

Biden Seeks To Put Teeth In Environmental Justice Policies

By Michael Phillis

Law360 (February 5, 2021, 7:13 PM EST) -- President Joe Biden's promise to secure environmental justice is an ambitious effort to achieve long-sought equity for poor and minority communities that experts say could maybe, finally, put teeth behind the lip service that has been paid to the concept.

The president made a multifaceted approach to environmental justice — the concept of addressing the disproportionate environmental harms faced by largely poor, minority communities — an integral part of his climate change strategy as outlined in an executive order signed about a week after he took office.

That climate change order is intended to force the government to address the outsized burden "disadvantaged communities" have borne from pollution, often stemming from industrial facilities in those areas. It directs the federal government to step up enforcement of environmental laws, commits to steer clean energy investments toward those communities and sets out a framework to make environmental justice a priority across the federal government.

"We have been demanding for a very long time to have real teeth to the laws, to the executive orders, to policies," Kerene Tayloe, director of federal legislative affairs at the group WE ACT, told Law360.

The move is not only a reversal of the Trump administration's approach, but proposes the most ambitious federal effort yet to achieve environmental equity and ensure agencies don't ignore community concerns, experts say.

Environmental justice has been part of federal policy since the early 1990s, when President Bill Clinton signed an executive order making it the federal government's goal to strive for environmental justice. But Tayloe says that move was weak in practice.

"The executive order is something that not all presidents paid attention to and you could easily ignore it, looking back at the last administration," she said, referring to Clinton's order.

It's too early to say how effective the implementation of Biden's plan will be, but environmental justice advocates say they are hopeful the proposal will lead to real, systemic change. Tayloe said the work of advocates is "showing up in these policies."

"Black communities showed up in great numbers [for Biden], and it is only fair that he also show up for us in terms of creating policy that really we have been asking for for a very long time," Tayloe said.

Here, Law360 breaks down four major environmental justice components of Biden's executive order.

Environmental Justice Across Agencies

Experts say federal agencies often acknowledge the need for environmental justice without taking it seriously and that only certain agencies, such as the U.S. Environmental Protection Agency, frequently grapple with the issue. Biden has promised a "whole-of-government approach" intended to change that and bring environmental justice to the forefront.

Marianne Engelman-Lado has led the Environmental Justice Clinic at Vermont Law School and was recently named deputy general counsel for environmental initiatives at EPA. In an interview with Law360 before she joined the EPA, she said that forcing agencies to consider environmental justice early on in decision-making is critical. She added that although an executive order can't accomplish everything, she would like to "take that leap of faith" that the Biden effort is meaningful.

"Having the president send a message to the agencies that he is serious about this — he is signing his pen to it and he expects it to be carried out — I imagine people are scurrying about figuring out how they will carry it out. That is what will make the difference," she said.

To help carry out that goal, the Biden administration is establishing a White House Environmental Justice Interagency Council made up of the heads of various departments. An advisory council at EPA will provide environmental justice guidance for high-level executive branch officials and recommend ways to update the Clinton-era order. The U.S. Department of Health and Human Services will also establish an office to address the health impacts of climate change.

Because environmental justice touches everything from climate policy to housing and transportation, it needs attention and work from a range of agencies, experts said.

By involving multiple departments from the beginning, the administration is signaling that "this is a priority, this is important, and we need to get this done," said J. Simone Jones, an associate at Sidley Austin LLP.

"By being a top-to-bottom initiative, there is the opportunity to receive increased attention, increased resources," Jones said.

She said that under President Barack Obama, attention was paid to environmental justice, but the approach was more segmented, with an uneven focus across agencies.

"To change the direction of environmental justice there has to be a clear signal sent not only to the public but within government that this is a priority, that this is something that needs to get done. So that is the benefit of a top-to-bottom approach," Jones said.

Coordinating Enforcement With DOJ

The Biden executive order calls for significant changes to improve coordination between the EPA and the U.S. Department of Justice, which has been directed to step up enforcement of violations that have an outsized impact on environmental justice communities. The order even asks the attorney general to consider renaming the DOJ's Environment and Natural Resources Division to the Environmental Justice and Natural Resources Division.

Such an order immediately shifts priorities, said Thomas A. Lorenzen, a partner at Crowell & Moring LLP who served as assistant chief of the Environmental Defense Section at the DOJ.

