



Environmental Justice Policy Gains Momentum Under the Biden Administration

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Since January 20, 2021, the Biden Administration has been delivering on its promise to issue wide-ranging and forceful suite of actions that will impact virtually all sectors of the economy. Signaling its importance as a top priority, one of the first Executive Orders the President signed was [“The Executive Order on Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis”](#) (the Order on Protecting Public Health). The Order on Protecting Public Health contains a series of directives to federal agencies and departments that will significantly impact the environmental, natural resources, and energy sectors and further reinforces the Biden Administration’s commitment to aggressively addressing climate change and environmental justice (EJ) as promised in Biden’s July 2020 [“Plan to Secure Environmental Justice and Equitable Opportunity.”](#)

Companies and governmental entities looking to secure permits for new facilities or that have scheduled permit renewals may want to take steps now to prepare proactively for potential environmental justice challenges. A starting point would be to gather data that accurately calculates the adverse impacts of their projects and meaningfully engage communities with mitigation strategies ahead of government directed discussions.

The following update provides background on EJ and highlights potential implications related to the Order on Protecting Public Health.

What is Environmental Justice?

EJ is a social movement that first garnered national attention in the early 1980s when citizens of a predominantly African American community in Warren County, North Carolina peacefully protested the fact that dangerous chemical waste was to be disposed of in their neighborhood landfill. The EJ movement embodies the principle that no group of people, regardless of race, color, national origin, or income, should bear a disproportionate share of negative environmental consequences resulting from industrial, governmental, and commercial operations or policies. EJ also encapsulates the meaningful involvement of all people concerning the development, implementation, and enforcement of environmental laws, regulations, and policies that impact that community’s quality of life.

While ultimately unsuccessful in halting the dumping of toxic polychlorinated biphenyls in the Warren County landfill, in the years that followed the Warren County protest, leaders of the EJ movement began to coalesce around mounting studies and evidence that showed that low income and minority communities around the country were disproportionately targeted as areas to place pollution producing facilities.

The federal government first addressed the evidence of environmental discrimination in 1994 when then President Clinton issued Executive Order 12898, [“Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations”](#), which directed agencies to identify and address the “disproportionately high and adverse” health and environmental impacts of their policies on poor and minority populations. Since its issuance, President Clinton’s Executive Order served as the cornerstone for numerous environmental justice initiatives, but the Biden Administration, in recognition of the need for urgent and targeted action to reverse the impacts of systemic environmental racism, is looking to build upon the sentiments of the Clinton Executive Order and strengthen its implementation.

Biden's Executive Order

Acknowledging threat multipliers like climate change and the coronavirus pandemic worsening the health effects for those living in disproportionately impacted communities, Biden's Executive Order puts EJ at the center of all federal actions to assure that minority and low-income communities are prioritized in federal government decisions that have environmental impacts.

The Order on Protecting Public Health affirms that "where the Federal Government has failed to meet that commitment in the past, it must advance environmental justice," which complements the Clinton Administration's initial efforts on EJ in 1994. The Order on Protecting Public Health states:

It is, therefore, the policy of my Administration to listen to the science; to improve public health and protect our environment; to ensure access to clean air and water; to limit exposure to dangerous chemicals and pesticides; to hold polluters accountable, including those who disproportionately harm communities of color and low-income communities; to reduce greenhouse gas emissions; to bolster resilience to the impacts of climate change; to restore and expand our national treasures and monuments; and to prioritize both environmental justice and the creation of the well-paying union jobs necessary to deliver on these goals.

In addition to prioritizing EJ, the Order on Protecting Public Health also directs all federal agencies and departments to immediately review and address actions taken during the Trump Administration, and suspend, revise, or rescind those found to be in opposition to, or to conflict with, these stated policy goals. For example, these actions will include, but are not limited to:

- Reversal of the rollback of methane emission standards.
- Reexamination of the fuel economy and emissions standards for cars and light trucks, while also moving forward with standards that will dramatically reduce emissions and increase transportation electrification in the future.
- Reconsideration of rollbacks of energy efficiency standards.
- Review of mercury and air toxics standards for coal plants.
- Reconsideration of changes to the way costs and benefits are calculated.
- Rescission of the rule that limits the science that the U.S. Environmental Protection Agency can use in rulemaking.
- Reestablishment of the interagency working group on the "social cost of greenhouse gas" emissions to determine the social benefits of limiting global warming as a critical input to evaluating regulatory proposals, and requiring an interim "social cost of carbon," "social cost of nitrous oxide," and "social cost of methane" within 30 days which will be used until final values are published.
- Elimination of shortcuts of environmental reviews of federal projects under the National Environmental Policy Act (NEPA).

