



July 31, 2024

To: Office of Energy Justice and Equity, Department of Energy
Re: Request for Information Related to the Department of Energy's Environmental Justice Strategic Plan, Docket DOE-2024-0018

The Institute for Policy Integrity at New York University School of Law (Policy Integrity)¹ respectfully submits the following comments on the Request for Information Related to the Department of Energy's (DOE's) Environmental Justice Strategic Plan (EJ Strategic Plan RFI).² Policy Integrity is a non-partisan think tank dedicated to improving the quality of government decisionmaking through advocacy and scholarship in the fields of administrative law, economics, and public policy.

DOE's EJ Strategic Plan RFI seeks feedback on its draft environmental justice strategic goals and what actions it should undertake to advance environmental justice, among other topics. Policy Integrity offers the following recommendation:

- **DOE's EJ Strategic Plan should include objectives under Goals 1 and 3 to develop and issue agency-wide guidance on how to consider and analyze environmental justice concerns in their regulatory and policy actions.** DOE is currently engaged in myriad regulatory, permitting, licensing, and policy activities in the energy field that affect environmental justice communities. Without clear and consistent direction to staff in the form of agency-wide guidance, it will be difficult for DOE to develop the agency culture, analytical tools, and harmonized approaches that it will need to meet its stated goals in the strategic plan. The objectives should also include specific deadlines to complete the agency-wide guidance.

Background

On October 31, 2023, DOE changed the name of the Office of Economic Impact and Diversity to the Office of Energy Justice and Equity (OEJE) to "better reflect DOE's commitment to energy justice and tackling the climate crisis through equity-centered solutions."³ OEJE's mission states that the office "develops and executes Department-wide policies to implement applicable legislation and Executive Orders that strengthen diversity and inclusion goals affecting equal

¹ This document does not purport to represent the views, if any, of New York University School of Law.

² 89 Fed. Reg. 51,880 (June 20, 2024).

³ *DOE's Office of Economic Impact and Diversity Changes Its Name to Office of Energy Justice and Equity* (October 31, 2023), available online at <https://www.energy.gov/justice/articles/does-office-economic-impact-and-diversity-changes-its-name-office-energy-justice>.

employment opportunities, small and disadvantaged businesses, minority educational institutions, and historically under-represented communities.”⁴ The OEJE created the Office of Energy Justice, Policy, and Analysis (OEJPA) to conduct “policy analysis, research and evaluation, technical assistance. . .to advance equity for racial and ethnic minorities and other disadvantaged communities and individuals in accordance with Public Law 95-619 and Executive Orders 12898, 13985 and 14008.”⁵ OEJPA provides a number of tools and other research for DOE staff through its Policy and Analysis divisions.⁶

Presidential executive orders call on DOE to consider the impacts of their decisions on environmental justice communities and to integrate those impacts into their regulatory and programmatic determinations. Under Executive Order 12,898, agencies “shall make achieving environmental justice part of its mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minority populations and low-income populations.”⁷

Executive Order 14,096 directs agencies to “submit to the Chair of CEQ and make available to the public online an Environmental Justice Strategic Plan” that “sets forth the agency’s vision, goals, priority actions, and metrics to address and advance environmental justice.”⁸ Further, the Order states that Environmental Justice Strategic Plan “shall . . . identify and address opportunities through regulations, policies, permits, or other means to improve accountability and compliance with any statute the agency administers that affects the health and environment of communities with environmental justice concerns.”⁹ Agencies must complete the EJ Strategic Plan within 18 months of the issuance of the Order and must update the plan every four years.¹⁰

Executive Order 14,096 also calls on agencies to “advance environmental justice for all . . . by preventing pollution, addressing climate change and its effects, and working to clean up legacy pollution that is harming human health and the environment.”¹¹ Moreover, it adds that each agency’s environmental justice strategic plan should set “priority actions . . . to address and advance environmental justice . . . including through the identification of . . . guidance documents.”¹²

To date, DOE has not taken steps to identify the need for or issue any **agency-wide guidance** to specifically address and advance environmental justice. Although OEJPA offers tools and research that could support the consideration of environmental justice concerns in DOE decisionmaking, those materials do not offer a clear process for agency staff engaged in various

⁴ See DOE website at <https://www.energy.gov/justice/mission>.

⁵ See DOE website at <https://www.energy.gov/justice/office-energy-justice-policy-and-analysis>.

⁶ See DOE website at <https://www.energy.gov/justice/policy> and <https://www.energy.gov/justice/analysis>.

⁷ Exec. Ord. No. 12,898 § 1-101, 59 Fed. Reg. 7629 (Feb. 11, 1994). See also Exec. Ord. No. 14,008 § 219, 86 Fed. Reg. 7619 (Feb. 1, 2021) calling on agencies to “address the disproportionately high and adverse human health, environmental, climate-related and other cumulative impacts on disadvantaged communities.”

