

Applying Environmental Justice to the Regulated Community: What to Expect and How to Plan Accordingly

Environmental justice (EJ) has been a central focus of the Biden Administration, which has encouraged a “whole-of-government” approach. Notably, this encouragement to address EJ issues, while backed by multiple executive orders (EOs), has lacked any federal law upon which agencies can enforce responsive action. Agencies, such as the Environmental Protection Agency (EPA) and Department of Justice (DOJ), have nevertheless sought creative avenues to enforce EJ problems.

This paper will review how EJ has been approached throughout the federal government’s permitting and enforcement initiatives, and how the EPA’s EJ efforts are impacting regulated entities.

Overview of Environmental Justice

What Is Environmental Justice?

While the term “environmental justice” has not yet been defined by Congress or by the EPA in its regulations, the EPA and other federal agencies have often used the following definition in various policy statements: “Environmental Justice is the fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies.”¹ It is, in short, a means to address and correct alleged racial discrimination by state or federal environmental regulatory (in)action. Nevertheless, the absence of a statutory or formal regulatory definition has been problematic in the incorporation of EJ principles into state or federal permitting and enforcement practices.

State of Environmental Justice in the United States

While legislation has been proposed to require federal agencies to address EJ, no legislation has successfully passed both chambers of Congress. Federal agencies, such as the EPA and DOJ, are utilizing currently available tools to pay heightened attention to EJ communities and to promote EJ priorities at the direction of the Biden Administration. Nevertheless, these actions are not mandated by federal law and a subsequent presidential administration could deprioritize EJ and limit EJ enforcement actions. Therefore, EJ enforcement exists in a tenuous place, as its implementation is largely reliant on the current administration’s policy priorities, which depend heavily on the use of presidential executive orders.

Recent Developments

Executive Orders

On January 27, 2021, the President issued EO 14008, “Tackling the Climate Crisis,” a detailed order that has generated considerable discussion and commentary.² EO 14008 describes the “climate crisis” in existential terms: “There is little time left to avoid setting the world on a

¹ Env’t Prot. Agency, *Environmental Justice*, <https://www.epa.gov/environmentaljustice>.

² See *Tackling the Climate Crisis at Home and Abroad* (E.O. 14008), 86 Fed. Reg 7619 (Feb. 1, 2021).

dangerous, potentially catastrophic, climate trajectory.”³ This EO established a range of federal actions to respond to climate change and reduce greenhouse gases.

Regarding EJ, the EO notes the importance of “environmental and economic justice.”⁴ Federal agencies will make achieving environmental justice an important part of their missions.⁵ The EO also established a White House Environmental Justice Interagency Council (WHEJIC), which is chaired by the head of the Council of Environmental Quality.⁶ The purpose of WHEJIC is to develop “clear performance metrics” to measure the success of the new program. A White House Environmental Justice Advisory Council (WHEJAC) was also established and will be housed within the EPA to advise the Interagency Council and publish an annual Environmental Scorecard. Furthermore, both the EPA and Attorney General have specified roles in strengthening environmental enforcement in underserved communities; indeed, it is recommended that the Environmental and Natural Resources Division of the DOJ be renamed the Environmental Justice and Natural Resources Division. EO 14008 also discusses the “Justice40 initiative,” the goal of which is to have 40 percent of federal “overall benefits” flowing to disadvantaged communities.⁷

Following on the heels of EO 14008, on February 16, 2023, President Biden issued EO 14091, “Further Advancing Racial Equity and Support for Underserved Communities Through the Federal Government.”⁸ EO 14091, “Advancing Racial Equity and Support for Underserved Communities Through the Federal Government,” builds on the executive order President Biden signed on his first day in office. EO 14091 lays out how the Administration has promoted equity throughout the government, including “deliver[ing] environmental justice and implement[ing] the Justice40 Initiative.”⁹ The EO also directs each federal agency to establish an Agency Equity Team which would “build upon and coordinate with the agency’s existing structures and processes, including with the agency’s environmental justice officer.”¹⁰ Finally, federal agencies are required to submit an Equity Action Plan annually, which would provide an update on the agency’s equity actions.¹¹

Executive branch agencies have taken President Biden’s direction seriously and are moving forward with all deliberate speed to embed EJ principles and practices into agencies’ day-to-day operations and decision-making processes. While addressing EJ involves unique efforts by each federal agency, the EPA’s actions are the primary focus of this paper.

Federal Agency Response

³ *Id.*

⁴ *Id.* § 219.

⁵ *Id.*

⁶ *Id.* § 220.

⁷ *Id.* § 223.

