

An EJ Roundup: EPA Implementation of Environmental Justice Is Taking Shape

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The concept of environmental justice (EJ) is often talked about. But tracking the tangible steps the Biden administration is taking to advance EJ can be difficult. In its early days, the Biden administration issued the [Executive Order on Tackling the Climate Crisis at Home and Abroad](#) (Exec. Order 14008).^[1] Since then, however, some interest groups have expressed disappointment in the administration's pace on EJ. There is still much uncertainty surrounding what the EPA's proposals and programs will look like in practice. We provide a roundup of the key federal EJ initiatives and actions advanced by the EPA and the White House in recent months.

- **The Justice40 Initiative:** Announced as part of Executive Order 14008, the Justice40 Initiative is a government-wide program. The goal is that 40% of overall benefits of federal investments flow to disadvantaged communities. The Office of Management and Budget (OMB), the Council on Environmental Quality, and the White House Office of Domestic Climate Policy issued interim guidance in July 2021.^[2] This defines "disadvantaged communities" and identifies covered programs and investments, including 21 pilot programs that will be the first tasked with maximizing benefits to disadvantaged communities. These include the Drinking Water State Revolving Fund, the Clean Water State Revolving Fund, the Brownfields Program, the Superfund Remedial Program, the Diesel Emissions Reduction Act Program, and Reducing Lead in Drinking Water. The interim guidance also directs agencies with covered programs to deliver to OMB their own methodology for calculating covered program benefits accruing to disadvantaged communities and plans for stakeholder engagement. In addition, interim guidance instructs agencies to report progress toward reaching the 40% goal to OMB. The White House has indicated that additional guidance for the Environmental Justice Scorecard is coming.^[3]
- **The EPA's Draft Strategic Plan FY 2022–2026:** On October 1, 2021, the EPA released its draft strategic plan (Draft Plan) for fiscal years 2022–2026.^[4] This is a roadmap for the EPA's priorities over the next four years. In the introduction of the Draft Plan, the EPA announces a new foundational principle for the agency – "to advance justice and equity."^[5] To carry out this principle, the EPA established new strategic goals for addressing EJ and climate change. This goal will be a focus in all five of the programmatic areas – enforcement and compliance, air quality, water quality, land revitalization, and chemical safety. Notably, the EPA's second strategic goal in the Draft Plan is to "take decisive action to advance environmental justice and civil rights." The aim to advance EJ is also reflected in strategies and specific long-term performance goals outlined in the Draft Plan. Examples of goals to be achieved by September 30, 2026, include:

- Conduct 55% of inspections annually at facilities that affect communities with potential EJ concerns.
- Ensure that 40% of Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), Homeland Security, Federal Emergency Management Agency (FEMA) and oil and chemical release response exercises with EPA participation conducted annually address EJ concerns.
- Publicly identify and begin to implement at least ten commitments toward improving environmental and public health conditions on the ground for communities with EJ concerns.
- Include commitments to address disproportionate impacts in all written agreements between the EPA and states and tribes (e.g., grant work plans) implementing delegated authorities.

The EPA is currently seeking comment on the Draft Plan. The comment period closes on November 12, 2021. The final plan will be submitted to Congress in February 2022.

