

Barry University School of Law

Digital Commons @ Barry Law

Faculty Scholarship

7-2023

Federal Environmental Justice Legislation and Regulations

Nadia B. Ahmad

Follow this and additional works at: <https://lawpublications.barry.edu/facultyscholarship>



Part of the [Environmental Law Commons](#), and the [Natural Resources Law Commons](#)

D I A L O G U E

FEDERAL ENVIRONMENTAL JUSTICE LEGISLATION AND REGULATIONS

SUMMARY

With passage of the Inflation Reduction Act and Water Resources Development Act of 2022, the statutory landscape has changed to reflect the Biden Administration’s emphasis on environmental justice. On February 27, 2023, the Environmental Law Institute (ELI) and ELI’s Pro Bono Clearinghouse co-hosted a panel of experts who explored how communities can leverage the statutory changes that have taken place, what decisions have been left up to agencies, and how proposed legislation, like the Environmental Justice for All Act, will affect future environmental justice efforts. Below, we present a transcript of that discussion, which has been edited for style, clarity, and space considerations.

Kristine Perry (moderator) is a Staff Attorney at the Environmental Law Institute.

Nadia B. Ahmad is an Associate Professor at Barry University School of Law.

Stacey Halliday is a Principal at Beveridge & Diamond PC and Chair of the Diversity, Equity, and Inclusion Committee.

Christie Hicks is Senior Director and Lead Counsel for Equitable Regulatory Solutions at the Environmental Defense Fund.

Kristine Perry: This is the fifth part of our *Community Lawyering for Environmental Justice* series, hosted by the Environmental Law Institute’s (ELI’s) Environmental Law Pro Bono Clearinghouse.¹ The Clearinghouse accepts viable matters from communities and individuals seeking pro bono legal representation, but ELI doesn’t do any of the vetting ourselves for these matters. It does not accept criminal or non-viable matters.

Once we have the matters, we post them on our website.² The Clearinghouse is open to both ELI and non-ELI members. We hope that you will join us in taking on this really important and meaningful work. And this continuing legal education (CLE) series for community lawyering really helps these attorneys.

Community lawyering is often quite different than the usual work lawyers might do at a firm or government agency. We want this series to be interactive and useful for these attorneys as they take on this type of work. For example, we get a lot of questions about conflicts. So, one of our recent series was on conflicts and how to approach

them from a nonprofit, firm, and an academic setting. Please check out the other CLEs that we have available.

For today’s event, I’m going to introduce each speaker and then they’ll have 10 minutes to present. Then, I’ll open it up to questions.

Nadia B. Ahmad was born in Orlando to immigrant parents from Pakistan and India. She is an associate professor at Barry University School of Law and coordinator of the Environmental and Earth Law certificate program. Her research centers on the intersection of energy siting, the environment, and sustainable development, and draws on international investment law and corporate social responsibility. She has spent her academic career focusing on frontline communities who are the most vulnerable to energy production, and is a co-author of the textbook *Environmental Justice: Law, Policy, and Regulation*.

Nadia Ahmad: What I want to speak about specifically is some of the key legislation passed relating to environmental justice (EJ) and the legislation that has been incorporated in existing provisions.³ We’re looking at how to develop a low-carbon energy system that will promote social equity and justice. At the same time, we’re seeing infrastructure improvements that will improve not only the quality of life through health and economic benefits, but also work toward the ideal of having a clean and healthy environment.

Much of this work that has been developing is part of a broader community engagement—efforts that have centered the work of local communities in different stakeholder engagements. More and more, we are seeing frontline communities speak from the vantage point of “We speak for ourselves.” We’re witnessing how legislation is developed in

1. ELI, *ELI Pro Bono Clearinghouse*, <https://www.eli.org/probono> (last visited May 11, 2023).

2. ELI, *Find Matters*, <https://www.eli.org/probono/matters> (last visited May 16, 2023).

3. Editor’s Note: Nadia Ahmad is an elected member of the Democratic National Committee.

a way that centers the concerns of communities of color as well as those who are poor, marginalized, and Indigenous.

Federal and state-level legislation are effective through a multistakeholder approach. Yet, these emerging legislative trends also occur in a multidisciplinary space from the vantage point of academics. Simply assuming an environmental perspective will not provide the sense of what is happening on the ground. Other questions we should ask are: What are the social impacts? What are the economic impacts? What are the environmental impacts?

We then look at how we can bring all these different facets together to develop the synthesis of more robust laws that incorporate EJ. Not only are we looking at incorporating clean energy, but also energy efficiency. We need to see lower utility bills and lower water bills, which are essential for marginalized communities.

There's also a sense of having renewable energy investment not only in places that are affluent and rich, but also places at the margins. That's why the key legislation that was passed in 2022 will be important. Setting up specific types of value change for energy transitions and fostering specific types of innovation can make that happen.

Some of the key legislation includes the Inflation Reduction Act (IRA),⁴ which was preceded by the Bipartisan Infrastructure Law.⁵ The changes from these laws will create movement in terms of how the United States will keep up with its Paris Agreement commitments.⁶ According to research conducted by the World Resources Institute, these historic pieces of legislation will up the ante for what the United States can do in terms of delivering on climate finance, and also EJ.⁷

The IRA includes \$370 billion that has been set aside to lower energy costs for families and small businesses, as well as to accelerate energy solutions in every sector of the economy, and measures to strengthen supply chains.⁸ As that happens, the goal is to increase good paying jobs and not just to create jobs. At the heart of the IRA, there are incentives to spur manufacturing within the United States. Not only is it an energy transition, but it's a just transition.

The new economic opportunities that are developed as a result of these clean energy initiatives are also going to make possible a new economic system. We grapple with the idea of what is a just energy transition. The Joseph Biden-Kamala Harris Administration has sought to focus on what it can do for working families.

The IRA works to develop specific types of clean energy incentives. That also includes the president's Justice40 Ini-

tiative, which has sought to deliver more than 40% of the overall benefits of climate and clean energy federal investments to communities that are marginalized and overburdened by pollution as well as underserved by infrastructure and other basic services.