⁸ See Further Advancing Racial Equity and Support for Underserved Communities Through The Federal Government (E.O. 14091), 88 Fed. Reg. 10825 (Feb. 16, 2023).

⁹ *EO 14091.*

¹⁰ *Id.*

¹¹ *Id.*

Shortly following his confirmation in spring of 2021, EPA Administrator Michael Regan directed all EPA offices to strengthen the enforcement of the “cornerstone” environmental statutes, particularly with respect to communities that are “overburdened with pollution.”¹² Later that month, the EPA’s Office of Enforcement and Compliance Assistance (OECA) issued a memorandum titled “Strengthening Enforcement in Communities with Environmental Justice Concerns.”¹³ Accordingly, there will be more facility inspections, an increase in the use of “innovative” enforcement tools to resolve environmental noncompliance, and an emphasis on EPA engagement with local communities. The memorandum concludes by observing that if a “co-regulator” with the EPA (i.e., a state permitting agency) is not taking timely or appropriate actions, the EPA will not hesitate to step in.¹⁴

Shortly thereafter, the EPA’s Enforcement Office distributed a subsequent memorandum that outlined additional actions that can be taken to advance EJ goals, such as increasing community engagement (one of the long-time goals of the process) and utilizing the courts to obtain injunctive relief when necessary.¹⁵

In its draft of the “FY 2022-2026 EPA Strategic Plan to Protect Human Health and the Environment,” the EPA included a new goal of advancing environmental justice and civil rights.¹⁶ This plan reflects a new “foundational principle” for the EPA to advance justice and equity and serves as a guide for agency actions.¹⁷ In late May 2022, the EPA’s Office of General Counsel released a 200-page document titled, “EPA’s Legal Tools to Advance Environmental Justice” to provide a thorough overview of the EPA’s legal authorities, highlight the lack of explicit statutory and regulatory authority, and to underscore the opportunity to advance EJ by rulemaking and other means.¹⁸ The EPA released an addendum in January 2023, specifically focusing on cumulative impacts.¹⁹ Through its statements and guidance, as well as enforcement discussed further below, the EPA has shown its intention to meet the Biden Administration’s goals on environmental justice.

More publicly, EPA Administrator Regan also embarked on the Journey to Justice tour in November 2021 to bring attention to persistent EJ community concerns in Mississippi, Louisiana and Texas. As a result of the tour, Administrator Regan has directed the EPA to:

¹² Email from Michael Regan, Env’t Prot. Agency Admr. to EPA Employees (Apr. 07, 2021). <https://www.epa.gov/sites/default/files/2021-04/documents/regan-messageoncommitmenttoenvironmentaljustice-april072021.pdf>

¹³ Memorandum from Acting Assistant Admr., Lawrence E. Starfield (July 01, 2021). <https://www.epa.gov/system/files/documents/2021-07/strengtheningenvirjustice-cleanupenfaction070121.pdf>

¹⁴ *Id.*

¹⁵ Memorandum from Acting Assistant Admr., Lawrence E. Starfield (July 01, 2021). <https://www.epa.gov/system/files/documents/2021-07/strengtheningenvirjustice-cleanupenfaction070121.pdf>

¹⁶ Env’t Prot. Agency, 2022 – 2026 EPA Strategic Plan (2022). <https://www.epa.gov/system/files/documents/2022-03/fy-2022-2026-epa-strategic-plan.pdf>

¹⁷ *Id.*

¹⁸ Env’t Prot. Agency, EPA Legal Tools to Advance Environmental Justice (2022). <https://www.epa.gov/system/files/documents/2022-05/EJ%20Legal%20Tools%20May%202022%20FINAL.pdf>

¹⁹ Env’t Prot. Agency, EPA Legal Tools to Advance Environmental Justice: Cumulative Impacts Addendum (2023). <https://www.epa.gov/system/files/documents/2022-12/bh508-Cumulative%20Impacts%20Addendum%20Final%202022-11-28.pdf>

- “Aggressively use” its authority to conduct unannounced inspections and use every available tool to hold non-compliant facilities accountable;
- Deploy additional air monitoring tools, such as the recently announced Multi-Scale Monitoring Project called the Pollution Accountability Team (PAT);
- Utilize EPA resources to invest in community air monitoring programs;
- Apply pressure to state and local officials to do more to protect EJ communities;
- Hold polluting facilities “more accountable” with increased monitoring and oversight of their facilities; and
- Apply the best available science to policymaking.