"Where you'll see this the most in the short term is in dedication of enforcement resources," he said.

According to Lorenzen, most statutes don't directly address environmental justice issues. So leaders at the department have to make decisions about where to allocate resources and how to prioritize environmental justice.

"I would look to DOJ to be focusing on violations of the law and compliance at facilities that are in or near disadvantaged communities that thus bear the brunt of the adverse effects of those violations or lack of compliances," Lorenzen said. "That's what you'll see off the bat."

The executive order tells the Justice Department to consider creating an office of environmental justice to "coordinate environmental justice activities" across the DOJ and in U.S. attorney's offices around the country. The order also instructs the DOJ and EPA to come up with an environmental justice strategy to address "systemic environmental violations" in communities.

The Justice Department doesn't handle enforcement in a vacuum, Lorenzen said. The department is likely to prioritize existing referrals from other agencies that touch on environmental justice issues. Bad conduct can be punished more frequently in disadvantaged communities to send a message about the DOJ's new focus, he said.

Julius Redd, a principal at Beveridge & Diamond PC, told Law360 that he would advise industries located in environmental justice communities to work on their relationships with their neighbors and review their practices to see what might need to be improved.

Biden's order also promises to provide timely information on pollution and emissions in areas that have the most significant exposure. Lorenzen said that more information in the hands of litigants may encourage settlements.

"If the information is out there, and there is less dispute over what that information is, what is available and what is not, it may force the parties to grapple with the strength of the evidence earlier in the process and possibly push the parties towards settlement earlier in the cases," Lorenzen said.

Using Clean Energy Investment

The executive order also aims to capitalize on a central argument of the Biden campaign: that climate change is an opportunity to expand the economy.

The executive order establishes the Justice40 initiative, setting a goal of having 40% of the benefits of federal investments in areas like clean energy, transit, water infrastructure and others go to disadvantaged communities.

"That 40% is critical to really moving us forward in a way that we have not seen," said Tayloe of WE ACT. "I think putting money to the right communities that have been not only displaced or disinvested, who have typically been the sacrifice for more well-to-do communities, will be necessary to make sure we aren't being left behind" in the drive toward clean energy.

Also crucial is that environmental justice communities have a say in the process, she said. The executive order calls for disadvantaged communities to be consulted.

Details for how the administration intends to achieve the 40% goal of benefiting disadvantaged communities are still to come, with recommendations due within about four months of the executive order's signing.

Redd said he could imagine a range of projects that could qualify, from electric vehicle charging stations in disadvantaged communities to training and workforce development. Other areas may include addressing legacy pollution and replacing water infrastructure, an especially pertinent issue in the wake of the lead-tainted water crisis in Flint, Michigan, and other areas.

The key is "ensuring that members of disadvantaged communities have the competency, training, awareness and skill sets to fulfill some of the jobs of tomorrow or some of the jobs that will come with climate adaptation and climate resiliency," Redd said.

Using Data to Create Accountability

The order calls for better use of data to map pollution impacts and asks officials to measure performance in addressing them. Although details of the data program need to be worked out, once there is a consensus about which communities are most affected, it can change how the government makes decisions, said the EPA's Engelman-Lado.

The federal government has a data tool called EJSCREEN but could improve that with more powerful mapping and data tools, environmental justice experts say. It may draw on a California mapping tool called CalEnviroScreen, which can look at multiple sources of pollution and overlay that data on population information to figure out which communities are disproportionately impacted, Engelman-Lado said.

The strength of the California tool is that it allows the state to find the areas that are the most impacted and target resources and attention to those communities, she said. It can also help officials think twice about allowing projects that will add pollution in areas that are identified as disproportionately suffering.

By February 2022, officials must release a scorecard on the government's environmental justice performance. The order does not specify what metrics will be used.

Chandra Taylor, an attorney with the Southern Environmental Law Center, said the scorecard should be a critical barometer of progress, illustrating what has worked that the country should do more of and what still needs more attention.

"The scorecard that advocates are expecting is one that really makes the issues plain, that doesn't back away from the real, raw set of problems that currently exist, where they exist and the level at which they exist," Taylor said. "Something that is bold and something that is putting it out there. That would be huge."

--Editing by Jill Coffey.