

Draft Plan Illuminates EPA's Enviro Justice, Climate Priorities

By **Michael Leslie, Ilana Saltzbart and Granta Nakayama**

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The U.S. Environmental Protection Agency's draft strategic plan provides the key to understanding a number of the agency's recent initiatives, including an enhanced focus on environmental justice communities, greater oversight of regulatory programs, forging state and local partnerships to enforce environmental laws, and implementing climate adaptation and environmental justice enforcement initiatives.

On Oct. 1, the EPA issued its draft strategic plan for fiscal years 2022-2026.[1] The plan communicates the EPA's vision, priorities and strategies for accomplishing its mission over the next four years, and sets out the agency's new climate change and environmental justice strategic goals. It emphasizes that these two overarching principles will be embedded in all EPA work.

The draft strategic plan explains that the EPA is renewing its commitment to the three principles articulated by its first administrator, William Ruckelshaus, to "follow the science, follow the law, and be transparent." In addition to those goals, the agency is adding a "fourth foundational principle: advance justice and equity." [2]

The plan also outlines four cross-agency strategies emphasizing essential ways to achieve the EPA's strategic goals and objectives, and states that "[e]ngaging with our Tribal, federal, state, and local government partners and our many stakeholders is an integral part of strategic planning." [3]

A prime example of this cross-agency strategy is the EPA's Sept. 10 memorandum of understanding with the California Environmental Protection Agency to strengthen environmental enforcement in communities overburdened by pollution. [4]

While the EPA describes this MOU as the first of its kind, its press release states that the agency intends the memorandum to serve as a model for other EPA-state partnerships on environmental justice. This conforms with the EPA's key strategic goal of increasing cross-agency partnerships to coordinate enforcement of environmental laws. As a result, industry should expect more states to sign on to similar MOUs.



Michael Leslie



Ilana Saltzbart



Granta Nakayama

In light of the EPA's new draft strategic plan, and its cross-agency partnerships such as the MOU with CalEPA, facilities operating in environmental justice areas can expect more inspections, including joint federal-state inspections, and enhanced enforcement activities. These activities are likely to dovetail with the EPA's national compliance initiatives, meaning an uptick in investigations and enforcement actions related to the Clean Air Act air toxics and accidental release prevention programs, among others.

The EPA's plan also combines two of the Biden administration's whole-of-government policy initiatives — environmental justice and climate change — to leverage the agency's federal enforcement tools to require companies to enhance facility infrastructure to address releases to air, water and land from extreme weather events, especially in light of reported environmental releases following Hurricane Ida and other recent storms.

Key Objectives of the EPA'S Draft Strategic Plan

The EPA's draft strategic plan sets out the agency's key goals for fiscal years 2022-2026, including:

- Implementing cross-agency strategies to strengthen state, local and tribal partnerships;
- Tackling the climate crisis;
- Taking decisive action to advance environmental justice and civil rights;
- Enforcing environmental laws and ensuring compliance;
- Ensuring clean air, clean water and safe drinking water for all communities;
- Cleaning up and revitalizing communities; and
- Ensuring the safety of chemicals for people and the environment.

These goals are designed to implement the agency's four key strategic principles, as set out in the plan:

- Ensuring scientific integrity and science-based decision making;
- Considering the health of children and other vulnerable populations;
- Advancing the EPA's organizational excellence and workforce equity; and
- Strengthening tribal, state and local partnerships and enhancing environmental justice engagement.

Emphasizing the importance of its new cross-agency strategy, the draft strategic plan explains:

State and local governments provide the majority of on-the-ground environmental protection in this country, implementing federal environmental laws as well as their own. In Indian country EPA directly implements the majority of federal programs. ... Environmental outcomes are best achieved through collaborative and effective partnerships across all levels of government, successful oversight of federally delegated programs, and robust engagement with non-governmental organizations, national and

community groups, industry, and the public. ... As a result, EPA will advance durable policies to its most pressing challenges and ensure the equitable protection of all communities, including those who have historically been underserved and overburdened.[5]

Elements of the CalEPA Environmental Justice Enforcement MOU

The environmental justice enforcement MOU between the EPA and CalEPA provides a framework for collaborative activities related to inspections, compliance assistance, enforcement, communication, community engagement and training in overburdened communities.

The MOU states that the agencies "intend to use data to identify overburdened communities and the environmental and climate harms that affect them, and to prioritize ... enforcement and compliance work accordingly." [6] Key features of the MOU include:

- Strategic targeting of joint inspections in overburdened communities "for the purpose of reducing pollution burdens, increasing environmental compliance, and improving public health outcomes in these communities";[7]
- Sharing and jointly developing metrics for determining pollution burdens and vulnerability;
- Coordinating enforcement efforts, including joint judicial enforcement actions in overburdened communities;
- Early engagement with overburdened communities "to ensure that ... targeting of enforcement resources, development of enforcement responses and remedies, and compliance-related activities are fully informed by the ... experiences of these communities";[8] and
- Sharing of privileged information between the EPA and CalEPA.