⁸ Exec. Ord. No. 14,096 § 4(b), 88 Fed. Reg. 25,251, 25,256 (April 26, 2023).

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.* § 1.

¹² *Id.* § 4(b).

forms of policy and regulatory actions on how to comprehensively consider environmental justice in decisionmaking.

Recommendation

- **DOE’s EJ Strategic Plan should include objectives under Goals 1 and 3 to draft and adopt agency-wide guidance that establishes a framework to perform robust environmental justice analyses (EJ Analysis) in decisionmaking following best practices from other agencies.**

Proposed Goals 1 and 3 of DOE’s EJ Strategic Plan RFI include “building the technical capacity of DOE staff” and “recognizing and repairing harms to communities and the environment.”¹³ However, currently there are no specific DOE guidance documents that establish a comprehensive agency-wide framework for how DOE staff should consider environmental justice in its decisionmaking to accomplish these goals. And none of the past DOE EJ strategic plans include any goals or objectives establishing such a framework.¹⁴

Adopting an agency-wide guidance is critically important to shaping analytic expectations and clarifying the technical approaches and methods that staff should use to evaluate environmental justice concerns for regulatory actions (i.e., EJ analysis). Guidance on these issues provide staff with consistent, systematic, and scientifically-supported approaches, which will result in more transparent and legally-defensible outcomes. Guidance can include definitions of key terms that intersect with environmental justice (e.g., vulnerability, susceptibility, community, adverse harm, cumulative impact, etc.) and can spell out the steps that an agency should take to meaningfully consider and analyze environmental justice concerns in its decisionmaking using best available peer-reviewed science and methodologies. Guidance also provides reasonable expectations for the public and regulated entities on how the agency considers environmental justice concerns in its decisionmaking, thus boosting meaningful engagement with stakeholders and recognition of harms for communities. Moreover, it will be difficult for DOE to “recognize and repair harms to communities and the environment,” if there is not an agency-wide robust analytical framework (1) to determine if there is likely harm in the first place, and (2) then to identify and evaluate what actions can be taken to repair the harms.

- **There is a strong need for DOE guidance on how to consider environmental justice concerns in decisionmaking.**

DOE is engaged in important regulatory, permitting, licensing, and policy activities in the energy field that affect environmental justice communities. For example, LNG production and export facilities, as well as other infrastructure projects, are frequently proposed and located in or near environmental justice communities, which are primarily low-income communities, communities

¹³ Notice of Request for Information Related to the Department of Energy's Environmental Justice Strategic Plan, 89 FR 51880, 51881 (June 20, 2024) (Docket No. DOE-HQ-2024-0018).

¹⁴ See *U.S. Department of Energy Environmental Justice Strategy*, DOE/LM-1472 (2017) at 10; *Department of Energy 2019 Environmental Justice Second Five-Year Implementation Plan*, DOE/LM-1485 (2019) at 3.

of color, and/or indigenous and tribal communities.¹⁵ These communities bear the brunt of the public health and environmental impacts of gas production and liquefaction for export, often experiencing disproportionate cumulative effects of pollution, which leads to myriad serious health challenges such as asthma, lung and cardiovascular diseases, cancer, preterm births, and premature deaths.¹⁶

Furthermore, environmental justice communities, such as in the Gulf Coast where many existing or pending LNG export facilities are located,¹⁷ experience many of the initial and most severe consequences of extreme weather events linked to climate change, such as hurricanes and floods, which jeopardize community safety and resilience.¹⁸ LNG facilities may also harm local fisheries¹⁹ and ecologies,²⁰ and environmental justice communities may experience disproportionate welfare losses due to impacts on commercial fisheries, subsistence fishing opportunities, recreational opportunities tied to affected aquatic or terrestrial ecosystems, and compromised drinking water or irrigation supplies.²¹

Despite these significant environmental justice implications, DOE has not closely studied the environmental justice impacts of the LNG export program. DOE cannot fully assess whether LNG exports are in the public interest²² without analyzing their environmental justice consequences. Yet, existing DOE research and tools do not provide a clear framework for conducting the level of analysis required to fully consider environmental justice in decisionmaking in the LNG context.

Oversight of LNG production is just one of DOE’s many critical policy areas with understudied environmental justice impacts. Agency-wide guidance to properly analyze and consider EJ effects would ensure that DOE develops and follows a harmonized and efficient approach to addressing EJ across its many policy spheres.

- **DOE should look to other federal agencies for insight on adopting guidance on how to consider environmental justice in it decisionmaking.**

¹⁵ See Aaron B. Flores et al., *Environmental Injustice in the Disaster Cycle: Hurricane Harvey and the Texas Gulf Coast*, 14 ENV’T JUSTICE 146 (2021).

¹⁶ See Timothy Q. Donaghy et al., *Fossil Fuel Racism in the United States: How Phasing Out Coal, Oil, and Gas Can Protect Communities*, 100 ENERGY RSCH. & SOC. SCI. 103,104 (2023).