We're eager to see exactly how the IRA is going to build off what has already been put in place. For example, the United States has sought to reduce its greenhouse gas emissions below its 2005 levels by 2030.⁹ Between the IRA and the Bipartisan Infrastructure Law, the U.S. Department of Energy (DOE) estimates that there is going to be at least a 40% reduction in economywide greenhouse gas emissions below those 2005 levels to reach that goal in 2030.¹⁰

I was amazed to see that happening, and so quickly. But part of that should not be so astounding, because during the COVID pandemic we saw the passage of \$1 trillion, \$2 trillion aid packages to prevent us from annihilation as a species. That is the type of commitment and the herculean efforts that will be required going forward as well, especially to implement climate change adaptation and clean energy in a way that doesn't leave EJ communities behind.

The IRA has also included provisions such as electric vehicle charging stations, power infrastructure, and climate resilience. A lot of this is about creating the mechanisms that are going to drive change, especially to have clean energy options, and how specific tax credits are going to be deployed on different levels.

Whether it is for solar panels, wind turbines, batteries, or critical minerals, the legislation is going to provide about \$30 billion for clean energy options.¹¹ It also has another \$10 billion for clean energy tax credits for manufacturing.¹² Of that, about \$6 billion is set up for existing heavy manufacturing, such as steel and cement. All of those supply chains are really trying to be a part of these changes that are happening.

There's an incentive program, which has had some controversy, relating to clean hydrogen production. But there have been movements away from coal as an economic driver, especially for communities that have been disenfranchised or left out of the clean energy transition. Therefore, being able to provide direct incentives to those who are able to decarbonize their homes, as well as to create clean energy jobs, has been impactful.

There was also \$8 billion allocated to financial and technical assistance for clean energy projects that are going to

4. Inflation Reduction Act of 2022, Pub. L. No. 117-169, 136 Stat. 1818.

5. Infrastructure Investment and Jobs Act, Pub. L. No. 117-58, 135 Stat. 429 (2021).

6. Savannah Bertrand, *How the Inflation Reduction Act and Bipartisan Infrastructure Law Work Together to Advance Climate Action*, ENV'T & ENERGY STUDY INST. (Sept. 12, 2022), <https://www.eesi.org/articles/view/how-the-inflation-reduction-act-and-bipartisan-infrastructure-law-work-together-to-advance-climate-action>.

7. Melissa Barbanell, *A Brief Summary of the Climate and Energy Provisions of the Inflation Reduction Act of 2022*, WORLD RES. INST. (Oct. 28, 2022), <https://www.wri.org/update/brief-summary-climate-and-energy-provisions-inflation-reduction-act-2022>.

8. *Id.*

9. Fact Sheet, White House, President Biden Sets 2030 Greenhouse Gas Pollution Reduction Target Aimed at Creating Good-Paying Union Jobs and Securing U.S. Leadership on Clean Energy Technologies (Apr. 22, 2021), <https://www.whitehouse.gov/briefing-room/statements-releases/2021/04/22/fact-sheet-president-biden-sets-2030-greenhouse-gas-pollution-reduction-target-aimed-at-creating-good-paying-union-jobs-and-securing-us-leadership-on-clean-energy-technologies/>.

10. White House, *Inflation Reduction Act Guidebook*, <https://www.whitehouse.gov/cleanenergy/inflation-reduction-act-guidebook/> (last visited June 5, 2023).

11. Senate Democrats, Summary of the Energy Security and Climate Change Investments in the Inflation Reduction Act of 2022, https://www.democrats.senate.gov/imo/media/doc/summary_of_the_energy_security_and_climate_change_investments_in_the_inflation_reduction_act_of_2022.pdf.

12. *Id.*

benefit low-income communities and disadvantaged communities (DACs); and about \$12 billion has been allocated for direct and indirect investments for renewable energy projects.¹³ This builds off of the earlier legislation, the Bipartisan Infrastructure Law, which seeks to strengthen the nation's resilience, especially in response to extreme weather and climate change.

I'm based in Orlando, Florida. Last year, we saw two very extreme weather events with Hurricane Ian and Hurricane Irma. Their impacts were similar to the very extreme weather that we had in 2004. But what was astounding was that the sea level had increased more than one foot in the almost 20 years between these extreme weather events. As a result, the impacts of the more recent storms were far more intense, and the water has taken far longer to recede. There are communities that are still flooded and are not going to be able to go back to the way they were.

These pieces of legislation are building upon President Biden's larger movement toward the Build Back Better infrastructure framework.¹⁴ It also works toward developing how the United States is going to have a 100% carbon pollution-free power sector by 2035 and achieve a net-zero economy by 2050. Some of those provisions include clean drinking water, as there are some six to 10 million lead service lines in cities and towns across the country, many of which are in communities of color and low-income neighborhoods.

The Bipartisan Infrastructure Law aims to expand clean drinking water. This is near and dear to my heart: between the Bipartisan Infrastructure Law and the IRA, there is an aim within 10 years to eradicate lead poisoning from water lines in this country. That is the result of a building and developing national grassroots movement.

We're also seeing an emphasis on legacy pollution. More than one in four Black and Hispanic Americans live within three miles of a Superfund site.¹⁵ That's a higher percentage than the general American population overall. No community deserves to live, work, play, or go to school in a contaminated area. The Bipartisan Infrastructure Law delivers a wider net in terms of tackling legacy pollution by providing funding for Superfund and brownfield sites and also reclaiming abandoned mine land as well as capping orphaned oil and gas wells.¹⁶ About \$21 billion has been set aside for these tasks. All of this is part of this broader effort.

Another part of the Bipartisan Infrastructure Law covers public transport. This includes concerns that bus and

transit workers constitute about 31% from the African-American community and 19% from the Hispanic community, compared to 12% to 18% of the overall work force. The legislation aims to expand public transit, and it makes the largest investment in passenger rail since the creation of Amtrak.

