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Environmental Justice

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Federal Action

Environmental Justice (EJ) efforts continue to expand as a programmatic priority for federal and state governing bodies. On April 21, 2023, President Joe Biden passed a new Executive Order on Revitalizing Our Nation's Commitment to Environmental Justice for All (E.O. 14096) that builds upon a series of similar orders he signed over the last three years. E.O. 14096 specifically says the Biden administration will pursue a "whole-of-government" approach to EJ.

Accordingly, the Order directs each agency to make achieving EJ a part of its mission and, among other things, take proactive steps to address inequities in federal policies and practices.¹ Notably, the Order also sets forth a new, broader definition of EJ than the EPA's current definition, specifically including "Tribal affiliation" and "disability" within the list of protected groups.² To advance EJ initiatives and coordinate the development of "policies, programs, and partnerships to achieve the policies" described in E.O. 14096, the Order establishes a new White House Office of EJ within the Council on Environmental Quality

1 Executive Order 14096, "Revitalizing Our Nation's Commitment to Environmental Justice for All," section 3(a) (available at Executive Order on Revitalizing Our Nation's Commitment to Environmental Justice for All | The White House).

2 Executive Order 14096, "Revitalizing Our Nation's Commitment to Environmental Justice for All," section 2(b). In addition, the definition specifically identifies the following as adverse human health and environmental effects that people should be fully protected from: "the legacy of racism or other structural or systemic barriers." Id.

(CEQ).³ In addition, to "address the need for a coordinated federal strategy to identify and address gaps in science, data, and research" related to EJ, the Order directs the creation of an EJ Subcommittee of the National Science and Technology Council. This Subcommittee is tasked with preparing a Research Plan (updated biennially) to provide recommendations to the CEQ and federal agencies on data collection, research techniques, and public accessibility of information, with the goal of advancing EJ.⁴

Following clear and consistent directives from President Biden, EJ funding has increased as a result of the 2022 Inflation Reduction Act (IRA). Through the IRA, Congress made about \$3 billion in funding available for EJ grants. Earlier this year, the administration announced two new grant programs that will collectively provide a total of \$650 million to community-based non-profit organizations, state governments, and other entities to support EJ efforts. In an effort to help communities access these new federal resources, EPA recently launched its Community, Equity & Resiliency initiative and began hosting virtual meetings regarding various EJ topics.⁵ And in March, EPA's 2024 Fiscal Year Budget in Brief⁶ revealed that the administration's ask for a total of \$1.9 billion in EPA funding includes \$369 million for EJ and \$31 million for civil rights activities. This amounts to nearly \$267

3 Executive Order 14096, "Revitalizing Our Nation's Commitment to Environmental Justice for All," section 8(b).

4 Executive Order 14096, "Revitalizing Our Nation's Commitment to Environmental Justice for All," section 5(a)(iii).

5 More information about EPA's "Virtual Open House," which runs from November 6 to November 14, is available at its new Community, Equity & Resiliency webpage: <https://www.epa.gov/community-equity-resiliency>.

6 "FY 2024 EPA Budget in Brief," United States Environmental Protection Agency, March 2023 (available at <https://www.epa.gov/system/files/documents/2023-03/fy-2024-epa-bib.pdf>).

million more for EJ and \$18 million more for civil rights than the FY23 enacted levels. While adoption of the EPA's proposed budget is far from guaranteed, it does further demonstrate the current administration's persistence in funding EJ efforts.

The administration's efforts to utilize Title VI of the Civil Rights Act to pursue EJ have been mixed. In early May, the Department of Justice resolved its first EJ investigation by entering into a settlement agreement with the Alabama Department of Public Health (ADPH) pursuant to which ADPH agreed to take certain steps to remedy the inequitable enforcement of its sanitation laws. In October, EPA agreed to accept a Title VI petition on behalf of Alabama residents that alleges the state rules governing distribution of Clean Water State Revolving Fund (SRF) monies discriminate against minority residents. Alternatively, on June 27, 2023, EPA closed two civil rights investigations into Louisiana officials' permitting practices spurred by Title VI complaints after state officials argued that EPA's actions were unconstitutional and moved for an injunction preventing the investigations. While EPA pointed to other "significant actions" (outside of the Title VI probe) it had taken and plans to take to address the complaints, the threat of litigation may have been a significant motivator to drop the investigations as well. Either way, this area of EJ efforts is proving to be one to watch.

Pennsylvania Developments

In Pennsylvania, recent personnel and staffing updates demonstrate a continued commitment to EJ efforts. In late March, Department of Environmental Protection (PADEP) Secretary Negrin⁷ announced that he had named Fernando Treviño to the new position of Special Deputy Secretary for Environmental Justice. The Secretary indicated that Mr. Treviño will be supported by additional EJ staff, as he plans to place an EJ coordinator in each of DEP's regional offices across the Commonwealth. As of this writing, the Office of Environmental Justice appears to be fully staffed, as Regional Coordinators, Regional Directors, and Assistant Regional Directors (among others) have been assigned to each of PADEP's six regional offices.

