



PRESIDENT BIDEN'S EXECUTIVE ORDER DIRECTS SWEEPING NEW ENVIRONMENTAL JUSTICE ACTIONS

by Karen C. Bennett

On April 21, 2023, President Biden issued Executive Order (EO) 14096 (the Order) declaring that a healthy environment is a matter of justice which the federal government has a fundamental duty to uphold on behalf of all people.¹ The Order follows six similar EOs² focused on marshalling federal resources to deliver on the Administration's environmental justice and climate change promises. The Order's publication coincided with the President's announcement that he will seek re-election for a second term in the White House.

The timing of the Order's release, along with its tenuous connection to statutory authority, suggests the Order may be politics over substance. EJ groups, after all, have been critical of the President's failure to deliver on his EJ and climate change commitments. Though the President suggests he is acting under authority granted by the 1964 Civil Rights Act³ and other federal environmental laws, the Order, like previous EJ proclamations, reaches much further than any congressional direction under those laws. For example, the Order expands environmental justice protections beyond those protected groups identified in the CRA to include income, Tribal affiliation, disability, and sex. And the mandates go beyond Congress' prohibition on discrimination based on race, color, or national origin in implementing federal programs to requiring that federal agencies, contractors, and federal funding recipients must take *affirmative* actions to "advance" environmental justice.⁴

All Americans should be treated fairly under the law, a concept that includes equal opportunity for meaningful participation in public processes without discrimination based on race, color, or national origin. But those basic principles do not excuse government from needing to address civil rights and environmental justice concerns in a manner consistent with statutory authority. The

¹ 88 Fed. Reg. 25251 (Apr. 26, 2023).

² EO 13985 (Advancing Racial Equity and Support for Underserved Communities Through the Federal Government), EO 13990 (Protecting Public Health and the Environment and Restoring Science To Tackle the Climate Crisis), EO 14008 (Tackling the Climate Crisis at Home and Abroad), EO 14052 (Implementation of the Infrastructure Investment and Jobs Act), EO 14057 (Catalyzing Clean Energy Industries and Jobs Through Federal Sustainability), EO 14082 (Implementation of the Energy and Infrastructure Provisions of the Inflation Reduction Act of 2022), and EO 14091 (Further Advancing Racial Equity and Support for Underserved Communities Through the Federal Government).

³ Section 601 of Title VI prohibits the discrimination of individuals in federally assisted programs or activities on the ground of race, color, or national origin. If any recipient of federal funds is found in violation of Title VI, then that recipient may lose its federal funding.

⁴ EO 14096, Sec. 3 (vi) and (xiv).

President's Order overreaches that authority and raises a number of questions.

For example, the Order sweeps broadly to provide EJ protections to groups including those identified by their income, race, color, national origin, Tribal affiliation, disability, or sex and requires that these individuals are:

"fully protected from any risk of disproportionate and adverse human health and environmental effects (including risks) and hazards, including those related to climate change, the cumulative impacts of environmental and other burdens, and the legacy of racism or other structural or systemic barriers; and have equitable access to a healthy, sustainable, and resilient environment in which to live, play, work, learn, grow, worship, and engage in cultural and subsistence practices."⁵

Without citing statutory authority, this sweeping definition transforms the role of federal government from ensuring *against* discriminatory practices in implementing federal programs to promoting the *advancement* of EJ and addressing historic inequities, including addressing even the *risk* of adverse effects *unrelated* to federal activities.

Also, citing no new authority, the Order establishes EJ and climate change as a separate analysis for consideration under the National Environmental Policy Act (NEPA) (42 U.S.C. 4321 *et seq.*)⁶ and requires the Environmental Protection Agency (EPA), in deciding whether to approve agency environmental impact assessments, to consider whether the agency has analyzed, avoids or mitigates disproportionate human health and environmental effects on communities with environmental justice concerns.⁷ The President's use of executive authority to accomplish these objectives warrants scrutiny and we encourage affected parties, particularly, anyone seeking a federal grant, permit, or authorization to expand or develop transportation or industrial operations to ask these questions.

Setting aside whether the Order has a basis in law, its implementation will require tremendous federal expenditures. Among other things, the Order establishes the White House Office of Environmental Justice within the Council on Environmental Quality (CEQ) and creates a new presidentially appointed Federal Chief Environmental Justice Officer to advance EJ initiatives.⁸ One focus of this new executive level office will be to oversee how each federal agency implements the Order. For example, the Order requires each federal agency (and encourages independent agencies) to develop an EJ Strategic Plan. The plan should include measures for expanding public reporting requirements and use of environmental impact or compliance assessment tools such as fenceline monitoring. The plan should also improve relief methods for individuals and communities with environmental justice concerns, such as penalizing violations and promoting future compliance through harm mitigation and corrective action, as well as potentially removing exemptions or waivers.⁹ Other new offices will focus on closing information gaps in scientific research and analyzing cumulative impacts and risks from multiple sources, pollutants or chemicals and exposure pathways, and accounting for non-chemical stressors and current and anticipated climate change.

Interested parties should be on the lookout for implementation guidance. The Order requires that CEQ issue interim guidance within six months and final guidance within 18 months of issuance

⁵ EO 14096 Sec. 2(b).

⁶ EO 14096 Sec. 3(a)(ix).

⁷ EO 14096 Sec. 3(b)(i).

⁸ EO 14096 Sec. 8.

⁹ EO 14096 Sec. 4(c).

of the EO, along with any additional guidance the CEQ Chair deems appropriate.¹⁰ The Order is silent on public participation in the forthcoming implementation-guidance process.

The President's latest EO is ambitious and expensive, but whether it accomplishes meaningful change must be evaluated considering the recognized limitations that appear at the end of every Executive Order:

(b) this order shall be implemented consistent with applicable law and subject to the availability of appropriations.

(c) This order is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party.

One thing is for sure, whether it is based on any clear congressional direction, the Order warrants close attention, as it will create additional regulatory burdens requiring time and resources where any federal grant or authorization is needed.

¹⁰ EO 14096 Sec. 9.