

CLIENT ALERT

Subtle Environmental Justice Actions That Go the Extra Mile: Evaluating Recent EJ Developments

March 21, 2022

It has been just over a year since the Biden administration announced its commitment to environmental justice (EJ), and the regulated community can now examine whether the administration has been effective in achieving some of its EJ policy goals. Some are also comparing the administration's actions with various states' actions concerning EJ.

Overall, it seems that the administration has undertaken a collection of acute regulatory actions that weave EJ initiatives into several laws. By comparison, several states appear to have taken a robust approach to implementing EJ principles, including enacting legislation that directly benefits disadvantaged communities.

This alert provides an update on these recent EJ developments at the federal and state levels.

Federal EJ Developments

- **EJ Action Plan:** On January 5, 2022, EPA released a draft [Environmental Justice Action Plan](#), which outlined the new federal EJ program and indicated that EPA's Office of Land and Emergency Management (OLEM) will address EJ concerns in all of the programs that the office oversees, including Superfund, emergency response, and risk management. The action plan states four goals: (1) strengthening compliance with environmental statutes and civil rights laws; (2) incorporating EJ considerations into the regulatory process; (3) improving engagement with communities during rulemaking and permitting decisions; and (4) implementing President Biden's Justice40 Initiative. Justice40 aims to deliver 40 percent of the overall benefits of federal investments in climate and clean energy, including sustainable transportation, to disadvantaged communities.
- **Fenceline Communities Screening Methodology:** On January 21, 2022, EPA released for public comment [version 1.0 of a proposed screening level methodology](#) to evaluate potential chemical exposures and associated risks to fenceline communities in Toxic Substances Control Act (TSCA) risk evaluations. TSCA requires EPA to evaluate all of a chemical's conditions of use when conducting a risk evaluation. But under the previous administration, the first 10 risk evaluations under TSCA generally did not assess air, water, or disposal exposures to the general population. As an initial step to understand the risks to fenceline communities, EPA has developed this screening methodology that will be used to further examine whether the policy decision to exclude air and water exposure pathways from the risk evaluations will lead to a failure to identify and protect fenceline communities.
- **EJ and the 2012 Mercury and Air Toxics Standards (MATS):** On January 31, 2022, EPA announced a [Proposed Notice of Rulemaking](#) in which it seeks to reaffirm the scientific, economic, and legal underpinning of the 2012 MATS for power plants, which requires significant reductions of mercury and other harmful pollutants. By controlling for these emissions, EPA's proposal closely examined the improvements to public health for children and particularly vulnerable segments of the populations, such as Indigenous communities, low-income communities, and people of color that live near power plants or are affected by hazardous air pollution. Taking account of the burdens that hazardous air pollutants, including mercury, impose on public health as well as the costs of controlling these emissions, EPA proposes to find that it is

appropriate and necessary to regulate emissions of air toxics from power plants under the Clean Air Act. The proposal leaves the current emissions standards unchanged but would ensure the continuation of public health protections, while seeking information from the public on opportunities for additional pollution reductions. The proposal might also serve as a basis for strengthening MATS down the line.

- **Justice40 Initiative Updates:** In February 2022, as part of its Justice40 Initiative, the White House Council on Environmental Quality (CEQ) released its Climate and Economic Justice Screening Tool (CEJST). CEJST aims to help federal agencies identify disadvantaged communities that are marginalized, underserved, and overburdened by pollution.

Notably, while the tool includes a series of environmental, economic, and other metrics for determining whether certain communities are eligible for Justice40 funds, CEJST does not include race as a factor. CEQ did not include race as a factor for the tool to protect it from likely legal challenges concerning the use of race.

CEQ is now soliciting public feedback concerning CEJST by April 25, 2022.

In addition, the U.S. Department of Transportation (DOT) has developed criteria aimed at delivering Justice40 benefits to disadvantaged communities. DOT has begun to identify disadvantaged communities (DAC) census tracts based on several indicators (commute time, homes without vehicles, walkability, traffic proximity, cancer risk, etc.) and will ask applicants for federal infrastructure grants and loans to identify how their projects will benefit those DACs.

State EJ Developments

- **New York:** On March 9, 2022, the State's Climate Justice Working Group (a group comprised of 13 representatives from EJ organizations and State agency and technical experts) released draft criteria for identifying disadvantaged communities. The criteria fulfill an essential element in the implementation of the State's ambitious Climate Leadership and Community Protection Act, which requires the State to invest or direct resources to ensure that disadvantaged communities receive at minimum 35 percent of the overall benefits of spending on clean energy and efficiency programs. Specifically, the draft, which will be reviewed annually, includes an interactive map and identifies a list of communities covered by the criteria for directing programs and projects to reduce air pollution and greenhouse gas emissions, to provide economic development opportunities, and to target clean energy investments.
- **Delaware:** The State has taken steps towards implementing Biden's Justice40 Initiative by establishing the Justice Forty Oversight Committee to better locate and help organize disadvantaged communities so that they can benefit from federal grants, loans, and investments in line with Biden's plan. The committee is in the process of developing the State's first EJ screening tool in coordination with the State's environmental agency.
- **North Carolina:** On January 7, 2022, the governor of North Carolina signed Executive Order No. 246 to affirm the State's commitment to a clean energy economy. The order updates the State's carbon-reduction emission goals to align with climate science, reduce pollution, and protect vulnerable communities. The order also encourages and prepares the agencies for transition to clean transportation in the future by calling for an increase in registered zero-emission vehicles to at least 1.25 million by 2030.
- **California:** California's EJ law requires the state's environmental agency to identify and prioritize inspection and enforcement in overburdened communities. As a result, in the fourth quarter of 2021, the California Air Resources Board appointed a manager of its new Office of EJ to promote EJ and racial equity in air pollution reduction efforts in the state.

Further, the state recently released [CalEnviroScreen 4.0](#), its prized online interactive map that uses a range of indicators to identify communities disproportionately affected by environmental hazards.

- **Washington:** The State of Washington has recently enacted two pieces of EJ legislation. The first, the [Health Environment for All \(HEAL\) Act](#), requires seven of the state’s agencies to conduct EJ assessments, establishes a new EJ Council, and requires agency coordination in community engagement measures. The second, the [Climate Commitment Act](#), establishes a program to reduce carbon pollution by, among other things, expanding air quality monitoring in EJ communities, requiring bi-annual EJ reviews of whether greenhouse gases are being reduced, and more.

Conclusion

First, while the Biden administration has moved methodically to weave EJ policy into existing regulations, several states have moved more quickly to implement EJ policies, including enacting new laws and developing tools for identification of overburdened communities.

Second, at the federal level, challenges lie ahead for ensuring that EJ is successfully integrated into federal law and policy long-term. For instance, although communities of color bear a disproportionate burden from pollution, the administration may continue to refrain from considering race as a factor when, for example, allocating federal funds to avoid future legal challenges.

While the administration is making progress towards its goals — as evidenced by the examples outlined above — regulated entities should expect to continue to see increased state action in achieving and enforcing EJ.

We will continue to publish alerts to reflect further developments, including key administrative and regulatory actions taken both federally and at the state level in furtherance of EJ.

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