 will be another eventful year for EJ.

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