

Achieving Biden's EJ Agenda

The president announced an ambitious environmental justice program on his first day in office, taking several administrative actions. But durable, lasting policy will depend on an all-of-government approach to bring equitable relief to vulnerable communities



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One of the new administration's most ambitious goals is to reorient federal policymaking to prioritize environmental justice. President Biden signed Executive Order 14008 on January 27 to "secure environmental justice and spur economic opportunity for disadvantaged communities that have been historically marginalized and overburdened by pollution and under investment." Many applauded the administration's swift and comprehensive commitment, including Robert Bullard, known as "the father of environmental justice," who said the president's "all in one" approach is an "advancement in accepting what environmental justice really is." Bullard believes the order "sends a clear message that at the highest level of government, these actions will be taken seriously." Yet he along with many other advocates of what in this article we'll call EJ acknowledge that the road ahead will not be easy.

If the administration is to execute on EO 14008, it will have to confront data and programmatic gaps in the government's ability to identify and map EJ communities, assess the cumulative impacts of proposed government actions, and make EJ an enforcement priority. This article addresses the key challenges to accomplishing the administration's stated goal and identifies discrete actions that the government could take to update its EJ data collection capabilities; establish EJ as a key component of environmental enforcement strategy; and incorporate EJ criteria into siting, rulemaking, and permitting.

The Environmental Protection Agency defines 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." In regular parlance, it refers to government policies that address disparate environmental and public health impacts of pollution on minority and economically disadvantaged communities.

The federal government first began studying EJ issues in the 1980s, after community organizers brought nationwide attention to the landfills sited in predominantly Black neighborhoods. However, EJ didn't become an important consideration in government decisionmaking until 1994, when President Clinton signed EO 12898, requiring each federal agency to "make achieving environmental justice part of its mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minority populations and low-income populations." While the order brought attention to the EJ movement, it had little substantive force, as it did not require that EJ play a determining factor in siting, rulemaking, or permitting decisions. It left it to federal agencies to adopt and implement their own EJ policies — a task some have yet to fulfill.

In the nearly three decades since EO 12898 was signed, presidential administrations have differed in their approach to EJ. Some administrations have strengthened environmental protection laws and ad-

vanced an EJ agenda, while others have reduced funding to EJ projects. Regardless of the approach, significant progress remains to be achieved if the Biden administration is to succeed in addressing underlying concerns about the disparate environmental and public health effects of pollution on disadvantaged communities. If President Biden and his team are going to make strides where other administrations have not, they will need to prioritize EJ in a range of decisionmaking.

One of the administration's first challenges will be figuring out how to define an EJ community. As it stands, there is no single federal directive on how to identify and prioritize vulnerable neighborhoods. Without a concrete definition — or at least guidelines — the administration will be challenged to allocate resources in a manner consistent with its objectives. The Trump administration's Opportunity Zones provides a cautionary tale. The incentive program was created as part of the 2017 tax bill to reduce tax liability on investors who reinvest capital gains in "low-income communities," which were defined simply as a census tract with a poverty rate of at least 20 percent and a median family income up to 80 percent of the area median. Because of the broad definition, rapidly gentrifying neighborhoods could be designated as Opportunity Zones, and resources intended to flow to low-income communities instead accrued to investors.

In order to properly define what constitutes an EJ community, the Biden administration would be well served by first improving the screening and mapping tool EPA developed in 2010, known as EJSCREEN. While the development of the tool marked an important first step, it is somewhat limited in scope and does not include well-accepted EJ factors such as local drinking water quality and indoor air quality. Nor is EJSCREEN capable of analyzing more than one pollutant or demographic data set at a time, thereby limiting its ultimate utility in examining the intersection of data involving environmental exposure and socioeconomic factors. Despite the limitations, there is currently no other federal data collection tool that identifies EJ communities.

Consistent with the direction in EO 14008 to create a "Climate and Economic Justice Screening Tool," the administration's efforts would be significantly enhanced by updating EJSCREEN and its mapping capabilities. The administration could develop an equity map, which demonstrates how environmental pollutants are geographically distributed and serves as a tool

for analyzing how pollutants overlap and interact with other health, economic, demographic, and social vulnerabilities unique to each community.

Several states already employ sophisticated equity mapping, including California, which uses its CalEnviroScreen to identify communities for prioritized EJ investments. The federal government would be well served to emulate California's Office of Environmental Health Hazard Assessment in creating its own mapping tool. Like CalEnviroScreen, an updated EJSCREEN should collect comprehensive data on environmental, health, and demographic factors, including groundwater contamination, housing burden, asthma, and cardiovascular disease, and then develop a cumulative-impact score based on an analysis of both environmental exposure and socioeconomic factors. By employing a comprehensive equity-mapping tool, the government can more accurately identify and prioritize the country's most vulnerable communities for the targeted EJ policies announced by the administration. In turn, companies will have an improved resource for calculating the risks associated with their existing and planned business operations.