There is also an emphasis on clean school buses. More than 25 million school children and thousands of bus drivers breathe polluted air on their rides to and from school. This legislation aims to tackle that issue, so that there's not only cleaner air, but also a demand for American-made batteries and vehicles that will create jobs and provide for domestic manufacturing.

There is an emphasis on modern and clean infrastructure and how that's going to be developed with an investment of more than \$17 billion for port infrastructure and \$25 billion for airports to address repairs and maintenance backlogs as well as to reduce congestion and emissions near airports.

The broader resilience goal is to address the impacts of climate change on millions of Americans, such as washed-out roads during hurricanes, airport power outages, and flooded schools. Efforts are aimed at mitigating these challenges and ensuring the well-being of those affected. People of color are more likely to live in those areas that are vulnerable to such flooding and other climate change-related weather impacts.

Laws that are able to make our communities safer as well as our infrastructure more resilient are crucial. There is an investment of more than \$50 billion to protect against droughts, heat waves, wildfires, and floods, in addition to broader investments for the weatherization of American homes. It will be crucial to see how these efforts will be developed moving forward.

Kristine Perry: We're pleased to be joined by Stacey Halliday, a shareholder at the environmental law firm Beveridge & Diamond PC. Stacey co-chairs the firm's EJ practice, and is the current chair of the firm's Diversity, Equity, and Inclusion Committee. Stacey previously served as special counsel to the U.S. Environmental Protection Agency's (EPA's) general counsel from 2015 to 2017, where her portfolio included congressional oversight and external stakeholder engagement. She currently serves as a board member for ELI.

Stacey Halliday: My perspective and contribution to this conversation is thinking about community lawyering in the context of where opportunities are created given increased EJ activity in industry.

I counsel clients on incorporating EJ into their work. It has fallen into a couple of different buckets of increasing variation as this landscape has evolved. First, I work at the companywide level with risk assessments, tracking regulatory developments, compliance obligations, and enforcement risks. That could be something like mapping all facilities and getting an assessment of not just federal policy shifts, but also state-specific jurisdictional requirements for these facilities.

13. DOE, Biden-Harris Administration Announces Historic Investments to Support America's Energy and Industrial Communities (Feb. 13, 2023), <https://www.energy.gov/articles/biden-harris-administration-announces-historic-investments-support-americas-energy-and>.

14. White House, *The Build Back Better Framework*, <https://www.whitehouse.gov/build-back-better/> (last visited June 5, 2023).

15. Linda Villarosa, *Pollution Is Killing Black Americans. This Community Fought Back*, N.Y. TIMES (July 28, 2020), <https://www.nytimes.com/2020/07/28/magazine/pollution-philadelphia-black-americans.html>.

16. Press Release, U.S. Department of the Interior, President Biden's Bipartisan Infrastructure Law to Conserve Ecosystems, Clean Up Legacy Pollution Sites Across the Country (Oct. 18, 2022), <https://www.doi.gov/pressreleases/president-bidens-bipartisan-infrastructure-law-conserve-ecosystems-clean-legacy>.

Other companywide work that I do focuses on environmental, social, and governance (ESG) and EJ governance counseling. That includes things like developing an EJ policy and creating implementation strategies for different aspects of the company's work. And then developing training programs because, although EJ has been around for decades, a lot of C-suites haven't been familiar with this term. Now, everyone's eager to figure out what EJ means—what does it mean for us, and how do we think about it for our company?

I also advise on federal funding opportunities—what Nadia was talking about with the IRA and Bipartisan Infrastructure Law. There's a huge driver now for companies to think about EJ in the context of being competitive for those grants. That's a lot of what we're doing.

Then, finally, there is the sort of traditional work of more project- or permit-specific counseling, as permitting authorities ask questions about impacts on neighboring communities. It's been really fantastic and challenging. I never thought I'd be doing it in the private sector. It's exciting to see it grow.

There is a new and growing business case for consideration of EJ. Building off of the regulatory and legal landscape that Nadia painted with mitigation and enforcement risks, we're seeing agencies, particularly EPA, with a clear focus on prioritizing enforcement action and on communities facing EJ issues. This includes an uptick in enforcement of Title VI of the Civil Rights Act, which prohibits discriminatory use of federal funding—to put it simply—on the basis of race, color, or national origin.

We're seeing a pretty potent increase in investigations and overall activity in Title VI for federal funding recipients, which raises an interesting question about what that means for all the IRA money and Bipartisan Infrastructure Law money now going to a lot of private companies who are going to be federal funding recipients and held to the same civil rights laws. A lot of clients are asking about that, and they want to get ahead of it.

There's increased focus on EJ analysis in permitting from a lot of different agencies now because of Executive Order No. 14008, which directed federal agencies to reiterate the Executive Order No. 12898 directive from 1984 to have federal agencies consider EJ in their work.¹⁷ Executive Order No. 14008 made that a much more granular requirement and incorporated a lot more accountability in terms of demonstrating that commitment, including the Justice40 program that Nadia mentioned.

We're seeing a lot of agencies interpret those marching orders differently. Agencies like the U.S. Army Corps of Engineers (the Corps), which oversees §404 permits under the Clean Water Act (CWA),¹⁸ are thinking about the need for processes for incorporating EJ considerations. How do we think about impacts on neighboring communities with respect to permitting, how do we quantify those impacts, how do we document them, how do we mitigate any

adverse impacts, and how do we weigh them against other countervailing benefits or other issues that we're considering permitting?

Again, clients are trying to get ahead of that and understand how they measure those impacts in a way that is meaningful and effective and makes sense for their operations. We're also seeing a lot of interest from investors, increasingly so from activist investors who during the proxy season are demanding racial equity and EJ audits.

These investor requests and proxy votes are often resolved voluntarily by subject companies, who—in lieu of a full audit—may commit to start looking at these issues and start thinking about an EJ policy, expanding engagement, or assessing impacts in meaningful ways.

