

Environmental Justice and Why You Should Care

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“Environmental Justice” is the concept that all people - regardless of race, color, national origin, or income - should receive fair treatment and have meaningful involvement with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies. Environmental justice has been discussed in concept since President Clinton issued an Executive Order on the subject in the mid-1990s, but until recently that concept has rarely been translated into any real-world impact. Now, the Biden Administration has signaled an intention to implement principles of Environmental Justice across a wide swath of federal actions. Recent developments, including a decision by the Fourth Circuit and action taken by the City of Chicago in response to a request from the Environmental Protection Agency (“EPA”) Administrator Michael Regan, suggest that Environmental Justice will in fact be a central focus for environmental engagement going forward.

In January, President Biden issued an [Executive Order](#) that created the White House Environmental Justice Interagency Council (the “Council”). The Council is notable because it expands the purview of Environmental Justice concerns beyond just EPA. The Council includes the Attorney General and the Secretaries of Agriculture, Commerce, Defense, Energy, Health and Human Services, Housing and Urban Development, Interior, Labor, and Transportation. Previously, EPA spearheaded the oversight and incorporation of Environmental Justice into its agency actions only. The expanded scope of oversight and enforcement of Environmental Justice metrics beyond just EPA suggests that we will now see Environmental Justice principles implemented in projects, initiatives, and enforcement actions across all of these federal agencies. The Executive Order directs the Council to develop “a strategy to address current and historic environmental injustice,” to develop clear performance metrics for federal agencies to ensure accountability, and to publish performance scorecards on its implementation publically.

Perhaps even more relevant, acting chief of EPA’s enforcement office, Lawrence Starfield, recently issued an internal memorandum directing EPA regulators to increase oversight of locations in areas that raise Environmental Justice concerns.

Both developments harken an increased focus on Environmental Justice with real world impacts to facility management, ongoing remediation and enforcement matters, and risk management in merger and acquisition due diligence.

Environmental Justice Metrics

In employing Environmental Justice principles, agencies are to measure a specific population's exposure to pollution.¹ This can be measured by analyzing factors such as proximity to emission sources, any unique exposure pathways, any physical infrastructure that may exacerbate the issue (such as housing conditions or water infrastructure), and/or the potential for multiple or cumulative exposures across these various factors. In addition, Environmental Justice principles include allowing a meaningful opportunity for communities to participate in decisions that will affect their environment and/or health. Whether an agency provided a meaningful opportunity to participate can be measured by the distribution, frequency, and translation of notices relating to the decision in question, and the mechanisms for providing and incorporating public comment(s) into the final decision. Moreover, federal agencies must consider Environmental Justice in any National Environmental Policy Act ("NEPA") analysis. EPA developed the [EJSCREEN](#) tool to show where current Environmental Justice communities are located. We note that the Biden Administration recently announced that it will be developing a new Climate and Economic Justice Screening Tool to identify additional communities threatened by the cumulative impacts of the multiple stresses of climate change, economic and racial inequality, and multi-source environmental pollution.

Implications for Industry

The new emphasis on Environmental Justice signals that facility owners and operators can expect and should anticipate a number of changes in the coming months related to enhanced regulatory scrutiny of certain sites, changes in enforcement and enforcement terms, increased facility inspections from governmental agencies, and an increased demand for monitoring, notification, and community engagement. In addition, companies can expect increased scrutiny during or before notice and comment on federal projects, infrastructure projects, or major construction, including permitting decisions, which could result in potential delays. Parties engaged in ongoing or anticipated cleanups can also expect increased scrutiny on final cleanup remedies at cleanup sites, which could result in more notice and comment opportunities and, again, potential delays and increased costs.

Enhanced Scrutiny

The key takeaway from the Biden Administration's Environmental Justice initiatives is that the federal government will pay much closer attention to locations where Environmental Justice is a concern. For example, it may be more difficult to obtain siting permits or apply for or renew environmental permits including air permits and wastewater permits. Moreover, transactions involving locations in Environmental Justice communities may include additional terms that account for the risks of purchasing, developing, or operating on a site that will be scrutinized by EPA and the DOJ, not to mention all of the other agencies involved in the Council. Companies considering transactions or developments that involve owning or operating a facility should consider adding Environmental Justice concerns to their diligence reviews.