In practice, this likely means industry will experience the following to achieve the EPA’s goal of more robust enforcement, especially in and near disproportionately impacted communities of color, rural and urban low-income communities, and indigenous communities:

- More frequent environmental compliance audits and inspections under all major federal environmental statutes—CERCLA, RCRA, CWA, SDWA, CAA, EPCRA, FIFRA and TSCA;
- Robust and coordinated criminal and civil administrative enforcement (except intra- and inter-agency) against companies and their corporate executives; and
- More frequent administrative actions and citizen-suits, and perhaps even an expanded interpretation of a private party’s standing to bring enforcement actions against alleged corporate violators.

It is worth noting, that both the EPA and Attorney General have specified roles in strengthening environmental enforcement in underserved communities. For environmental legal practitioners, this relationship is also important because it is complementary, with the EPA often working enforcement cases with the DOJ. As a result, one of the most significant regulatory initiatives has been the Attorney General’s release of a Comprehensive Environmental Justice Enforcement Strategy on May 5, 2022.²⁰ This new strategy, based on the President’s EO 14008, provides a roadmap for using the DOJ’s manifold civil and criminal enforcement authorities, working in conjunction with the EPA and other federal agencies to advance EJ through timely and effective remedies for “systemic” environmental violations and “contaminations” and for injury to natural resources in “underserved communities” that have been historically marginalized and

²⁰ Memorandum from U.S. Dep’t of Just. Assoc. Att’y Gen., (May 05, 2022).
<https://www.justice.gov/asg/page/file/1499286/download>

overburdened, including low-income communities, communities of color, and tribal and indigenous communities.

While this is not an exhaustive list of EJ initiatives undertaken at the EPA or other federal agencies, it is illustrative of the considered efforts of the Biden Administration to cement EJ practices throughout the federal government outside of the American Procedure Act rulemaking process.

Environmental Justice in Permitting

Outside of a formal rulemaking process, the EPA also has undertaken several efforts to incorporate EJ into permitting. For example, in August 2022, the EPA published its *Interim Environmental Justice and Civil Rights in Permitting Frequently Asked Questions (FAQs)*.²¹ The Office of General Counsel considers this a “living document,” and it is subject to further change as needed to continually integrate EJ and civil rights into the agency’s permitting practices. Later that year, the EPA’s Office of Air and Radiation issued an *EJ in Air Permitting Memorandum*²² and *EJ in Air Principles*.²³

Interestingly, but consistent with various memos issued to date that address EJ, the *EJ in Air Principles* states that,

Nothing in this document is intended to impose or establish legally binding requirements and no part of this document has legally binding effect or represents the consummation of agency decision making. To the extent there is any inconsistency between this document and any statute, regulation, or guidance, the latter takes precedence. EPA retains discretion to use or deviate from this document as appropriate. It is, therefore, not a final agency action and is not judicially reviewable.²⁴

In short, what are state regulators and regulated companies to do when it is clear that EPA expects action but recognizes that its call to action has no legally binding effect? That is an open question that has resulted in mixed outcomes across the country.

For example, in Chicago, state officials denied a permit that would have allowed a scrap metal recycler to move from a wealthy area to a mostly poor, minority area. Officials considered the history of pollution issues and concerns about the “company’s past and potential noncompliance” in denying the permit. Administrator Regan endorsed the denial of this permit by Chicago officials stating: “This is what environmental justice looks like; All levels of government working together to protect vulnerable communities from pollution in their backyards.”²⁵

²¹ [EJ and Civil Rights in Permitting - Frequently Asked Questions | US EPA](#)

²² <https://www.epa.gov/caa-permitting/ej-air-permitting-principles-addressing-environmental-justice-concerns-air>

²³ *Id.*

²⁴ *Id.*

²⁵ [Statement from Administrator Regan on RMG Permit Denial by the City of Chicago | US EPA](#)

On the other hand, in Michigan, a permit was granted for a hot-mix-asphalt plant to be constructed in a poor, minority neighborhood near Flint. This resulted in competing lawsuits between EJ groups and the Michigan Department of Environment, Great Lakes and Energy (EGLE), highlighting the limitations against the EPA and state officials involving actions to address EJ concerns. The EGLE stated the permit met the air regulation requirements and that it was beyond their authority to implement EJ “in a manner that changes the applicable requirements for conditions in a PTI [permit to install].”²⁶ Despite opposition from the City of Flint, the EPA and the Department of Housing and Urban Development (HUD), the permit was ultimately granted. As another example, state regulatory agencies are also contending with EJ incorporation into delegated programs.

There is also the issue of states seeking new permitting authority for certain regulated activities. For example, with the growing federal and state momentum behind carbon capture and storage (CCS) development and deployment, Louisiana is keen to attract CCS projects and is pursuing a primacy application over Class VI wells. If granted delegated authority, Louisiana, rather than the EPA, would review and approve or deny injection permit applications for such wells, and enforce those permits.