Finally, I mentioned the competitive federal funding piece, which is so dynamic. A lot of these, particularly DOE funding opportunities, require the incorporation of a community benefits plan in the application process. That could include a proposal for how the applicant is going to include things like work force development; community engagement; diversity, equity, and inclusion; and accessibility in their work. Then also, what Justice40 metrics they're going to use to track their work phase over a project. And that funding can be conditioned in an iterative way on that performance.

It's a pretty big deal, especially for companies that are trying to be competitive in this space and don't have a robust EJ or ESG program, or focused engagement efforts.

I'm also seeing more change in my work on that side—the carrot as opposed to the stick—because these companies are saying they want to be competitive, they want to get these funds, they want to contribute to the energy transition. They're being driven to develop these programs in a pretty significant way.

These opportunities that I've noted are coming from the perspective of business. But when you think about the community counseling and the community lawyering angle here, and opportunities through groups like the Pro Bono Clearinghouse, I think these industry-focused opportunities really do create some important community advocacy and community lawyering opportunities as well.

More and more often, communities are going to be proactively engaged by industry and by government, not just when something goes wrong. Community lawyering, just like the Pro Bono Clearinghouse, can provide helpful resources and technical assistance so that communities are prepared for the opportunities and can use them effectively. This includes things like assistance with understanding requirements, particularly for community engagement.

I'm looking at New York and New Jersey with their new EJ permitting laws that require consideration of cumulative effects on permitting decisions.¹⁹ Massachusetts has a new proposed rule on cumulative effects assessment.²⁰

17. Exec. Order No. 14008, Tackling the Climate Crisis at Home and Abroad, 86 Fed. Reg. 7619 (Feb. 1, 2021).

18. 33 U.S.C. §§1251-1387, ELR STAT. FWPCA §§101-607.

19. New Jersey Department of Environmental Protection, *Environmental Justice*, <https://dep.nj.gov/ej/law/> (last visited June 5, 2023).

20. Mass.gov, *Cumulative Impact Analysis in Air Quality Permitting*, <https://www.mass.gov/info-details/cumulative-impact-analysis-in-air-quality-permitting> (last visited June 5, 2023).

Pennsylvania has guidance on expanding community engagement requirements.²¹ We help clients and communities understand where they can play a role in the process in a meaningful way and understand how to articulate meaningfully what the impacts are and how to advance their own interests.

I remember working at EPA. I helped the Agency respond to the Flint drinking water crisis. These communities, as we all know, often face not one but a variety of ills from just a few long-term challenges. It's hard sometimes to take these opportunities and make meaningful progress from them because there are so many things to take apart and put into a context that can make sense in a legal proceeding. That technical assistance is really helpful.

Also important is effective engagement and input with federal agencies. For example, EPA is increasingly hosting comment sessions targeting communities facing EJ concerns. This presents really important opportunities in the rulemaking process. There's probably going to be a lot more of that with the Office of Environmental Justice and External Civil Rights. At EPA, there's going to be a whole lot more of this engagement, so having effective counsel and support to take advantage of those opportunities would be really helpful.

Finally, there's navigating these industry partnerships, like with community benefits agreements and DOE applications. That's huge. You can get great benefits if you know what to ask for and how to ask for it, and if there's enough consensus prior to those opportunities coming up.

That's going to feed into the Justice40 definition of "benefits" to very specific communities and helping communities understand and define benefits. That framework will also be a great opportunity for community lawyers to make an impact.

Kristine Perry: Our final speaker is Christie Hicks. Christie is a senior director and lead counsel of equitable regulatory solutions at the Environmental Defense Fund (EDF). She leads EDF's strategy to co-create a durable new model that prioritizes equity in the energy transition, and focuses on regulatory reforms that equitably reduce reliance on fossil fuels, eliminate overinvestment in long-lived fossil fuel infrastructure, increase clean energy access, and advance energy justice.

Christie Hicks: As Kristine said, I am a senior director at EDF for what we call equitable regulatory solutions. What that means is that my practice is focused primarily before state public utility commissions. I also oversee a body of work before other federal and state energy regulators across the country that have some authority or jurisdiction over energy infrastructure, programs, siting, and so on.

I have a deep focus in my work for justice, and I work very closely with many community-based organizations.

That's work that was ongoing before all of the new federal regulations came into play. In large part, that's because many of our states were probably a little further along than where the federal government has been. I think there are a lot of really important lessons that we can learn from state and local work that has been going on now for years. Actually, we have many community-based organizations that have been at this for many, many years. We don't need to reinvent the wheel here.

I was asked to talk about how communities can leverage the new laws and regulations, and what decisions have been left up to agencies, and how they can implement those statutes meaningfully. I'm excited to talk about the intersections of the work that we've already been doing at the state and local levels, and how we can use that to develop best practices and to improve the way that we implement all these new federal statutes and regulations.

As we know, there are many decisions that are being left up to implementing agencies. Billions of dollars, many new programs—and the work is underway right now. The comment processes for several things have even closed already, and some are ongoing. There are grant dollars going out the door and a lot of the decisions are being made on that right now.

These are the kinds of things that are going to set the course for whether the new programs and requirements are actually achieving the goals that they were set out to achieve. The opportunity to get that right is yesterday. My point is that we have to work really hard to get it right from the start and not fall into the thought process that, "decisions are being made right now, so we will just work as quickly as we can."

That's what has led us to where we are today, and it will truly just perpetuate the inequities of our energy system and the environmental injustices that have left overburdened communities with nothing left to give. So, while these requirements, dollars, and programs are a great start, they are only the start. In my humble opinion, implementation is equally, if not more, important.

We're truly addressing the deeply entrenched environmental racism and environmental injustices that exist today. It's going to require a whole systems change. The new foundation on which we can get that right or we perpetuate those inequities is going to be new processes, new ways of working with and for disproportionately burdened communities, and new ways of thinking for many decisionmakers and many stakeholders.

For that, there are so many parallels and intersections with our state and local work, including supporting meaningful participation by communities and community representatives. In organizations like mine, our role isn't to be a stand-in for frontline communities or to represent their concerns. We are not the experts on what they want or need. But we can and we should leverage our regulatory, legal, and technical expertise to raise the voices of frontline communities and to assist those organizations that represent those communities to have a seat at the table.