Importantly, the MOU seems to reflect a departure from the Trump administration EPA's approach of cooperative federalism in enforcement activities, potentially signaling that the EPA's Office of Enforcement and Compliance Assurance plans to rescind the July 11, 2019, policy addressing the role of the EPA in state enforcement activities. That policy had the practical effect of sidelining much of the EPA's civil investigation and enforcement activities during the Trump administration.

Enhanced Federal Enforcement in Environmental Justice Communities

The environmental justice enforcement MOU and the EPA's draft strategic plan provide better insight into how the agency intends to implement environmental justice concepts in the enforcement arena.

In April, June and July, the acting assistant administrator of the OECA issued a series of environmental justice-related policies in the context of civil and criminal enforcement, as part of the EPA's Environmental Justice Enforcement and Compliance Assurance Initiative.[9] Collectively, these policies express the agency's intention to leverage its enforcement authorities to help advance the protection of communities disproportionately affected by pollution.[10]

The MOU begins to flesh out how the OECA will leverage its enforcement authorities, in cooperation with state partners, to obtain tangible environmental benefits in overburdened communities. As discussed above, the EPA has indicated that this MOU with CalEPA will be the first in a series of federal-

state partnerships, stating that it will "serve as a model for other EPA and state partnerships on environmental justice."[11]

This joint enforcement focus in environmental justice communities is therefore expected to expand and continue. In fact, this initiative is already expanding into EPA-local partnerships, such as the recent announcement of a landmark EPA partnership with the mayors of 40 Mississippi River cities to tackle plastic pollution.[12]

The EPA's draft strategic plan further explains how the agency will approach environmental enforcement:

EPA will focus federal enforcement resources on the most serious environmental problems where noncompliance with environmental statutes and regulations is a significant contributing factor and where federal enforcement can have a significant impact on the nation's air, water, and land. This work will include targeting and screening to prioritize inspections in communities facing substantial burdens from environmental noncompliance. ... EPA will seek to increase inspections, prioritize enforcement cases, identify remedies with tangible benefits for impacted communities, and increase engagement with communities about enforcement cases.[13]

Regulatory Programs Likely to Have Enhanced Federal Enforcement Oversight

The EPA is expected to focus its environmental justice-related enforcement activities in programmatic areas already identified as warranting heightened federal oversight — the agency's National Compliance Initiatives.[14]

Facilities located in environmental justice communities that emit hazardous air pollutants and/or volatile organic compounds should expect increased federal inspections and oversight. This includes companies engaged in energy extraction and related activities, refineries, and chemical and petrochemical manufacturing, among many other industrial operations.

In addition, there has been a marked uptick in EPA enforcement of the Clean Air Act risk management plan program and general duty clause requirements — both of which are designed to minimize accidental releases of chemicals at facilities, and to ensure that hazardous chemical substances are managed safely.

In fact, in September, EPA Region 9 announced at least five settlements resolving alleged violations of the Clean Air Act risk management and general duty clause programs.[15]

In addition to Clean Air Act enforcement, the EPA's draft strategic plan sets out the agency's intention to increase its enforcement activities in the areas of safe drinking water,[16] hazardous waste,[17] chemical regulation and water pollution.

The plan also expresses the EPA's aim to increase environmental justice scrutiny of the permitting of new and existing facilities, environmental impact analysis under the National Environmental Policy Act,[18] and remediation and redevelopment of sites under the Comprehensive Environmental Response, Compensation and Liability Act — also known as the Superfund law — and the Resource Conservation and Recovery Act.[19]

On the Horizon: A Climate Adaptation Environmental Justice Enforcement Initiative

A key objective in the EPA's draft strategic plan is to "accelerate resilience and adaptation to climate change impacts." The plan states the agency's intention to "ensure its programs, policies, rulemaking processes, enforcement and compliance assurance activities, and operations consider the current and future impacts of climate change and how those impacts will disproportionately affect overburdened and underserved communities," including "[t]hrough adaptation planning and implementation activities." [20]

The EPA's plan states that the agency intends to:

implement 19 Climate Adaptation Implementation Plans developed by EPA programs and regions to align with and advance the five priorities in the 2021 EPA Adaptation Action Plan. Program and regional plans will build on progress to date and identify actions that integrate climate adaptation into remedies, permits, infrastructure investments, enforcement and compliance assistance, grants, loans, technical assistance, and operations. [21]

For example, in the wake of recent large hurricanes, facilities located in environmental justice communities nationwide could face novel enforcement inquiries related to the robustness of facility infrastructure, to prevent releases to air, water and land arising from extreme weather events. As part of its relief efforts following Hurricane Ida, the EPA deployed state-of-the-art technology to identify and monitor such releases. [22]

This month, the EPA released an extensive peer-reviewed report titled "Climate Change and Vulnerability in the United States: A Focus on Six Impacts." [23] The report's executive summary notes: "Many studies have discussed climate change impacts on socially vulnerable populations, but few have quantified disproportionate risks to socially vulnerable groups across multiple impacts and levels of global warming." [24]

The report analyzes the degree to which four socially vulnerable populations — defined based on income, educational attainment, race and ethnicity, and age — may be more exposed to the highest impacts of climate change in six categories:

- Air quality and health;
- Extreme temperature and health;
- Extreme temperature and labor;
- Coastal flooding and traffic;
- Coastal flooding and property; and
- Inland flooding and property.