Louisiana initially applied for primacy in September 2021 and waited over 19 months before receiving an administrative completeness determination from EPA Region 6. One of the reasons for the considerable delay in granting the completeness determination were ongoing concerns at the Region 6 office regarding Louisiana’s approach to EJ and lack of confidence in the state’s willingness to take a more proactive approach, in this case related to Class VI permitting and enforcement.

Eventually, after considerable back and forth between the respective regulatory agencies, Louisiana was able to demonstrate to Region 6 the capacity and willingness to address EJ considerations to Region 6’s satisfaction. At this stage of the regulatory process, Louisiana is awaiting final rule approval from the EPA’s Office of Water to grant it primacy. If final approval is granted this fall, it will have taken Louisiana and EPA approximately two years to negotiate a grant of primacy, with a considerable amount of that time devoted to addressing EPA’s EJ concerns.

Environmental Justice Enforcement in Action

Like permitting actions, the EPA has set EJ enforcement as a priority, and the agency has taken action to apply and enforce EJ principles where it deems necessary. In Texas, the EPA reached a settlement with the chemical manufacturer regarding three petrochemical manufacturing facilities in Texas. The settlement required installation and operation of air pollution controls and performance compliance measures, such as fence line and flare monitoring.²⁷ The monitoring

²⁶ [EGLE approves asphalt plant air permit; seeks federal guidance, support to address EJ concerns \(michigan.gov\)](https://www.michigan.gov/egle/0,4570,7510_7511_7512_7513_7514,00.html)

²⁷ <https://www.epa.gov/newsreleases/chevron-phillips-chemical-company-agrees-reduce-harmful-air-pollution-three-us>;

results will be publicly posted, making the information available to the surrounding community.²⁸

The EPA also initiated an investigation into two Louisiana state agencies: Louisiana's Department of Health (LDEH) and Department of Environmental Quality (LDEQ).²⁹ The EPA investigated the agencies regarding their oversight of chemical companies in an industrial corridor along the Mississippi River. Specifically, the EPA sought to determine (1) if the state provided proper assistance to Black residents to limit exposure to certain cancer-causing pollution and (2) whether the state's approval of permits for a synthetic rubber and plastics plant disproportionately harmed Black residents. In its investigation of the Louisiana agencies, the EPA relied on authority under Title VI Civil Rights Act of 1964.³⁰

In response to this investigation, Louisiana filed suit against the agency, arguing that the EPA did not have authority for its actions.³¹ The EPA ended this investigation in June 2023, without reporting any findings.³² However, the EPA argued in its notice of resolution that additional enforcement actions, regulations and a public information campaign had satisfied the aims of the investigation.³³ While this investigation may not have led to any enforcement action, it further demonstrates the EPA's heightened attention to EJ on a broad scale.

These examples are just a few of a growing number of enforcement or permitting actions related to EJ.

Path Forward

As the Biden Administration moves forward with its EJ agenda, states regulatory agencies and industry should take enhanced awareness of the communities that may be impacted by operational locations and choices and be informed of communities' unique environmental concerns and histories. For any members of the regulated community who may be new to using EJ tools and assessing the information they contain, such as EJScreen or CEJST, it may be prudent to reach out to counsel who are familiar with the innerworkings of the federal government and can assist in creating an action plan to prioritize facilities facing the highest risk of scrutiny and next steps to begin establishing positive working relationships with regulators and EJ communities.

Doing so will assist companies as they develop and maintain relationships and open communication with regulators and community leaders to help navigate additional regulatory scrutiny that may stem from EJ priorities, understand evolving environmental regulations, and preempt or respond to future enforcement actions.

²⁸ <https://www.epa.gov/newsreleases/chevron-phillips-chemical-company-agrees-reduce-harmful-air-pollution-three-us>;

²⁹ Cite letters from <https://www.law360.com/articles/169360>

³⁰ Cite letters from <https://www.law360.com/articles/169360>

³¹ <https://www.law360.com/articles/1691749/louisiana-says-epa-overstepping-on-environmental-justice>

³² Cite brief from <https://www.law360.com/articles/1693603>

³³ In [Docket 2:23-cv-00692, Defendants' notice of resolutions of Title VI Complaint](#).

Companies should also examine and audit their portfolios of legacy environmental liabilities with an eye toward those which may require greater resourcing or updated strategy to prepare for the effects that a robust federal EJ agenda is likely to have upon regulatory decision-making, permitting and enforcement actions. Companies should consider taking informed, proactive measures to mitigate risk as implementation of the Administration’s EJ policy continues apace. In doing so, a company may also simultaneously contribute to its environmental, social and governance (ESG) management efforts.