That also requires acknowledging that these are usually not single-issue organizations, like so many of us practitio-

21. Pennsylvania Department of Environmental Protection, *Environmental Justice Public Participation Policy*, <https://www.dep.pa.gov/PublicParticipation/OfficeofEnvironmentalJustice/Pages/Summaries-and-Documents.aspx> (last visited June 5, 2023).

ners benefit from, and recognizing that they have capacity limitations. They bear disproportionate burdens of health, economic, environmental, and so many other injustices every day.

One of the key ways to think about the new legislation and regulations is, from the outset, thinking about the high barriers to participation. These barriers have excluded those communities and those organizations from being involved in previous decisionmaking processes, and have really limited involvement in those decisionmaking spaces to only well-resourced and sophisticated participants. The new ways of decisionmaking should be foundationally different.

The reliance on what some call epistemic authorities—you know, people who have a lot of letters after their names—is what has led us to where we are today. We have to listen to different authorities if we want to see different results. It's really important that we as practitioners be intentional about that and take the time to do it. It does take more time to support community members' priorities, rather than moving forward with what we think is the quickest and "best for them" way, and then coming in later and trying to get community buy-in rather than having had authentic community engagement from the start.

There are a few high-level questions I ask myself in this work that are informed by EJ and community-based organizations that I work with in this space for each program, for each investment, for each requirement: Is this what the impacted community wants and how do we know that? Who stands to benefit and who stands to be harmed? What are the costs? Who pays them and what are the potential cost savings if that's applicable? Are there any alternatives and have the costs and job opportunities and other societal impacts of those been considered?

Then, we need to think about the different types of equity. Is there procedural equity? That is, how the decisions are being made both in the actual proposal and in the process for making a decision about it. Is there distributional equity in the benefits and the burdens of whatever this decision is going to be? Be it a grant, be it a new program, be it awarding something to a particular institution. Are there structural and intergenerational equity questions that haven't yet been thought about? The long-term positive outcomes, the institutional accountability. And is there recognition equity? Meaning acknowledging the disproportionate burdens and disparities in social vulnerability and having the right voices at the table.

It's really important that we be explicit and not implicit about those questions. We, as stakeholders and as informed practitioners, who have the luxury of spending our time in the legal space here, should expressly describe how we are thinking about each of these things. We should encourage and seek requirements for decisionmakers, whether it's a decision about a legal case or a particular grant, to expressly describe how they considered community perspectives in making their decisions about that.

We can and we should seek out communities and organizations that don't know how and where to engage so that

we can think about what support we can provide to them if they want to get involved. What are the gaps, and how can we help to fill those? For those who aren't in a position to go into the Clearinghouse and find cases and opportunities to represent others, or don't work for an organization where there are opportunities for direct representation of impacted communities, at least, as I said, thinking about how we can avoid the traps of community buy-in or thinking about what's best for the community as opposed to authentic community engagement, which is really the only way to get this right.

I'm excited to talk a bit later about some specific examples where I have worked with community-based organizations and contexts that I think are directly applicable to how Justice40 can be implemented, how grantmaking can be thought about, and addressing the historic exclusion of impacted communities in those kinds of decisions. I want to thank my fellow panelists and ELI for having me here this morning.

Kristine Perry: Thank you to Nadia who has to leave us in a few minutes. Nadia, if you have any closing remarks you'd like to say before you go.

Nadia Ahmad: The one thing I'd like to address is a question about how the Justice40 Initiative relates to the IRA from a funding perspective. I think the list of agencies that have already started to cover this is really remarkable. But at the same time, like Christie pointed out, there are gaps in terms of implementation. That's why I think it's crucial, especially for environmental professionals, to uplift communities at the margins to make sure that they recognize and know these resources, and know how to obtain and leverage them.

Kristine Perry: I'm going to start with a question for Stacey. Can you say more on what the Corps is doing on the National Environmental Policy Act (NEPA)²² and EJ? Is there a specific rulemaking or is there developmental guidance?

Stacey Halliday: What's interesting is that the Corps is doing what I think EPA is also doing a lot of, which is interpreting their existing authority to incorporate EJ and incorporate ideas of equity. With the Corps, I think what they're doing as part of the permitting process is asking more about how to document impacts on EJ communities when you're thinking broadly about impacts, particularly permitting action.

There's a lot of pressure, given the heightened Title VI activity, to make sure that these impacts are being considered and to avoid a potentially disproportionate impact on vulnerable communities. We need to make sure that's avoided and considered at the earliest possible stage. So, there's a little bit of fear, I think, and anxiety in these agen-

22. 42 U.S.C. §§4321-4370h, ELR STAT. NEPA §§2-209.

cies. They don't want to be targeted in that particular way about Title VI.

Also, a great tool in this respect is EPA's Legal Tools to Advance Environmental Justice: Cumulative Impacts Addendum.²³ I think it might have been torturous for all the Office of General Counsel lawyers to put that together because it's so dense. It goes statute by statute to say where EPA and its programs can incorporate EJ under existing authority. But that's the sort of review we're seeing in a lot of agencies that are having to do that analysis. It's not a new EJ law, it's not a new rule or explicit mention of EJ, but it shows how it can be woven into regular day-to-day agency work. Like overseeing the Corps as well.

Kristine Perry: Another question. Can either of you point the audience to any digestible resources that are helpful for community leaders regarding how to effectively leverage their voices, as corporations and governments now have a higher incentive to engage meaningfully with them?

Christie Hicks: From my perspective, part of what brings us here today is that the burden shouldn't be on overstretched community-based organizations to have to put in all that work on their own. I hope that those who are on this call and others within our networks can leverage the expertise and the resources that we have to partner with them and to lift up their voices. It seems a further burden to expect communities to go out and do that on their own. But it's a great question.