¹⁷ LAURA A. FIGUEROA & SARAH LADIN, INST. FOR POL’Y INTEGRITY, THE PUBLIC INTEREST REVIEW FOR LNG-RELATED AUTHORIZATIONS vi (2022).

¹⁸ See ENV’T PROT. AGENCY, CLIMATE CHANGE AND SOCIAL VULNERABILITY IN THE UNITED STATES (2021).

¹⁹ See, e.g., Xander Peters, *LNG Production Comes with a Price, Gulf Communities Warm*, Env’t Health News (Jan. 24, 2024), <https://www.ehn.org/lng-environmental-justice-2666656588.html>.

²⁰ Oil and Gas, U.S. Fish & Wildlife Serv. (last visited July 26, 2024), <https://perma.cc/87GC-JLXE>.

²¹ See Policy Integrity, Comments to EPA on Secondary National Ambient Air Quality Standards for Oxides of Nitrogen, Oxides of Sulfur, and Particulate Matter (June 14, 2024), https://policyintegrity.org/documents/Institute_for_Policy_Integrity_Comments_on_Review_of_Secondary_NAAQ_S_2024.06.14.pdf

²² Under 15 U.S.C. § 717b(a), DOE is mandated to balance a wide range of factors under the statutory “public interest” standard when considering the siting, construction, expansion, or operation of an LNG terminal.

Guidance developed by other federal agencies offers insights on how DOE can conduct a robust EJ analysis. A good starting point for DOE would be replicating the analytical framework that the Environmental Protection Agency (EPA) articulated in its *Technical Guidance for Assessing Environmental Justice in Regulatory Analysis* (EJ Technical Guidance), which is currently being updated through a draft revision, and its *Guidance on Considering Environmental Justice During the Development of an Action*.²³ EPA developed guidance to help analysts evaluate potential environmental justice concerns associated with regulatory actions, based on EPA's longstanding expertise and experience with environmental and environmental justice issues. Indeed, EPA has adopted an extensive catalogue²⁴ of technical guidance and tools related to evaluating environmental justice concerns within the regulatory process.

The EJ Technical Guidance, for example, provides detailed recommendations on how to analyze environmental justice in federal actions. The guidance recommends that analysts assess whether environmental justice concerns exist before a proposed action and whether such concerns are exacerbated or mitigated for each action alternative under consideration. Specifically, the guidance provides detailed recommendations for analysts on performing the following steps of an environmental justice analysis²⁵:

- Defining and identifying environmental justice communities
- Meaningfully involving environmental justice communities
- Identifying environmental justice concern
- Analyzing environmental justice concerns by performing a baseline analysis, examining the impact of the action on population groups, and analyzing whether environmental justice concerns are mitigated, exacerbated, or unchanged by each federal action option
- Performing proximity-based analysis
- Performing comparison population group analysis to determine disproportionality
- Considering multiple stressors and cumulative effects
- Assessing vulnerability to climate change
- Assessing the economic distribution of costs and benefits
- Identifying and addressing key data, analytical and methodological gaps

DOE should follow the best practices laid out in EPA's guidance to ensure its compliance with the environmental justice executive orders.

- **The objectives to create agency-wide guidance on environmental justice in decisionmaking under Goals 1 and 3 of the DOE EJ Strategic Plan should also include specific deadlines.**

²³ Env't Prot. Agency, *Technical Guidance for Assessing Environmental Justice in Regulatory Analysis*, EPA-HQ-OW-2023-0222-213 (2016); Env't Prot. Agency, *Draft Revision of Technical Guidance for Assessing Environmental Justice in Regulatory Analysis*, EPA-HQ-OA-2013-0320 (Nov. 15, 2023). The draft revision reflects advancements in the state of the science, new peer-reviewed guidance documents, and priorities and directions related to the conduct of environmental justice analysis, including Executive Order 14096. Env't Prot. Agency, *Guidance on Considering Environmental Justice During the Development of an Action* (May 2015). Available at <https://www.epa.gov/sites/default/files/2015-06/documents/considering-ej-in-rulemaking-guide-final.pdf>.

²⁴ See e.g., <https://www.epa.gov/environmentaljustice/ej-2020-resources>.

²⁵ EPA EJ Technical Guidance, *supra* note 23.

EPA adopted its EJ Technical Guidance to meet the goals it set in their 2014 EJ Strategic Plan, which stated that EPA would create and finalize guidance on considering environmental justice during the development of an action, as well as develop a technical guidance on how to conduct environmental justice assessments of rulemaking activities by certain dates.²⁶ EPA met those deadlines. DOE should replicate EPA's approach by setting deadlines to create and adopt the agency-wide environmental justice in decisionmaking guidance.

Sincerely,

Al Huang, Environmental Justice Director

²⁶ EPA, Plan EJ 2014 I, ii (2014), *available at* <https://nepis.epa.gov/Exe/ZyPDF.cgi/P100DFCQ.PDF?Dockey=P100DFCQ.PDF>.