Enforcement

The Biden Administration's focus on Environmental Justice also includes directing the Department of Justice ("DOJ") to enforce violations that impact disadvantaged communities more vigorously. President Biden issued a Plan to Secure Environmental Justice and Equitable Economic Opportunity in which the President directs that cases of environmental pollution be pursued to the "fullest extent permitted by law." The Plan also stated that President Biden will pursue additional legislation to hold corporate executives personally accountable for violations of environmental law, including the

possibility of incarceration. The DOJ's Office of Environmental Justice will coordinate with state attorneys general to focus on protecting disadvantaged communities.

In addition, the Starfield memo states that a "critical goal" of EPA's enforcement program going forward will be to obtain injunctive relief that remediates pollution and addresses past harm to communities. This is critically important because it signals that agencies will not only look to make facilities compliant with stricter standards going forward, but they will also seek to hold companies accountable for past practices as well. As a result, paying attention to Environmental Justice concerns that may be applicable during M&A diligence may well help mitigate risk.

Increased Facility Inspections

Starfield's directive further notes that facilities in "overburdened communities" should be subjected to increased inspections. Since the Council includes a number of agencies, facility owners and operators can expect that, in addition to inspections from EPA, inspections related to other federal agencies such as Health and Human Services or the Department of Labor may now include Environmental Justice considerations. The regulated community may want to update its facility compliance and prepare responsible personnel for the likelihood of ramped-up inspections. Moreover, companies intending to acquire or dispose of assets or businesses should not wait until a transaction to review and understand the risks attendant to Environmental Justice in the near future.

Community Engagement, Monitoring, and Notification

President Biden's Executive Order mandates new monitoring for frontline and fenceline communities, which are areas immediately adjacent to a facility that are impacted by the noise, odors, chemical emissions, traffic, and/or parking related to a facility. President Biden also directed EPA to create a community notification program, which will require that industries producing hazardous and toxic chemicals engage directly with the community where they are located to ensure residents have real-time knowledge of any toxic release. This program will also incorporate community engagement in any remediation plans related to toxic releases. Further, Starfield's directive states that agencies should engage with environmental justice communities about the facilities that are near them, what types of pollution are in the area, and what enforcement activities are underway.

Permitting

A recent federal court decision and a request sent by EPA Administrator Michael Regan may provide insight regarding how Environmental Justice concerns will affect project permitting. In *Friends of Buckingham v. State Air Pollution Control Bd.*, 947 F.3d 68 (4th Cir. 2020), the Court of Appeals for the Fourth Circuit remanded a minor source construction permit issued by the State of Virginia authorizing construction of a compressor station for the proposed Atlantic Coast Pipeline. The Fourth Circuit held that the state's determination that emissions would comply with applicable ambient air quality standards was insufficient in light of the Environmental Justice community located in the project area, and that the state should have assessed the risk of the project's emissions to the specific community adjacent to the project.

More recently, on May 7th, 2021, Chicago Mayor Lori Lightfoot directed the Chicago Department of Public Health to suspend consideration of an application to expand a metal recycling plant on the city's Southeast Side. Mayor Lightfoot's action occurred after EPA Administrator Regan sent a letter to the City, recommending that review of the permit be suspended until a Health Impact Analysis

(“HIA”) could be prepared and shared with the public, and offering the City assistance from Region 5 in gathering information necessary to prepare that HIA.

More than a Catchphrase

In sum, companies with facilities located in Environmental Justice communities should expect heightened scrutiny under the Environmental Justice initiatives set forth by the new Administration moving forward, and any company that owns or operates a facility should pay particular attention to Environmental Justice metrics. Companies might consider incorporating Environmental Justice metrics into existing facility compliance reviews as well as future planning and diligence related to potential acquisitions, divestitures, or facility expansion plans.

¹ Environmental Justice populations include low-income, minority, and Native American and indigenous communities. See EPA’s Environmental Glossary of definitions [here](#).

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National Law Review, Volumess XI, Number 138

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