Given the breadth of its EJ objectives, the administration also needs to refocus its environmental enforcement efforts to prioritize scrutiny of noncompliance in EJ communities. Some studies have shown that both federal and state agencies conduct fewer inspections and impose lower penalties in low-income neighborhoods and communities of color — a phenomenon referred to as *compliance bias*. A 2013 study by Professors David Konisky and Christopher Reenoc revealed, for example, that Clean Air Act permit holders in Hispanic communities are not only more likely to violate their obligations, but are also less likely to be pursued through enforcement by regulatory agencies.

The administration can address such patterns of compliance bias by prioritizing the deployment of enforcement resources to align with EJ objectives. At EPA, this would mean incorporating EJ as the central, organizing theme of the next biennial list of National Compliance Initiatives. The NCIs are developed by EPA to focus the agency's enforcement resources on activities that contribute to the cumulative impacts of pollution from various media, including air, water, and hazardous waste. The NCI currently embraces six national program priorities, which EPA has identified as the country's "most serious environmental violations." State environmental agencies have shown support for amending the NCI, as evidenced by a letter from the Environmental Council of the States, who

in September 2020 asked EPA to better address cumulative impacts of environmental pollution under the NCI.

Close coordination with the Department of Justice's Environmental and Natural Resource Division is required to accomplish the administration's EJ goals, as reflected in EO 14008's call for DOJ and EPA to develop a "comprehensive environmental justice enforcement strategy" and to create a new office within DOJ dedicated to enforcing environmental compliance in EJ communities. In addition, the new administration would be wise to reconsider ENRD's use of Supplemental Environmental Projects as a significant component in settlement agreements resolving environmental noncompliance.

As a positive early step, the Biden administration quickly reintroduced SEPs as an enforcement mechanism after they were eliminated under the Trump administration. Since 1980, SEPs have been used extensively in civil environmental enforcement settlements to fund projects that provide tangible environmental and public health benefits to affected neighborhoods. SEPs can be particularly effective in the pursuit of EJ because they not only directly address environmental harms but often improve engagement with impacted areas. By employing SEPs to promote remedial projects in EJ communities, the administration could redirect private resources to achieve EJ objectives, thereby amplifying the reach of EPA and DOJ enforcement resources. Finally, given the central role of state agencies in administering and enforcing both federal and state environmental regimes, the Biden administration also needs to identify ways to engage state agencies to develop EJ enforcement policies. This could be accomplished through the NCI process and the leadership of the Biden EPA.

The administration is also expected to advance its EJ enforcement strategy by supporting legislation that creates a private right of action under Section 602 of the Civil Rights Act, which would allow individuals to bring environmental discrimination complaints in court. Such an action would be an especially important avenue for EJ enforcement because it would only require plaintiffs to show discriminatory effect, rather than discriminatory intent, the more difficult standard used to date. Title VI of the act contains two sections that EJ activists have historically used to mitigate pollution in minority communities. Section 601 prohibits discrimination based on race, color, or national origin by any entity or program, including state and local agencies, that receives federal funds. Section 602 gives agencies like EPA the authority to

promulgate regulations to effectuate Section 601's discrimination prohibition. However, since the Supreme Court's decision in *Alexander v. Sandoval*, which held that Congress did not intend to create a private right of action under Section 602, individuals have been unable to enforce agencies' antidiscrimination regulations in court.

EJ activists have instead focused on filing Title VI administrative complaints with EPA to stop funding recipients from engaging in practices that have disparate impacts or discriminatory effects. For years, however, EPA's Office of Civil Rights, responsible for addressing complaints under Title VI, failed to timely review and process environmental discrimination complaints. A 2011 report commissioned by the agency revealed that only 6 percent of the 247 Title VI complaints received by OCR were addressed within the agency's own 20-day time frame.

Although OCR resolved its complaint backlog in 2019, it has yet to implement a proactive review process to ensure successful implementation of Title VI. In the instances where OCR completed its investigation of a Title VI complaint, it often issued decisions that were harmful to EJ communities. For example, in EPA's first Title VI civil rights decision, known as the *Select Steel* case, OCR found that the Michigan Department of Environmental Quality's issuance of an air permit did not violate civil rights law because it complied with National Ambient Air Quality Standards under the Clean Air Act. In effect, OCR's decision tied civil rights law to environmental standards and made it more difficult for individuals to enforce EJ under federal civil rights law. The Biden administration has committed to repealing the *Select Steel* decision and bolstering civil rights enforcement under Title VI.