There are so many local organizations across the country that have already been doing a lot of great work. It's probably a little bit less visible if you're not deeply entrenched within their networks already. But looking to community-based and EJ organizations in your neck of the woods and seeing all the great work that they have already done rather than looking for someone in particular, like an omnibus resource, is a great place to start.

Stacey Halliday: I couldn't agree more. So much of this is local and state by state. For example, the California Environmental Justice Alliance has a great document that I've used forever and love in terms of thinking about community engagement as effective.²⁴ It's targeted toward communities and taking advantage of some of the California-specific laws that empower them.

I agree that we should use more localized resources. Although I imagine that there's some good reception, too, at the federal agency level and EPA. I imagine right now everybody wants to answer the phone for communities.

But I agree with Christie, the burden shouldn't be on the communities. If there is a desire and appetite for that,

reaching out to an EPA region or a local EJ group is a great resource.

Kristine Perry: Next question. Is there any indication of EJ cases that might be put in front of the U.S. Supreme Court that would impact or hinder this new legislation?

Stacey Halliday: There's going to be some interesting outcomes from the two affirmative action cases, with Harvard and the University of North Carolina.²⁵ There will be implications for Title VI in terms of thinking about discrimination and implementation of those laws, if that's going to impact the way that funding is distributed and how we think about benefits. It's big and thorny. I stay up at night thinking about this. I haven't completely gotten through what I think is ahead. But that's something that comes to mind in terms of what's currently before the Court. I think oral arguments already occurred, so we're just awaiting the decisions.

Christie Hicks: I think some high-level context for those who aren't as deeply embedded with EJ communities might be helpful. There was some concern within EJ organizations about Justice40 and the ways in which certain communities were or weren't going to be designated as the communities that were targeted for that. I don't think that that discussion is over. From the federal government's perspective, they are working within the confines of the U.S. Constitution and had to use race-neutral qualifications for which communities would be designated.

There's been so much civil rights work already around race-neutral versus race-conscious legislation and regulations. There are state-level equivalents for Justice40 that are dealing with these same things. I'm in Chicago, Illinois. We have what's called "equity investment-eligible communities," which is also a race-neutral categorization or a designation for certain EJ and overburdened communities.

We also have requirements for disparity studies that will begin soon. I think there are going to be equivalents for those at the federal level as well because there are exceptions within the case law—that if you can show these very specific kinds of disparities, then it is okay to use race-conscious language.

But then the cases that Stacey was just discussing have the opportunity to possibly upend all of that. It's going to be very closely entwined with that civil rights body of law as we're looking for how we're implementing these EJ provisions of the law.

Kristine Perry: Next question. Is the IRA funding the Justice40 Initiative? What is the relationship there?

23. U.S. EPA, LEGAL TOOLS TO ADVANCE ENVIRONMENTAL JUSTICE: CUMULATIVE IMPACTS ADDENDUM (2023), <https://www.epa.gov/ogc/epa-legal-tools-advance-environmental-justice>.

24. California Environmental Justice Alliance, *SB 1000 Toolkit: Planning for Healthy Communities*, <https://caleja.org/2017/09/sb-1000-toolkit-release/> (last visited June 5, 2023).

25. *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College*, No. 19-2005 (1st Cir. 2020), *petition for cert. filed*, No. 20-1199 (U.S. Feb. 25, 2021); *Students for Fair Admissions, Inc. v. University of North Carolina*, No. 21-2263 (M.D.N.C. 2021), *petition for cert. filed*, No. 21-707 (U.S. Nov. 11, 2021).

Stacey Halliday: No. It's less about funding. Justice40 is a commitment from Executive Order No. 14008 to direct 40% of benefits from climate investments to DACs. As defined by the Council on Environmental Quality (CEQ), it's currently just a tool. It seems to be the main focal point for defining those communities. As Christie mentioned, this is currently race-neutral.

With respect to the IRA, at least from my perspective of the Community Benefits Plan work that we're doing, applicants are being asked to provide metrics to demonstrate those benefits that are flowing to identified DACs. So, that's one thing. It's more about measurement of the distribution of those benefits and impacts. It's less about direct funding for the program itself. All federal funding agencies with Justice40-equivalent programs identify which programs are being tracked to reach the 40% federal family-wide goal.

The challenge here is, how do you define "benefits," how do you define "DACs," how do you do that in a way that makes sense and is defensible and lasting? The benefits conversation is one that's still evolving. I think DACs have settled into the mapping system. That's going to be challenged, but I think they're more in the conversation about how we're defining and tracking those benefits in an effective way and deciding if they're actually flowing to those DACs.

Kristine Perry: Christie, do you want to jump in on the definition-of-benefits conversation? How do we define that or how do you see it being defined in your work?

Christie Hicks: It's a great question because it's one that we are still figuring out. There's likely not a one-size-fits-all approach depending on what the particular program or investment is. One example that I can give from my work is that in 2021, Illinois passed the Climate and Equitable Jobs Act.²⁶ It included a Justice40-equivalent requirement, particularly for electric distribution grid planning, that at least 40% of the benefits of new grid investments must accrue to, as I mentioned, equity investment-eligible communities.

We took a step back and took on what I called the "community experts project," or "experts next door," with the hope that we would have lived-experience testimony that would help shape how the decisionmakers were deciding what it meant for the benefits to be accruing to the communities that they were intended to reach. Over the course of the past year and a half or so, I have worked with a number of community representatives to introduce their lived-experience and their community-representative testimony at our state public utility commission.

One particular example that I think is helpful, because it's really tangible, is that there was a community member who talked about the house that she lives in today. She's a sexagenarian who lives in the same house where she grew up. She talked about the fact that she grew up in that home

and in that community. It didn't require air-conditioning. There were a lot of services around. It was a really great place to live and to thrive.

There have been a lot of changes over the 60 years that she's lived there, including that her area has become an urban heat island. There is far less tree canopy. There's far more pollution. Over the course of her 60 years, there have been industrial facilities that have gone in and come back out again. And there's been a lot of disinvestment in her particular community.