The key findings of this report include:

- Of the four socially vulnerable groups examined, minorities are most likely to currently live in areas where the analyses project the highest levels of climate change impacts with 2 degrees Celsius of global warming or 50 centimeters of global sea level rise.
- Minorities, individuals with lower income and individuals with lower educational attainment are at increased risk of ambient air pollution exposure and health effects related to that exposure. Race, in particular, plays a significant role in determining one's risk of exposure to air pollution, even after controlling for other socioeconomic and demographic factors.

- Individuals in these socially vulnerable groups are approximately 15% more likely to live in areas with the highest projected increases in childhood asthma diagnoses due to climate-driven increases in particulate air pollution, and in areas where the highest percentage of land is projected to be inundated due to sea level rise.
- With higher levels of global warming and sea level rise, the risks to socially vulnerable groups are projected to increase.

Conclusion

In light of the findings in the EPA's climate change report, and the key policy goals in the agency's draft strategic plan, the intersection of climate change and environmental justice is likely to be the next front for the agency's environmental justice enforcement program.

Tackling the effects of climate change in overburdened communities brings together the two key Biden administration whole-of-government initiatives. It is important for practitioners and their clients to keep abreast of these fast-breaking developments, as the new emphasis and focus on environmental justice and climate change are already affecting all aspects of environmental law.

Michael Leslie, Ilana Saltzbar and Granta Nakayama are partners at King & Spalding LLP.

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[1] The EPA's draft FY 2022-2026 strategic plan can be found at <https://www.epa.gov/system/files/documents/2021-10/fy-2022-2026-epa-draft-strategic-plan.pdf>. The EPA states that public review and comment, congressional consultation and tribal consultation will take place in October and November. The agency anticipates issuance of the final strategic plan in February 2022.

[2] Strategic Plan at p. 4.

[3] Strategic Plan at p. 5.

[4] The environmental justice enforcement MOU is available at https://www.kslaw.com/attachments/000/009/040/original/EPA_Cal_EPA_MOU_EJ_Enforcement.final.pdf?1631557831. The EPA's press release announcing the environmental justice enforcement MOU is available at <https://www.epa.gov/newsreleases/us-epa-calepa-launch-joint-effort-strengthen-environmental-enforcement-communities>.

[5] Strategic Plan at p. 89.

[6] MOU at p. 2.

[7] MOU at p. 3.

[8] MOU at p. 3.

[9] See <https://www.epa.gov/enforcement/environmental-justice-enforcement-and-compliance-assurance-initiative>.

[10] For instance, in the EPA's April 30, 2021, guidance, "Strengthening Enforcement in Communities with Environmental Justice Concerns," the Office of Enforcement and Compliance Assurance articulated a series of steps it would explore to advance the agency's environmental justice goals, including increased inspections of facilities in overburdened communities; resolving environmental noncompliance through remedies with tangible benefits for the community, including fence-line monitoring; and increasing engagement with communities about enforcement cases that most directly impact them. See Memorandum from Lawrence E. Starfield, Acting Asst. Admin., U.S. EPA Office of Enforcement and Compliance Assurance, Strengthening Enforcement in Communities with Environmental Justice Concerns (April 30, 2021) available at <https://www.epa.gov/sites/default/files/2021-04/documents/strengtheningenforcementincommunitieswithejconcerns.pdf>.

[11] <https://www.epa.gov/newsreleases/us-epa-calepa-launch-joint-effort-strengthen-environmental-enforcement-communities>.

[12] <https://www.epa.gov/newsreleases/epa-formalizes-local-federal-partnership-protect-mississippi-river-communities-plastic>.

[13] Strategic Plan at p. 31.

[14] See <https://www.epa.gov/enforcement/national-compliance-initiatives>.

[15] See <https://www.epa.gov/newsreleases/us-epa-penalizes-four-california-facilities-more-800000-clean-air-act-chemical-safety>; <https://www.epa.gov/newsreleases/us-epa-penalizes-hawaiian-ice-chemical-safety-violations>.

[16] <https://www.epa.gov/newsreleases/us-epa-issues-new-emergency-order-drinking-water-safety-oasis-mobile-home-park>.

[17] <https://www.epa.gov/newsreleases/epa-issues-administrative-order-consent-techtrix-inc-gadsden-alabama-properly-manage>.

[18] Strategic Plan at p. 23.

[19] Strategic Plan at p. 33.

[20] Strategic Plan at p. 14.

[21] Strategic Plan at p. 15.

[22] See <https://www.epa.gov/newsreleases/epa-expands-air-monitoring-efforts-communities-impacted-hurricane-ida>.

[23] EPA. 2021. Climate Change and Social Vulnerability in the United States: A Focus on Six Impacts. U.S.

Environmental Protection Agency, EPA 430-R-21-003, <https://www.epa.gov/cira/social-vulnerability-report>.

[24] Climate Change Report at p. 4.