

Biden Administration Revitalizes and Advances the Federal Government's Commitment to Environmental Justice

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On April 21, 2023, the eve of Earth Day, President Biden continued his Administration's spotlight on environmental justice issues by signing Executive Order 14096, entitled 'Revitalizing Our Nation's Commitment to Environmental Justice for All.'

This Executive Order prioritizes and expands environmental justice concepts first introduced in President Clinton's 1994 Executive Order 12898. The 1994 Order directed federal agencies to develop environmental justice strategies to address the disproportionately high and adverse human health or environmental effects of federal programs on minority and low-income populations.

One of President Biden's early actions [covered here], Executive Order 14008, introduced the whole-of-government approach for all executive branch agencies to address climate change, environmental justice, and civil rights. It created the White House Environmental Justice Interagency Council, comprising of 15 federal agencies, including the United States Environmental Protection Agency ("EPA") and the Department of Justice. Biden's new Executive Order expands the whole-of-government approach by: (1) adding more agencies to the Environmental Justice Interagency Council and (2) establishing a new White House Office of Environmental Justice within the White House Council on Environmental Quality ("CEQ"). The new Office of Environmental Justice will be led by a Federal Chief Environmental Justice Officer and will coordinate the implementation of environmental justice policies across the federal government.

This new Executive Order emphasizes action over aspiration by directing federal agencies to "address and prevent disproportionate and adverse environmental health and impacts on communities." It charges federal agencies with assessing their environmental justice efforts and developing, implementing, and periodically updating an environmental justice strategic plan. These new Environmental Justice Strategic Plans and Assessments are to be submitted to the CEQ and made public regularly, including through an Environmental Justice Scorecard, a new government-wide assessment of each federal agency's efforts to advance environmental justice.

Specifically, defining "environmental justice" is one strategy to make concrete what federal agency efforts will address. Under the Executive Order, "environmental justice" means "the just treatment and meaningful

involvement of all people, regardless of income, race, color, national origin, Tribal affiliation, or disability, in agency decision-making and other Federal activities that affect human health and the environment so that people: (i) are fully protected from disproportionate and adverse human health and environmental effects (including risks) and hazards, including those related to climate change, the cumulative impacts of environmental and other burdens, and the legacy of racism or other structural or systemic barriers; and (ii) have equitable access to a healthy, sustainable, and resilient environment in which to live, play, work, learn, grow, worship, and engage in cultural and subsistence practices." This definition adds "Tribal affiliation" and "disability" to the protected categories and expands the scope of effects, risks, and hazards to be protected against. The Fact Sheet accompanying the Executive Order explains that the definition's use of the phrase "disproportionate and adverse" is a simpler, modernized equivalent of the phrase "disproportionately high and adverse" originally used in Executive Order 12898. Whether this change in language from "disproportionately high" to "disproportionate" will affect agency decision-making is something to watch for in the future.

As part of the government-wide mission to achieve environmental justice, the Executive Order explicitly directs each agency to address and prevent the cumulative impacts of pollution and other burdens like climate change, including carrying out environmental reviews under the National Environmental Policy Act ("NEPA"), by:

- Analyzing direct, indirect, and cumulative effects of federal actions on communities with environmental justice concerns;
- Considering the best available science and information on any disparate health effects (including risks) arising from exposure to pollution and other environmental hazards, such as information related to the race, national origin, socioeconomic status, age, disability, and sex of the individuals exposed; and,
- Providing opportunities for early and meaningful involvement in the environmental review process by communities with environmental justice concerns potentially affected by a proposed action, including when establishing or revising agency procedures under NEPA.

The Executive Order also emphasizes transparency by directing agencies to ensure that the public, including members of communities with environmental justice concerns, has adequate access to information on federal activities. These activities include planning, regulatory actions, implementation, permitting, compliance, and enforcement related to human health or the environment when required under the Freedom of Information Act, the Clean Air Act, the Clean Water Act, the Emergency Planning and Community Right-to-Know Act, and any other environmental statutes with public information provisions.

CEQ is expected to issue interim guidance by the end of the year and more long-term guidance by the end of 2024 as to implementing the Executive Order's directives. It is too early to know whether any directives will go through rulemaking under the Administrative Procedure Act. But with a presidential election looming and ongoing budget negotiations between the White House and Congress that propose modest cuts to NEPA as part of permitting reform, CEQ's efforts may be limited to guidance for now.

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