

ADDRESSING ENVIRONMENTAL JUSTICE IN NEPA: A BRIEF HISTORY AND POTENTIAL CHANGES

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The U.S. Environmental Protection Agency (EPA) serves as the coordinating agency for environmental justice (EJ) in the federal government. They define environmental justice as “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.”

Identifying and analyzing EJ issues formally began in federal agency NEPA reviews following directions from Presidential Executive Order (EO) 12898, *Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations*, and in an accompanying presidential memo issued by President Clinton in 1994.

EO 12898 also requires federal agencies to:

- Develop an agency-wide environmental strategy to identify and address disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minority and low-income populations.
- Ensure greater public participation when environmental justice is an issue being analyzed. In addition, verify agency programs, policies and activities that substantially affect human health or the environment do not have the effect of excluding persons (or populations) from participation in, denying them benefits of, or subjecting them to discrimination because of their race, national origin, or income.
- Collect, maintain, and analyze information (when possible) to assess and compare the environmental and human health risks related to federal programs, policies, and activities, especially when they have a disproportionately high adverse effect on minority and low-income populations.
- Work to ensure public documents, notices, and hearings relating to human health or the environment are concise, understandable, and readily accessible to the public.

The Presidential Memorandum outlines NEPA-specific requirements for addressing EJ. These requirements include:

1. Analyzing federal actions under NEPA to evaluate human health, economic, and social effects, including impacts primarily affecting minority populations, low-income populations, and Indian tribes.
2. Identifying mitigation measures in NEPA documents that address significant and adverse environmental effects of proposed federal actions on minority populations, low-income populations, or Indian tribes.
3. Providing opportunities for effective community participation in the NEPA process, including recognizing potential effects and mitigation measures identified by the community, and improving accessibility of public meetings, crucial documents, and notices.

Further direction on how to conduct EJ analyses in agency NEPA reviews came from the Council on Environmental Quality's (CEQ) 1997 Guidance document *Environmental Justice: Guidance Under the National Environmental Policy Act*. The document provides criteria to consider and procedures to follow for determining whether an impact from a federal agency's action may be disproportionately high and adverse to a minority or low-income population. The guidance also notes that a potentially significant adverse impact to the quality of the human environment under NEPA equally affecting all people within a geographic area may not rise to the level of an EJ issue, even when a minority or low-income population is present. Additionally, the guidance includes definitions of several key terms related to a NEPA EJ analysis:

- **Minority** is a member of the following population group(s): Hispanic (White) or Latino, Black or African-American, American Indian and Alaskan Native, Asian, and Native Hawaiian and other Pacific Islanders. **Minority populations** are to be considered under EO 12898 where (a) the minority population of the affected area exceeds 50 percent; or (b) the minority population percentage of the affected area is meaningfully greater than the minority population percentage in the general population, or other appropriate unit of geographic analysis.
- **Low-income** is defined as persons with household income at or below the federally-defined poverty threshold. In identifying **low-income populations**, agencies may consider as a community either a group of individuals living in geographic proximity to one another or other set of individuals that experience common conditions of environmental exposure or effect.
- **Disproportionately high and adverse** effects are those significant adverse public health or environmental effects that are, or are likely to be, appreciably greater in a minority or low-income population.

After the release of the Executive Order, Memorandum, and CEQ Guidance on EJ in the mid-1990s no additional substantial policy or guidance was issued for nearly two decades. Then in 2016, during the Obama Administration, the EPA published *Promising Practices for Environmental Justice Methodologies in NEPA Reviews*, which provides a variety of methodologies for studying EJ in the NEPA process. The methodologies come from actual examples of agency practices, identifying effective ways federal agencies can gain an understanding of EJ in the context of the NEPA process.

In the Trump Administration, EJ was largely downplayed, to the point that for a period of time the EPA's Environmental Justice page was removed from the agency website. However, the new Biden Administration has moved rapidly to develop new EJ initiatives and policies. For example, on January 27, 2021 President Biden signed EO 14008, *Tackling the Climate Crisis at Home and Abroad*. Although the order primarily directs policy initiatives in relation to climate change policy, a portion of the order focuses specifically on EJ initiatives and policies and includes the following actions:

- Establishes a new White House Environmental Justice Interagency Council and a new White House Environmental Justice Advisory Council at the U.S. Environmental Protection Agency to develop a strategy to address current and historic environmental injustice.
- Directs the Interagency Council to develop clear performance metrics to ensure accountability and publish an annual public performance scorecard on its implementation.
- Calls on the chair of the White House Council on Environmental Quality (CEQ) to develop a Climate and Economic Justice Screening Tool that will highlight disadvantaged communities.
- Appeals for recommendations on how certain Federal investments could support a goal of 40 percent of the overall benefits of those investments to flow to disadvantaged communities. The focus is primarily on federal investments in the areas of clean energy and energy efficiency; clean transit; affordable and sustainable housing; training and workforce development; the remediation and reduction of legacy pollution; and the development of critical clean water infrastructure.
- Requires agencies, for the first time, to make annual "Environmental Justice Scorecards" available on their websites no later than February 2022.

- Instructs the Department of Health and Human Services to create an Office of Climate Change and Health Equity and it tasks the Department of Justice with establishing an Office of Climate Justice.

Although these directives do not directly speak to the NEPA process, over time as they are implemented, many will clearly overlap with NEPA. In addition, these high-visibility EJ actions and the organizational structure established by the Biden administration suggests there will likely be additional measures. Some of these next steps will likely involve actions that align closely with traditional EJ principles (such as enhanced community engagement and public participation) in agency decision-making. Other actions are likely to involve funding and programmatic actions, such as prioritization of funding for Brownfield revitalization and drinking water infrastructure in EJ communities. It is also reasonable to expect CEQ will publish updated guidance and direction for federal agencies' EJ analyses in their NEPA reviews. Additionally, the Biden administration is expected to revise the new 2020 CEQ Implementing Regulations and potentially create specific regulatory requirements for federal agencies' EJ analysis.

As a result of all these recent, and potential future, administration actions NEPA practitioners should expect both substantial changes and ultimately better direction on how to address EJ issues in their NEPA reviews.