- **Peer-Reviewed Social-Vulnerability Report:** In September, the EPA issued a peer-reviewed report called “Climate Change and Social Vulnerability in the United States.” It examines how four “socially vulnerable populations”—based on income, educational attainment, race and ethnicity, and age—are disproportionately exposed to climate change impacts in six categories. The categories are air quality and health, extreme temperature and health, extreme temperature and labor, coastal flooding and traffic, coastal flooding and property, and inland flooding and property. The report identifies areas of the United States that are likely to see the most significant air quality impacts, extreme temperatures, and flooding impacts. Then, it analyzes the likelihood that socially vulnerable populations live in such high-impact areas. The report does not introduce any EJ policies or EJ rules. It provides data that the EPA may use in developing such initiatives. The EPA said that “understanding the comparative risks to vulnerable populations is critical for developing effective and equitable strategies for responding to climate change.”^[9]
- **Cumulative Risk Analysis:** Administrator Michael Regan announced that the EPA would focus on the use of cumulative impacts as part of the EJ agenda at the EPA. Cumulative risk analysis is intended to better account for the overlapping risks that low-income communities, communities of color, and other vulnerable communities may face. First, the EPA’s Office of General Counsel is reviewing agency regulations to determine whether they can legally be interpreted as giving the EPA authority to assess cumulative impacts.^[10] EPA also advanced “EPA Guidelines for Cumulative Risk Assessment Planning and Problem Formulation” to peer review this summer.^[11] Administrator Regan has also discussed with Congress potential legislative changes to accomplish this goal.
- **Guidance on § 319 Nonpoint Source (NPS) Grants:** In a September 27, 2021 memorandum, the EPA identified actions that state and tribal NPS programs can undertake to sustain or expand efforts that benefit disadvantaged communities. These include steps in watershed planning and NPS project implementation. The memorandum also outlined actions that the national NPS program would implement to support state and tribal changes that seek to advance EJ considerations.
- **CERCLA Model Consent Decree Reform:** On August 31, 2021, the EPA issued a new model Remedial Design/Remedial Action (RD/RA) Consent Decree (CD) and Statement of Work (SOW) for Superfund enforcement agreements. The SOW is the accompanying document to the CD that sets out how the RD/RA will be implemented at a specific Superfund site. The EPA and DOJ use these models when negotiating settlements with potentially responsible parties. Among the changes to streamline the models are new community-involvement provisions for the RD/RA SOW aimed to advance EJ.^[12] The revisions come on the heels of a July 1, 2021 memorandum issued by the EPA Office of Enforcement and Compliance Assurance, consistent with Executive Order 14008.^[13] The memorandum called for strengthening enforcement actions under CERCLA and Resource Conservation and Recovery Act (RCRA) in order to protect overburdened communities affected by contaminated sites. The memorandum identifies ensuring prompt cleanup actions, including through the expedited RD/RA negotiations, as one of the keys toward advancing EJ principles.
- **OIG’s 35th Avenue Superfund Site Case Study:** On September 16, 2021, the EPA Office of the Inspector General (OIG) announced that it would be auditing the 35th Avenue Superfund site in Birmingham, Alabama. This Superfund site includes two coke oven plants, asphalt batch plants, pipe manufacturing facilities, steel producing facilities, quarries, a coal gas holder and purification system facility, and the Birmingham-Shuttlesworth

International airport. The 35th Avenue site is in a mixed industrial and residential area, with parcels located in the Collegeville, Fairmont, and Harriman Park neighborhoods. OIG will evaluate what steps the EPA has taken to identify and address disproportionate health effects to disadvantaged communities located near the Superfund site. The OIG has said that beyond the 35th Avenue Superfund site, the benefits of the audit are expected to include “improving the EPA’s coordination of programs to mitigate disproportionate health effects and address cumulative impacts on communities with environmental justice concerns in general.”^[11]

- **EJ Funding Under the American Rescue Plan:** In June, the EPA announced that it would provide \$50 million for EJ initiatives under the American Rescue Plan. These funds were designated by Congress in March 2021 in response to the COVID-19 pandemic. One of the ways that the EPA will be using the funds is awarding grants to local initiatives addressing disproportionate environmental impacts on vulnerable communities throughout the country. Examples of funded initiatives include an on-the-job training program that prepares young adults for careers in the water industry in Baltimore City and a housing intervention program targeting indoor air quality in Fort Collins. The EPA will also fund the Diesel Emissions Reduction Act rebate program for electric school buses. This will focus on communities with air quality and health challenges. In addition, the EPA committed funds to expanding enforcement to include monitoring near pollution sources in low-income communities.^[12]

Key Takeaways

- Much of the Biden administration’s efforts in implementing EJ to date have focused on funding or grants and on reemphasizing the availability of existing tools for EJ considerations.
- EPA “social vulnerability” reports and “cumulative risk assessment” guidance signal that regulated entities should anticipate increased scrutiny of permit reviews for operations located near EJ populations. Use the EPA’s EJSCREEN tool to determine whether your business or facility is located in or near an identified EJ area.
- Watching the progress of the 21 pilot programs identified under the Justice40 initiative guidance will provide insight into how agencies including the EPA will calculate and report EJ benefits moving forward.