Meanwhile, in accordance with Former Governor

7 Secretary Negrin submitted his resignation on October 26, and will be taking a medical leave of absence until the resignation becomes effective on December 9, 2023. Former Executive Secretary Jessica Shirley will serve as Interim Active Secretary, effective immediately.

Tom Wolf's Executive Order 2021-07, PADEP released its interim final EJ Policy in August, along with a link to the latest EJ mapping tool ("PennEnviroScreen") and an explanatory Methodology Document. The Policy took effect on September 16, 2023, when official notice of the Interim Final rulemaking was published in the Pennsylvania Bulletin. PADEP began using PennEnviroScreen on September 16th to determine whether facilities are located in environmental justice areas (EJ areas) based on 32 environmental, health, and socioeconomic indicators. The publication date was also the start of a public comment period that runs until November 30, 2023. During the comment period, DEP will accept both written and verbal comments on both the Interim Final Policy and the Methodology Document. Receipt and review of public comments on the Interim Final Policy will be yet another "critical benchmark towards the final EJ Policy," which is due from DEP in 2024.⁸

The Interim Final Policy describes detailed public participation requirements for facilities in EJ areas and indicates that non-compliant facilities may be subject to inspections, enforcement, and even civil penalties. Interestingly, the Interim Final Policy, which is expected to result in lengthier permitting proceedings, may be at odds with the Shapiro Administration's newly launched PAYback program, a part of the Governor's promise to establish standard processing times. PAYback is a money-back guarantee system that allows entities to check their eligibility for a refund of permit, license, or certification application fees and request that refund if they believe they are eligible.

On a related front, in April PADEP's Energy Programs Office hosted meetings with leaders and residents in EJ communities around the state to learn how PADEP can assist EJ communities to become more sustainable and prepare for the effects of climate change. Sessions were held in Meadville, Pittsburgh, Scranton, Reading, Harrisburg, Norristown, and Philadelphia, and also provided for virtual attendance. Discussions covered a wide range of topics including fuel source strategies, land use regulations and building codes, infrastructure, and public health. Community feedback was synthesized into a

8 DEP Newsroom, Shapiro Administration Expands Environmental Justice Protections with Updated Policy and Improved Mapping Tool (Aug. 29, 2023), <https://www.ahs.dep.pa.gov/NewsRoomPublic/arti-cviewer.aspx?id=22337&ty-peid=1>.

Stakeholder Engagement Report, which is now available on PADEP's website.⁹

During its Philadelphia session, the PADEP Energy Programs Office representative indicated that PADEP plans to be more intentional about the inclusion of EJ in the Pennsylvania Climate Action Plan, which is updated every three years (the last update was released in 2021). In addition, what they learn from the meetings will inform other program development, such as grants. Lastly, the Energy Programs Office plans to incorporate community feedback from the meetings to create a strategy for equitable implementation of climate actions in the Commonwealth with federal funding, in alignment with federal Justice40 guidance.

Although PADEP has spearheaded the Commonwealth's recent EJ efforts the Pennsylvania House's Environmental Resources and Energy Committee recently passed HB652,¹⁰ which calls for heightened permitting standards in designated "Environmental Justice Areas" for certain new types of facilities. Permit applicants in these designated areas would have to submit a report assessing the environmental impact of the proposed new facility together with the cumulative impacts on the EJ area. Following a public hearing, PADEP will evaluate revisions or conditions to the permit that may be necessary to reduce adverse impacts to public health or the environment in the EJ area and may even deny the application based on cumulative environmental impacts. The bill now heads to the full House of Representatives before consideration by the Republican-controlled Senate.

HB652 is said to be modeled after New Jersey's pioneering EJ rules, which became effective on April 17, 2023.¹¹ These rules implement the state's Environmental Justice Law, adopted in September 2020, and they allow New Jersey's DEP to deny an application for a new facility if that facility cannot avoid imposing disproportionate impacts on an overburdened community (OBC). Notably, however, a facility that does cause such disproportionate impacts can still be permitted where it demonstrates that it will serve a compelling public interest in the OBC. For any members of New Jersey's regulated community considering new projects or expansions of existing facilities, additional cost and time should certainly be factored into the permitting process.

⁹ <https://www.dep.pa.gov/Citizens/climate/Pages/Climate-Action-for-Environmental-Justice-Communities.aspx>.

¹⁰ Available at Bill Information - House Bill 652; Regular Session 2023-2024 - PA General Assembly (state.pa.us). The proposed bill would apply to certain water, air, waste, mining, oil and gas development, and power plant permits, among others. See HB652 § 4302 (definition of "Facility").

¹¹ N.J.A.C. 7:1C (available at njac7_1c.pdf).

This article is an update of the Environmental Justice section of The 2023 Babst Calland Report. To request a copy of the full report, click here: <https://reports.babstcalland.com/energy-2>

Link to similar article of interest:
<https://www.spotlightpa.org/statecollege/2023/11/pennsylvania-environmental-justice-dep-health-risks-safety/>

Link to EPA EJScreen/Mapping Tool:
<https://www.epa.gov/ejscreen>