

DEVELOPMENTS IN FEDERAL AND PENNSYLVANIA ENVIRONMENTAL JUSTICE POLICY

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This article provides an update on the recent developments in environmental justice (EJ) policy and funding at the federal level, as well as forthcoming updates to Pennsylvania's own EJ Policy, which could have tangible impacts on Pennsylvania's regulated community.

I. Federal Background

Executive Action

Since Day One of taking office, the Biden administration has made EJ a priority. For example, on January 20, 2021, President Biden signed Executive Order 13985 (Advancing Racial Equity and Support for Underserved Communities Through the Federal Government), which directs federal agencies, including the U.S. Environmental Protection Agency (EPA), to “assess whether underserved communities and their members face systemic barriers in accessing benefits and opportunities available pursuant to those policies and programs.” E.O. 13985 then directs agencies to develop plans to overcome these barriers. Two more executive orders on EJ followed in January 2021, including E.O. 14008 (Tackling the Climate Crisis at Home and Abroad), which required the integration of EJ considerations into federal agency processes. Notably, E.O. 14008 established the Justice40 initiative, which sets the goal that 40% of the overall benefits of certain federal investments flow to disadvantaged communities, and it established an EJ screening tool to highlight disadvantaged communities that are “marginalized, underserved, and overburdened by pollution.”

On February 16, 2023, President Biden signed Executive Order 14091 (Further Advancing Racial Equity and Support for Underserved Communities Through the Federal Government), which builds upon the administration's prior “equity-related Executive Orders by extending and strengthening equity-advancing requirements for agencies, and [positioning] agencies to deliver better outcomes for the American people.” Among other things, E.O. 14091 addresses equity-focused leadership, embedding equity in government-wide processes, and the creation of economic opportunities in rural communities.

EPA Continues to Refine Its EJ Agenda

In response to the directives in EO 13985, EPA released its Equity Action Plan in April 2022, to “take decisive action to advance environmental justice and civil rights.” EPA has released formal EJ planning documents since 2010, including its most recent EJ 2020 Action Agenda, and the Equity Action Plan builds on this past work. One of the Equity Action Plan's priorities is the development of “a comprehensive framework for considering cumulative impacts in relevant EPA decisions,” which would be applied across EPA's programs and activities. The Equity Action Plan describes the issue of cumulative impacts in the context of federal, state, and local permitting decisions:

For decades, EPA, state environmental regulators, and local zoning officials have made decisions that contributed to the disproportionate pollution burden on people of color and underserved communities across the country, such as decisions to site and permit new industrial facilities in ways that concentrate them

within these communities. Communities overburdened by pollution often raise concerns about the cumulative impacts of these individual environmental management decisions on public health and quality of life.¹

According to EPA, addressing cumulative impacts is a priority because multiple sources have identified it as “critical to achieving equitable and just outcomes across EPA programs.”² In the short-term, EPA plans to develop a framework for considering cumulative impacts in relevant EPA decisions, and produce guidance that will operationalize this framework. EPA intends to identify and promote uses of the cumulative impacts framework in multiple contexts, including permitting, compliance monitoring and enforcement, cleanups, and rulemaking. The cumulative impacts framework will likely factor into permit conditions, mitigation, and potential denial of permits.

The concept of “cumulative impacts” is not new. Various federal environmental statutes including the National Environmental Policy Act, Clean Water Act, and Resource Conservation and Recovery Act—and associated regulations—already incorporate consideration of cumulative impacts in some form or another. What is new, however, is EPA’s commitment to weaving a comprehensive analysis of cumulative impacts throughout its decision making. Speaking of decision making, in fall 2020 New Jersey adopted its new EJ Law, which provides that various types of permits shall be denied when the Department of Environmental Protection determines that approval would “cause or contribute to adverse cumulative environmental or public health stressors.”³

II. Pennsylvania Developments

Over the past several years, Pennsylvania has reevaluated its own EJ policies and programs. In October 2021, Governor Tom Wolf adopted Executive Order 2021-07 which formally established the Office of Environmental Justice (OEJ) within the Pennsylvania Department of Environmental Protection (PADEP). E.O. 2021-07 directed OEJ to revise the state’s EJ Policy (which was drafted in 2004 but had gone unchanged since then) to, among other things, develop statewide definitions of “environmental justice area” and “cumulative environmental impacts.” PADEP is in the home stretch of the revision process now, having released a draft of the revised Policy in spring 2022 for public comment. PADEP received over 1,200 public comments on the draft and is currently compiling a comment response document, as well as an updated draft. It is anticipated that the updated draft will be released early this year, in conjunction with key announcements from the Shapiro administration. Notably, the current draft did propose to apply cumulative impacts analysis broadly to agency decisions going forward.

As the public awaits the finalized EJ Policy update, PADEP continues to update and otherwise populate the Environmental Justice Areas Viewer⁴ with data used to identify potential EJ areas. The Viewer includes data on health, educational levels, and waste generators, and a third party has been retained to provide additional data such as transportation, income, and

¹ EPA, “E.O. 13985 Equity Action Plan: U.S. Environmental Protection Agency,” at 4 (Apr. 2022), https://www.epa.gov/system/files/documents/2022-04/epa_equityactionplan_april2022_508.pdf.

² *Id.* at 6.

³ N.J. Stat. Ann. § 13:1D-160.4(a)(3)(c).

⁴ Available at <https://www.dep.pa.gov/PublicParticipation/OfficeofEnvironmentalJustice/Pages/PA-Environmental-Justice-Areas.aspx>.

employment rates. Certain data is updated “nightly from Monday – Friday.” Accordingly, it is possible that the Viewer will show you outside of an EJ area one day and inside of one the next.

III. Federal Funding

Following clear and consistent directives from President Biden, EJ funding is more robust as a result of the 2022 Inflation Reduction Act (IRA). Through the IRA, Congress made about \$3 billion in funding available for EJ grants. The administration has recently developed the following EJ grant programs:

- On January 10, 2023, the administration announced the availability of \$100 million via EPA’s Environmental Justice Collaborative Problem-Solving (EJCPS) Cooperative Agreement Program and the Environmental Justice Government-to-Government (EJG2G) Program. The EJCPS Program will provide an estimated \$30 million in funding directly to community-based nonprofit organizations (and partnerships of these organizations). The EJG2G Program will provide \$70 million in funding, \$20 million of which will be for state governments to be used in conjunction with community-based organization partners.
- On February 23, 2023, the administration announced the availability of \$550 million via EPA’s new Environmental Justice Thriving Communities Grantmaking (EJ TCGM) Program. The program will fund 11 entities to serve as “grantmakers” to community-based projects that reduce pollution. The selected grantmakers will develop a process to allow organizations that historically have faced barriers to receiving funding more seamlessly apply for grants that address environmental harms and risks.

IV. Takeaways

As both EPA and states like Pennsylvania work to develop updates to their respective EJ policies and programs, it is difficult to say exactly how these changes will impact the regulated community with plans for activities in potential EJ areas. What is clear is that funding will continue to be dispersed by the federal government to both states and local community-based organizations to support EJ initiatives. This, coupled with further refinements to the scope and definition of EJ areas and cumulative impacts by federal and state agencies, means that members of the regulated community who may be planning to conduct activities in possible EJ areas should keep cognizant of this evolving landscape.