She talked about how that impacts her daily life, and the other cumulative burdens that she and her community deal with. We had a technical expert who evaluated some of the data that we could crunch to show what these disparities are. One of the things that we looked into was how frequently she and her community experienced electric service outages, because of the multitude of ways in which that impacts their quality of life, and discovered a couple of examples that are particularly jarring.

In Chicago, equity investment-eligible communities experience outages over 80% more frequently than non-equity investment-eligible communities within the city. They are almost 12 times more likely to have four or more outages in a year. And they are four times-plus more likely to have outages that last 12 hours or longer.

The investment that the energy companies proposed to address that was to improve their territory-wide service. Because of the testimony that this community member had given and the data she was able to help our technical expert evaluate, the decisionmakers said no; they said what we really need to look at here is the disparity, not just what improvements can be made, but whether we're closing the gap.

It was a very different way of looking at the problem. It's intentionally looking at disparities when we're thinking about Justice40 investments and how those benefits are accruing—it's that a benefit isn't necessarily just, okay, \$1 million goes to this community. How is that \$1 million spent? Does that \$1 million address the disparity? Or is it just going to be \$1 million that goes to some of the same kinds of investments that companies or the government would've been making otherwise? That's a long-winded way of getting to that point, but I think having a concrete example is helpful.

Kristine Perry: Another question that has to do with the grants. How do you see the role of scientists and engineers, and academia and industry, in working with community lawyers to take advantage of these grants?

Stacey Halliday: The projects I'm working on tend to be pretty significant. There's a lot of funding. There's creation of sort of hub-focused activities that try to put together clean energy generation with end-users. So, you get that whole life cycle, including engagement of communities.

One of the perks of doing this work and being in environmental law is that you get to work with scientists and technical experts so much of the time. That really helps

26. Climate and Equitable Jobs Act, Pub. Act 102-0662 (Ill. 2021).

with thinking about a lot of these applicants who are being asked to understand what the impacts of their work are in a very broad-based way that Christie characterized. Having technical experts available to help think through alternatives, to think through mitigation strategies, to really understand the whole scope and capability of whatever that technology is, I think, is really helpful.

There are so many emerging technologies right now that tend to mitigate any adverse impacts and also more probably achieve clean energy solutions. Having those scientists on hand with the lawyers and with communities can really help to understand the impacts, how we increase benefits, as well as how to mitigate any harm, in a way that lawyers certainly can't.

Kristine Perry: Christie, I know that you work with a large coalition of experts. Does this involve engineers, scientists, and nonlegal experts?

Christie Hicks: Yes, all of the above. One thing that has been really impactful in, again, thinking about this foundation, our ways of working, is having community listening sessions. Having the technical experts come and participate and having a dual role of both providing digestible translated information of what is happening here—why it matters to a community and what opportunities there are for them to be engaged—and then just listening. I mean that very deeply for myself as well.

We do not know what's best for a community. It's important to provide information so that they can make those decisions for themselves, and then have a really authentic feedback loop. You know, the priorities that you have just lifted up, translating that to what we are working on right now, and what do you think of that? And making it a really iterative process has been transformative in the work. And fun, too—I mean the opportunity to have engineers and economists sit down with community members and talk about each of our experiences. The relational aspect of it is just as important.

Kristine Perry: This one is for Stacey. Do we expect that the Office of Environmental Justice and External Civil Rights and IRA funding will overlap with DOE grant funding for industry commitments laid out in their Justice40 Initiative plan?

Stacey Halliday: That's such an interesting question. I think agency alignment is something that is hard right now because there is so much pressure to deliver and so much more accountability on agencies to show their EJ chops. Justice40 puts a finer point on that with actually documenting and showing where the money is going, and showing that the investment furthers those goals.

I do think there will be some necessary overlap. A lot of these projects are looking at the same identified DACs that are feasible and make sense with whatever the targeted goal of the funding is. There will be some overlap by virtue of that. There's a universe of DACs, and I do feel that they're focusing on them.

However, with EPA funding, there is more focus on community technical assistance and capacity-building, whereas the DOE funding is more focused on particular energy solutions with a substantial community engagement component as part of those projects. I think they're targeted in different ways, but will ultimately have some overlap just by virtue of shared use of CEQ-defined DACs.

Kristine Perry: Are there public resources that you would recommend that show the allocation of funds and their direct impacts to address disparities within EJ communities?

Christie Hicks: When the IRA was passed, the White House had a specific list of which programs were intended to address the environmental injustices, and I know there are different organizations that are tracking the implementation of different parts of that. It's probably somewhat dependent on specifically which kinds of programs someone is interested in. There's probably a trade association that has some kind of tracker going on their website that can be searched.²⁷

Stacey Halliday: I'm sure there are all kind of tools. I think it's pretty early in the process with the IRA and for Justice40. There's probably some light reluctance to get everything off the ground. But in a lot of those programs, the grants have timelines that go years. The first stage is usually the planning stage. Seeing that play out is probably going to be a couple of years from now. It will be interesting to see a changing political landscape and those programs play out in real time.

But there are some agencies that are trying to make public how their investments in EJ are benefiting communities through their report-outs on EJ progress. EPA releases annual EJ progress reports, which list EJ investments, enforcement, and the like.²⁸

DOE has the Energy Justice Dashboard,²⁹ which identifies investments that are made in DACs. It tells you what the grant number is and what the actual project was, but it's not granular. With my amateur use of the dashboard, all I can see is the total amount in the project itself. I'm sure there are ways to drill down further on that. But they probably have the best resource I could think of right now about distributed funding, and where it's going, and for what purpose.

Kristine Perry: I think it's important, Christie, to clarify what you said about the distinction between traditional authorities with letters after their names and the need for different authorities. Can you expand on what you mean

27. EDF and the Sabin Center for Climate Change Law have since released IRATracker.org, which includes several filters and search functions that allow stakeholders to track steps taken by federal agencies to implement the climate-change related provisions of the IRA.

28. U.S. EPA, *Environmental Justice in Enforcement and Compliance Assurance*, <https://www.epa.gov/enforcement/environmental-justice-enforcement-and-compliance-assurance> (last updated Nov. 28, 2022).