Implications

The Order on Protecting Public Health signals the Biden Administration's determination to rescind or amend the Trump Administration's executive orders, rulemakings, policies, and other actions that implicate EJ. In keeping with the Order, on February 19, 2021, the White House Council on Environmental Quality [rescinded](#) the Trump Administration's 'Draft National Environmental Policy Act Guidance on Consideration of Greenhouse Gas Emissions.'

Historically, NEPA has been used as a tool to protect EJ communities by ensuring that all adverse impacts of projects are fully examined and that public input from impacted communities is considered. Many have argued that the previous administration's changes to NEPA undermined these protections. Reversal of these changes will allow the Biden Administration to give EJ communities a greater opportunity to raise their concerns and ultimately influence the NEPA process, thereby positioning NEPA not only as a

mechanism to inform decision-makers about projects' or plans' potential adverse impacts, but also enabling it to become a salve for communities looking to prevent additional harm and possibly the first step in their quest to secure environmental improvements and change.

Project proponents must be cognizant of the impact that the EJ community can have on a project by challenging the federal permitting and the NEPA processes. This is particularly true when EJ concerns are paired and amplified by impacts to the rights and resources of Native American Tribes. The most pivotal example of this is the [Dakota Access Pipeline](#) and its federal easement under Lake Oahe, which the U.S. Court of Appeals for the District of Columbia Circuit recently revoked due to deficiencies in the U.S. Army Corps of Engineers environmental review of the Lake Oahe crossing. *Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs*, 985 F.3d 1032 (D.C. Cir. 2021). (See Van Ness Feldman's previous analysis of the Dakota Access case [here](#) and [here](#)).

In addition to investing in proactive planning efforts, companies should be aware of the costs associated with defending legal challenges precipitated by EJ concerns. For instance, in this past year, Dominion Energy and Duke Energy canceled the 600-mile-long Atlantic Coast natural gas Pipeline citing "ongoing delays and increasing cost uncertainty which threaten the economic viability of the project." In addition to opposition by Native American Tribes with ancestral lands and cultural resources along the proposed Atlantic Coast Pipeline route, the predominately Black community of Union Hill, Virginia was a vocal opponent to the pipeline. One major lawsuit filed in opposition to the project, *Friends of Buckingham v. State Air Pollution Control Board*, 947 F.3d 68 (4th Cir. 2020), led to the U.S. Court of Appeals for the Fourth Circuit's opinion that provided a win for the EJ movement. In that case, the Fourth Circuit concluded that the Virginia Air Pollution Control Board (Board) (1) failed to make findings regarding Union Hill's demographics; (2) failed to consider the potential air pollution impacts regardless of compliance with applicable air emissions standards; and (3) relied on an incomplete factual record in assessing site suitability. The court vacated the issuance of the permit and remanded the matter back to the Board. The decision confirmed that EJ considerations include a totality of the circumstance's analysis.

Due to the importance of the plans outlined in the Executive Order, we recommend that our clients and other interested parties continue to monitor and plan for more detailed actions. As the new administration continues to fill the relevant agency offices, more guidance will likely come from agencies directing how EJ priorities will be implemented in the environmental actions taken by the agencies. In addition to NEPA, the Biden team is expected to infuse the notions of EJ into rulemaking, enforcement actions and funding decisions. Future alerts will address these aspects of the EJ movement.

For More Information

The [Government Advocacy & Public Policy, Environmental](#), and [Native Affairs](#) teams at Van Ness Feldman are tracking and analyzing the impacts of the Biden Administration's actions on project proponents, stakeholders, disadvantaged communities, and Native American Tribes. We advise state, local, and Tribal governments; businesses; and communities on issues related to EJ. Our professionals have extensive experience working directly with and earning the trust of all stakeholders in matters involving the environment, including environmental communities, advocates, businesses and regulators. We counsel clients on operations and project development, and we craft engagement strategies that will produce sound results. Please contact [Gwen Keyes Fleming](#), [Maranda Compton](#), or [Tiffany Ganthier](#) for more information.

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