

Environmental Justice to Get a Boost in the Biden Administration

By Emily Mallen and Simone Jones

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Environmental justice is expected to serve as a focal point of the Biden administration. Sidley Austin LLP attorneys look at how the requirement for federal agencies to consider the disproportionately high and adverse health or environmental effects of their actions on minority and low-income populations—in effect since 1994—will get renewed focus across the government and impact infrastructure projects.

In the wake of social justice movements and calls for racial justice, there is an increased interest in President Bill Clinton's 1994 Executive Order 12898 and environmental justice more broadly, with environmental justice expected to serve as a focal point of President Joe Biden's administration.

Clinton's EO requires federal agencies to consider the disproportionately high and adverse health or environmental effects of their actions on minority and low-income populations.

Expected Changes to Promote Environmental Justice

Biden expressed his commitment to environmental justice during the 2020 campaign—a commitment extending to his Cabinet appointments to lead key agencies that will play a role in crafting policy.

For example, Environmental Protection Agency Administrator appointee Michael Regan created the Environmental Justice Equity Board while leading North Carolina's Department of Environmental Quality. It is expected that the EPA, under Regan's leadership, will create additional environmental justice programs, including a community notification program to provide real-time information about pollutant releases.

Brenda Mallory, an Obama administration EPA and Council on Environmental Quality (CEQ) veteran, was tapped to chair CEQ, which is expected to form a White House Environmental Justice Advisory Council and White House Environmental Justice Interagency Council to coordinate policies across the executive branch.

Deb Haaland, the nominee for secretary of the Department of Interior, will play an instrumental role in project permitting on federal lands. She has been a critic of the Dakota Access Pipeline, which has faced federal permitting difficulties, in part, due to environmental justice concerns.

The expected changes at the Department of Justice are also notable. An Environmental and Climate Justice Division may be created to complement DOJ's existing Environment and Natural Resources Division. It would be charged with increasing enforcement, supporting ongoing state/NGO climate litigation against industry, addressing legacy pollution to protect communities, and working with the EPA's Office of Civil Rights to implement its efforts.

With the Georgia runoffs yielding a slim Democratic Senate majority, the possibility increases for additional environmental justice legislation that could further strengthen the government's authority to prioritize environmental justice.

What Will This Mean for Infrastructure Projects?

Permits and Licenses

Environmental justice considerations in permitting decisions are primarily addressed through the National Environmental Policy Act (NEPA) process, which requires that federal agencies disclose whether their actions will have disproportionately high and adverse effects on minority and/or low-income communities; identify reasonable alternatives that consider such effects; and provide opportunities for meaningful public participation within affected communities.

The new administration's emphasis on environmental justice likely will result in more scrutiny of permit and license approvals across the range of federal environmental statutes.

Federal Energy Regulatory Commission

FERC is not subject to legislative or regulatory mandates on environmental justice. As an "independent agency," FERC does not view itself as bound by Executive Order 12898.

FERC addresses the subject through the NEPA review process when it evaluates natural gas infrastructure projects certified under the Natural Gas Act (NGA) and hydroelectric power facilities licensed under the Federal Power Act. FERC follows EPA guidance documents, including EPA's EJSCREEN, an environmental justice tool used to identify impacted populations.

FERC is likely to sharpen its focus on environmental justice even though its adherence to these principles remains largely voluntary. And, there are a number of ways in which the government-wide focus on environmental justice will find its way to FERC:

- EJSCREEN is based on census data that can only be disaggregated to certain prescribed levels, potentially excluding pockets of minority or low-income communities possibly experiencing disproportionately high and adverse effects. The EPA is expected to refresh this tool, which would result in FERC having more granular environmental justice data to consider.
- FERC is not obligated to adopt CEQ policies as an “independent agency,” but a Democratic-controlled body could choose to adopt new environmental justice policies.
- The certificate policy statement FERC uses to evaluate whether interstate natural gas infrastructure is required by public convenience and necessity is expected to be updated. A revised policy could require more specific analyses of projects’ environmental justice implications.
- FERC’s current Guidance Manual for Environmental Report Preparation recommends applicants to include environmental justice considerations when summarizing existing socioeconomic conditions in their NEPA documents. A new guidance manual could make this a requirement.
- FERC could exercise its discretion and add additional environmental conditions to pipeline certificates and hydropower licenses, including environmental justice conditions.
- If adherence to environmental justice principles becomes a condition of a certificate or license, violation of such principles could subject the regulated entity to FERC enforcement proceedings.
- Following passage of the Consolidated Appropriations Act in December, FERC is one step closer to opening an Office of Public Participation. Once established, the office would be able to provide financial compensation associated with intervening at FERC, giving environmental justice organizations and other public interest groups more representation at FERC.

Enforcement

Outside of FERC, environmental justice violations could subject a project developer or operator to federal enforcement proceedings, with environmental justice serving as a consideration in case selection.

It also is expected that violations occurring in those communities most often adversely impacted will likely receive greater attention and from higher levels within the government.

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Author Information

Emily Mallen is a partner in Sidley’s Energy practice where she helps clients understand and comply with obligations under energy and environmental laws, with particular focus on the Natural Gas Act, the Natural Gas Policy Act, the Interstate Commerce Act, and the National Environmental Policy Act.

Simone Jones is an associate in Sidley’s Environmental practice where she specializes in complex environmental litigation and internal investigations, particularly in the automotive sector.

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