For further information or questions about EJ initiatives and potential impacts on your business, please contact Jonathan D. Brightbill* (Partner, White Collar, Regulatory Defense, and Investigations/Environmental Litigation), Madalyn Brown (Associate, Environmental), or your Winston relationship attorney.

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Please note that government orders on the federal, state, and local level are changing every day, and the information contained herein is accurate only as of the date above.

^[11] Proclamation No. 14008, 86 Fed. Reg. 7619 (Jan. 27, 2021), <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/27/executive-order-on-tackling-the-climate-crisis-at-home-and-abroad/>.

^[12] Memorandum for the Heads of Departments and Agencies, Off. of Mgmt. & Budget, Exec. Off. of the President (July 20, 2021), <https://www.whitehouse.gov/wp-content/uploads/2021/07/M-21-28.pdf>.

^[13] *The Path to Achieving Justice40*, White House (July 20, 2021), <https://www.whitehouse.gov/omb/briefing-room/2021/07/20/the-path-to-achieving-justice40/>.

^[14] *Draft FY 2022-2026 EPA Strategic Plan*, EPA (Oct. 1, 2021), <https://www.epa.gov/system/files/documents/2021-10/fy-2022-2026-epa-draft-strategic-plan.pdf>.

^[15] *Id.* at 4.

^[16] *Climate Change and Social Vulnerability in the United States: A Focus on Six Impacts*, EPA 430-R-21-003 (2021), <https://www.epa.gov/cira/social-vulnerability-report>.

^[17] *Regan Continues To Weigh EPA Authority To Consider Cumulative Impacts*, Inside EPA (July 14, 2021), <https://insideepa.com/daily-news/regan-continues-weigh-epa-authority-consider-cumulative-impacts>.

¹⁰⁸ EPA Readies Long-Stalled Cumulative Risk Guide For Release By Year's End, Inside EPA (Sept. 15, 2021), <https://insideepa.com/daily-news/epa-readies-long-stalled-cumulative-risk-guide-release-year-s-end>.

¹⁰⁹ 2021 CERCLA RD/RA CD and SOW Model Documents, EPA, <https://www.epa.gov/enforcement/2021-cercla-rdra-cd-and-sow-model-documents>.

¹¹⁰ Memorandum, Off. of Enf't & Compliance Assurance, EPA, <https://www.epa.gov/system/files/documents/2021-07/strengtheningenvirjustice-cleanupenfaction070121.pdf>.

¹¹¹ Notification: 35th Avenue Superfund Site Case Study on Cumulative Impacts, EPA (Sept. 16, 2021), <https://www.epa.gov/office-inspector-general/notification-35th-avenue-superfund-site-case-study-cumulative-impacts>.

¹¹² EPA Announces \$50 Million to Fund Environmental Justice Initiatives Under the American Rescue Plan, EPA (June 25, 2021), <https://www.epa.gov/newsreleases/epa-announces-50-million-fund-environmental-justice-initiatives-under-american-rescue>.

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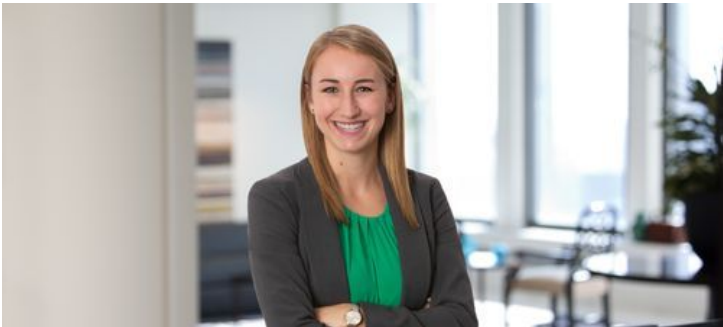
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