The administration will also need to make EJ a determining factor in siting, permitting, and rulemaking, which would both address existing problems and prevent new ones from arising. President Biden expressed his intent to incorporate EJ into the rulemaking process in one of his early executive orders. Among the 17 orders and memoranda rolled out on the president's first day of office, his Memorandum Modernizing Regulatory Review ordered agencies to ensure that newly promulgated rules "appropriately benefit and do not inappropriately burden disadvantaged, vulnerable, or marginalized communities." Such language embedded in a general regulatory review

Continued on page 46

memorandum, however, may face the same fate as Clinton's EJ executive order and only be haphazardly implemented, particularly because executive orders can be withdrawn by new administrations. If President Biden wants to achieve his objectives, the administration will need to work with Congress to develop lasting, enforceable policies.

While President Biden has a unified government, he will need to press Congress to pass legislation amending the Clean Water Act and Clean Air Act to require permitting decisions to evaluate cumulative impacts on vulnerable communities. This legislation could be modeled after New Jersey's recent EJ law, which requires the state Department of Environmental Protection to deny an environmental permit if it finds that a new facility would disproportionately impact "overburdened communities."

As in the New Jersey law, federal legislation should only authorize environmental permits if EPA determines that a facility would serve a compelling public interest in the community where it would be sited. Most state and federal environmental policies only require facilities or projects to have a compelling interest to the general public. In these instances, the burdens are disproportionately borne by one community to benefit the general population. However, where the scope of analysis is centered around the immediate community, as in New Jersey, government actors can ensure that both the costs and benefits are paid for and reaped by the same individuals.

President Biden should anticipate delays in congressional action and execute parallel policies by executive order. For example, the president could adopt key components of then Senator Kamala Harris and Representative Alexandria Ocasio-Cortez's Climate Equity Act and require all proposed environmental regulations to receive an equity score based on the rule's impact on vulnerable communities. This would ensure environmental regulators take into account the needs of frontline communities. In his EO 14008, President Biden announced the Justice40 initiative, which commits 40 percent of the benefits from federal investments to disadvantaged communities. In line with this initiative, the administration would be wise to implement an equitable climate justice plan by first allocating climate resilience funds to minority and low-income communities most impacted by the climate crisis.

Until legislation mandating EJ analysis in agency

decisionmaking is enacted, the administration will need to direct agency officials to consider EJ issues before they grant or renew permits under existing environmental statutes. A recent example of such analysis was made in a dissent to a Federal Energy Regulatory Commission order authorizing the Annova Liquid Nitrogen Gas export facility in Brownsville, Texas. Then Commissioner (now Chairman) Richard Glick found that the order violated both the National Environmental Policy Act and the Natural Gas Act because it failed to evaluate the project's impact on climate change and the surrounding community, in which one third of the population lives under the poverty line and which is substantially composed of minority groups.

Glick again raised EJ concerns during a FERC meeting on January 19, just days before President Biden tapped him to become chairman of the agency. He joined two other commissioners to grant rehearing of the panel's decision authorizing operation of the Weymouth Compressor Station located in a Massachusetts neighborhood that includes two state-designated EJ communities and has a long history of pollution. Since becoming chairman, Glick has created a senior staff position to incorporate EJ and equity concerns into the commission's decisionmaking.

If the administration wants to empower other agency officials to consider EJ in permitting and siting decisions, it will need to restore and fortify NEPA, one of the statutes on which then Commissioner Glick based his Annova LNG dissent. NEPA is known as the backbone of environmental law and is often the only statutory authority requiring agencies such as EPA or FERC to consider the environmental and human impacts of permitting decisions. Despite NEPA's pivotal role in environmental protection, the Trump administration made significant rollbacks to the statute in 2020, including prohibiting environmental impact analyses from considering "cumulative" or "indirect impacts." In effect, Trump's overhaul of NEPA prohibits evaluating EJ in significant federal decisionmaking. The Biden administration will need to not only reverse the rollback, but also strengthen NEPA by making EJ a decisive factor in decisionmaking.

While the White House has been applauded by many for its sweeping EJ agenda, it still faces significant challenges to achieve its ambitious goals. The administration will need to execute a unified, across-government plan of action to effectively address the disparate environmental and public health impacts that have historically affected vulnerable communities. **TEF**