

Biden's Enviro Justice Focus Brings New Business Risks

By **Erich Almonte, Michael Leslie and Cynthia Stroman** (May 10, 2023, 6:24 PM EDT)

President Joe Biden issued an executive order on April 21 titled "Revitalizing Our Nation's Commitment to Environmental Justice for All."^[1]

The order continues the administration's whole-of-government approach to environmental justice by creating a new White House Office of Environmental Justice and directing each federal agency to make it part of its mission.

In doing so, the order requires agencies to assess cumulative impacts on environmental justice communities in their National Environmental Policy Act reviews, suggesting that NEPA may play an increasingly large role in the administration's environmental justice efforts.

In addition, the order's focus on transparency toward and meaningful engagement by environmental justice communities may increase the risk of permit challenges, enforcement actions and citizen suits.

Companies operating in these communities should take note of these developments, conduct comprehensive environmental justice analysis early in their planning processes and look for opportunities to provide input as federal agencies sharpen their focus.

Whole-of-Government Approach

The White House is leading from the front, timing the publication of the order to coincide with the announcement of several other environmental justice initiatives, including the Council on Environmental Quality's publication of an environmental justice scorecard, a governmentwide assessment of federal agencies' efforts in this space.

The order creates a new White House Office of Environmental Justice in the CEQ, led by a new federal chief environmental justice officer to be appointed by the president.

The chief environmental justice officer will coordinate the development of policy to advance environmental justice, and the order directs all agencies to cooperate in the endeavor.



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The order also adds additional members to the White House Environmental Justice Interagency Council, which consists of the secretaries of Defense, State, Interior and Energy, the U.S. attorney general and several others. It directs the council to facilitate interagency collaboration on environmental justice programs and activities.

Relatedly, the order directs all federal agencies to make achieving environmental justice part of their missions. This requirement is not new. In fact, the first executive order on environmental justice, Executive Order 12898, dating back to 1994, requires the same.

But the new order goes further and directs agencies to publish an environmental justice strategic plan within 18 months and update it every four years, publicly report to the chair of the CEQ within two years about the plan's effectiveness, create performance metrics on achieving the order's goals and, critically, dedicate staff and funding to environmental justice activities.

The order also directs agencies to conduct environmental reviews under the National Environmental Policy Act in a manner that analyzes direct, indirect and cumulative effects of federal actions on environmental justice communities; considers best available science and information on any disparate health effects, including risks, arising from exposure to pollution and other environmental hazards; and provides opportunities for meaningful engagement of environmental justice communities in the NEPA process.

In addition, the order requires the U.S. Environmental Protection Agency to assess agencies' efforts in mitigating disproportionate impacts on environmental justice communities in carrying out its responsibility to review NEPA environmental impact statements under Section 309 of the Clean Air Act.

Notably, the CEQ is responsible for ensuring federal agencies comply with NEPA. The order's creation of the Office of Environmental Justice within the CEQ, and the requirement that agencies report their environmental justice plans' effectiveness to the CEQ, strongly suggests that NEPA may play an increasingly large role in the administration's environmental justice efforts.

In addition, the order forms a new Environmental Justice Subcommittee of the Office of Science and Technology Policy to implement a coordinated federal strategy to identify and address gaps in environmental justice data and publish and update a research plan with the Interagency Council.

Cumulative Impacts

The order stresses the importance of addressing cumulative impacts, or the combined effects of environmental and nonenvironmental stressors.

For example, the order introduces a new definition of environmental justice, which is broader than that of the EPA's and expressly incorporates protection from disproportionate adverse health and environmental effects and risks relating to cumulative impacts of environmental and other burdens.

It also directs agencies to analyze the cumulative effects of federal actions on environmental justice communities. Indeed, the order references cumulative impacts or effects nine times.

However, for all of its emphasis on the issue, the order does not provide any specific guidance on measuring or addressing such impacts.

Instead, it directs the newly formed Environmental Justice Subcommittee of the OSTP to provide recommendations to agencies for analyzing cumulative impacts and directs agencies to gather data and develop research and tools to analyze cumulative impacts and improve the consideration of environmental justice in decision making.

Transparency and Meaningful Engagement

In keeping with the administration's efforts over the last two years, the order repeatedly directs agencies to take steps to enable environmental justice communities to meaningfully engage on relevant issues.

For example, the order requires agencies to publicly report their environmental justice progress and directs the EPA to publish an internet-based whole-of-government clearinghouse of environmental justice material, including information on the government's activities and technical assistance, tools and resources to help environmental justice communities meaningfully engage.

The order also pays particular attention to elevating requirements for notifying communities of chemical releases under the Emergency Planning and Community Right-to-Know Act.

Key Takeaways for Businesses

Increased Focus on Environmental Justice Across Federal Agencies

The EPA has led the administration's environmental justice efforts thus far. But the order's directive for all federal agencies to dedicate staff to environmental justice, and to develop plans and metrics to assess progress, suggests that other federal agencies will prioritize environmental justice going forward.

As noted above, that focus likely will manifest itself, in part, through heightened scrutiny on environmental justice in agency NEPA reviews.

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

Time will tell if the empowerment of White House personnel to coordinate across agencies will bring some cohesiveness or consistency to the various agencies' approaches to environmental justice.

Cumulative Impacts

While the order does not provide specific guidance on cumulative impacts, future guidance and regulations, including under NEPA, are likely to have a major impact on companies operating in heavily industrialized environmental justice communities.

The order's references to impacts "already experienced" and the inclusion of "reissuance of licenses and permits" in the list of relevant activities subject to environmental justice attention signal the need for businesses to look not only forward but also in the rearview mirror when making business plans.

Companies should stay informed about developments on cumulative impact and disparate impacts

analyses and work with counsel to provide input to federal agencies via public comment to proposed rulemaking or agency guidance as agencies formulate their policies and rules on these issues.

Increasing Risk for Disputes

The availability of increasing amounts of environmental justice-related information, in conjunction with information from screening tools available today, may increase the risk of permit application challenges, government enforcement actions and citizen lawsuits as communities, nonprofits and individuals attempt to use such data to bolster their arguments regarding alleged risks and adverse impacts attributable to particular facilities.

Indeed, environmental nongovernmental organizations are increasingly raising environmental justice-related concerns in legal challenges to various projects requiring permits or other forms of governmental approval, and the new order and other government initiatives may provide additional fodder for these lawsuits.

Notably, industrial projects of all types — including clean and renewable energy projects that seek to lower overall carbon emissions but may be situated in close proximity to environmental justice communities with some attendant impacts — may be targeted for opposition by environmental nongovernmental organizations.

In addition, Congress allocated over \$3 billion in environmental justice grant funding in the so-called Inflation Reduction Act for the EPA to distribute through 2026.

While large, that amount is only a fraction of the approximately \$60 billion in funding dedicated to a wide variety of projects and programs addressing environmental justice issues that other agencies will have a hand in distributing.

The funding to community groups and environmental nongovernmental organizations will assist them in monitoring environmental impacts, training them to effectively assert environmental justice issues and likely empowering them to mount more challenges to permits and operations.

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[1] <https://www.govinfo.gov/content/pkg/FR-2023-04-26/pdf/2023-08955.pdf>.