29. DOE, *Energy Justice Dashboard (BETA)*, <https://www.energy.gov/diversity/energy-justice-dashboard-beta> (last visited May 16, 2023).

in defining “traditional” and who should also be considered authorities?

Christie Hicks: Yes. With the question a few minutes ago, I defined traditional authorities as engineers, economists, Ph.D.s of all sorts, and a lot of the stakeholders who have been playing in these spaces for many years, and thinking about things in really similar ways. For example, in so much of this work, there are cost-benefit analyses or cost-effectiveness tests. Those have been happening in similar ways for a really long time.

But community members have information. They have expertise that can't be shown on a map. It doesn't appear in any kind of a data set. They have the lived experience and the expertise on the way that their community has evolved, and on what their community needs, and what their priorities are that aren't going to be understood or reflected in traditional data.

In my view, thinking about stories of community expertise is an important new way of working. There are so many representatives of community-based organizations, as I was saying earlier, who have been so deeply entrenched in this work for decades, before any of this legislation was passed. By simply supporting their priorities through the expertise and the resources that we have, we can promote that expertise and work directly with community members and their representatives within their organizations and use our legal expertise to define them as the experts.

There is an important place for lay testimony and lay comments in a lot of these spaces as well. But particularly, once you get to the legal phase of things, decisionmakers are oftentimes bound by the record of the particular proceeding or decision that they are looking at right then. If that community expertise isn't a part of the legal record, then there's only so much that the decisionmaker can do.

Looking at who are the ultimate decisionmakers going to be and what is the body of evidence or data on which they'll be making their decision and thinking of some out-of-the-box ways that community representatives and community perspectives can be represented in the materials on which they will make their decisions is, I think, a challenge for all of us who are blessed to work in this space. It's something that our agencies and our implementers have to be thinking about as well.

Kristine Perry: There's time for one more question before we go to closing remarks. For both of you, how have you seen these regulations and legislation incorporated into direct action in community groups and industries?

Stacey Halliday: I've seen a whole host of things in the past couple of years, especially from clients who are waiting for an opportunity to have a really strong business case for their boards and for their C-suite because EJ is a material issue for a company in a long-term value generation. Now that there's a clear directive from the federal government with commitment on enforcement and on funding, there really is that case and a driver to do things like establish a public base in EJ policy.

Doing that kind of thing is no small feat, especially if it's moving the aircraft carrier for a large company and especially with legacy issues. You have to come together and get stakeholder buy-in, and learn what EJ is, and how to engage with communities, and how to do that more thoughtfully. How do we elevate the voice of the community? Not assume what they need, but actually listen more. How do we identify the communities that we're impacting, and how do we think about impacts?

That's been a really interesting journey. That's the biggest change I've seen so far. And I've been surprised that so much of this is driven by that sense of competition for this funding. It underscores a big challenge that we see with the federal government wrestling with particularly balancing climate and EJ goals.

I think some of the questions we've had are very insightful. They point out this tension. Things like using carbon capture, and nuclear energy, and how groups like the White House Environmental Justice Advisory Council have highlighted they're not something desired by particular communities. But I still somewhat agree that they're necessary, arguably for achieving some of the climate goals that the Administration wants to achieve. That's kind of an interesting tension that we're seeing wrestled out of this focus on EJ.

Christie Hicks: I recently heard that tension described as climate tunnel vision versus EJ, which I thought was really apropos. I agree. I think a lot of the ways in which I'm seeing, particularly the 2022 legislation reflecting EJ priorities, is in comment processes about how different decisions are going to be made, which is great because that is the foundation on which these things will be based.

Some of those comment processes have already come and gone. I have seen a number of federal agencies and state agencies that are doing parallel work as well and have been hosting listening sessions, which I think is so important. And they have been very responsive when there have been concerns lifted up about whether they need to extend processes or whether they need to make their processes more inclusive.

I know, for example, there has been an ongoing Office of Information and Regulatory Affairs process where they're looking at recommendations across the board for federal agencies.³⁰ If you haven't looked into that, it's one that I think is going to have some far-reaching impacts. It's another example of where we don't need to reinvent the wheel across all the agencies, but there is also probably not a one-size-fits-all approach.

There are a lot of great best practices for meaningful community engagement that we can be looking at across the board. I would say right now the bulk of it is happening in comment processes, but there are grants that are going

30. White House, *Broadening Public Engagement in the Federal Regulatory Process*, <https://www.whitehouse.gov/omb/information-regulatory-affairs/broadening-public-engagement-in-the-federal-regulatory-process/> (last visited June 5, 2023).

out the door what feels like every week. Things are moving really, really fast.

Kristine Perry: I do want to leave enough time for closing comments. Stacey, we'll start with you, if there's anything you'd like to add or reflect on.

Stacey Halliday: I appreciate ELI putting such a focus on this important, incredibly dynamic area, and also directing resources and support through the Pro Bono Clearinghouse. My work may be focused on industry, but I think it's really important for a lot of the reasons that my co-panelists underscored. When communities have those counseling resources, they are better equipped to take advantage of these new opportunities, effectively elevate their voices, and stay on top of new developments that might benefit them. It's a hard area to capture and hold on to, even if somebody does this 24 hours a day, with all the extra resources that we have in our practice.

Christie Hicks: I'll say it again, even though I'm sure that it's redundant to what we've already been talking about: addressing the environmental racism concerns that the legislation and regulations are intended to address requires addressing the historic exclusion of frontline organizations from those decisionmaking processes. The production and distribution of energy and of all of the different ways in which these new investments are going to be touching people's lives have environmental consequences, economic consequences, and health consequences.

We have to think about all of the intersectional impacts—all of the intersectional benefits and all of the intersectional burdens—of each of those. Meaningful representation in the decisionmaking process is about having a seat at the table, but it is also about having the knowledge and the resources to participate. Only with that meaningful representation will decisionmakers be able to equitably distribute the benefits and the burdens of all of these new programs.