



President Biden Issues Long-Awaited Update to Clinton-era Environmental Justice Executive Order

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Executive Summary

On April 21, 2023, [President Biden issued Executive Order \(EO\) 14096](#), “Revitalizing Our Nation’s Commitment to Environmental Justice for All,” fulfilling a campaign promise to update [EO 12898](#), “Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations.” Signed by President Clinton in 1994, EO 12898 has provided one of the only explicit mandates for federal agencies to consider environmental justice (EJ) in their programs and activities. However, EJ groups have long criticized the 1994 order for not specifying how agencies should fulfill its mandates, nor creating accountability mechanisms to ensure agencies comply.

President Biden’s EO broadens the scope of the 1994 order and offers agencies specific guidance on how to take EJ-related concerns into consideration while fulfilling their statutory mandates, including under the National Environmental Policy Act (NEPA). Key changes are summarized in Table 1.

The 2023 EO directs agencies to conduct more comprehensive analyses that account for the unique and often disproportionate burdens faced by communities with EJ concerns. Specifically, the EO requires agencies to better consult with those communities, create mechanisms to fill data gaps regarding the cumulative environmental burdens these communities face, and consider those cumulative impacts across a broad range of federal activities. While EOs are not judicially enforceable and cannot impose new legal obligations on federal agencies, the 2023 EO, if implemented consistently, has the potential to drive more robust environmental and public health protections in rulemakings, guidance, and permitting decisions.

The White Council on Environmental Quality (CEQ) will issue interim guidance to agencies on implementing the order by Oct. 24, 2023. At the date of this publication, agencies continue to rely on the language of the 1994 order in their rulemakings.¹ For example, on July 24, 2023, EPA proposed strengthening and expanding hazardous air pollutant emission standards for primary copper smelters, supplementing the proposed risk and technology review (RTR) issued in January 2022.² In the July proposal, EPA uses the agency’s definition of EJ, and relies on the EJ analysis included in the 2022 proposed RTR. That analysis addresses the elevated cancer risks to minority populations, low-income populations, and Indigenous peoples, but does not assess other environmental or human health effects or cumulative impacts on communities with EJ concerns as required under the 2023 EO.³ CEQ’s guidance will likely encourage more consistent implementation of the order government-wide.

¹ See, e.g., Removal of Title V Emergency Affirmative Defense Provisions From State Operating Permit Programs and Federal Operating Permit Program, 88 Fed. Reg. 47029 (July 21, 2023) (EPA quoting the 1994 order’s requirement that agencies address “disproportionately high and adverse human health or environmental effects” of their activities); Renewable Fuel Standard (RFS) Program: Standards for 2023-2025 and Other Changes, 88 Fed. Reg. 44,468 (July 12, 2023) (citing to the 2023 EO but quoting the 1994 order requiring agencies to assess “disproportionately high and adverse human health or environmental effects”); Notice of Intent to Prepare and Environmental Impact Statement for the Yazoo Backwater Area Management Project, 88 Fed. Reg. 43,101 (July 6, 2023) (same).

² National Emission Standards for Hazardous Air Pollutants: Primary Copper Smelting, 88 Fed. Reg. 47,415 (proposed July 24, 2023).

³ *Id.* at 47,434.



In this article, I review key differences between the 1994 EO and President Biden’s 2023 EO and summarize how these changes may affect agencies’ rulemakings, permitting decisions, and environmental assessments under the National Environmental Policy Act (NEPA). Specifically, I address how the 2023 EO covers more agencies, federal activities, and the effects of those activities (pp. 5-8), new requirements for federal agencies implementing NEPA (p. 9-10), new mandates addressing public engagement and civil rights enforcement (p. 10-11), new compliance options for independent agencies (p. 12), and new offices and obligations to promote accountability and fill crucial data gaps (p. 12-14) among other changes.

For more updates on the Biden administration’s environmental justice priorities and agency-specific actions, visit [EELP’s Federal EJ Tracker](#).

Background

No federal law, except for the Inflation Reduction Act (IRA),⁴ explicitly requires federal agencies to consider environmental justice when engaging in rulemaking, spending, or enforcement activities. Thus, agencies can mandate actions or remedies addressing environmental justice concerns if those actions are consistent with their existing statutory authorities.

In 1994, President Clinton signed EO 12898,⁵ which requires certain federal agencies to “make achieving environmental justice part of [their] mission.” However, like all EOs, the 1994 order is not judicially enforceable. The 1994 order also does not define “environmental justice,” and does not include metrics or reporting mechanisms, instead deferring to the head of each agency to “be responsible for ensuring compliance.”⁶ In the subsequent decades, a lack of funding, political will, and staff capacity have resulted in minimal federal progress on environmental justice.⁷

In his first week in office, President Biden issued an executive order requiring the White House Environmental Justice Interagency Council (IAC) to recommend changes to the 1994 order within 120 days.⁸ The White House Environmental Justice Advisory Council (WHEJAC), a 40-member body established to advise the CEQ and IAC,⁹ publicly submitted its own [proposed revisions to the 1994 order](#) to CEQ on May 21, 2021. The WHEJAC recommended the White House define key terms including “environmental justice,” “environmental justice community,” “just treatment,” and “meaningful participation”; provide explicit

⁴ The IRA includes several spending provisions prioritizing “disadvantaged” and low-income communities. However, because the IRA was passed through the reconciliation process, and therefore can only include provisions with “budgetary effects,” the IRA does not include policy guidance or enforcement provisions. Federal agencies will therefore play a significant role in defining key terms, processes, and criteria that will in turn determine how these benefits reach communities. For more on these provisions, read [EELP’s analysis Breaking Down the Environmental Justice Provisions in the 2022 Inflation Reduction Act](#). For more on the reconciliation process, see Congressional Research Service, [The Budget Reconciliation Process: The Senate’s “Byrd Rule”](#) (May 2021).

⁵ [Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations](#), Exec. Order No. 12,898, 59 Fed. Reg. 7,629 (Feb. 11, 1994).

⁶ The 1994 order does state each agency “shall conduct internal reviews and take such other steps as may be necessary to monitor compliance with this order,” but provides no oversight or accountability mechanisms to ensure those reviews are conducted or analyzed in a meaningful way. *Id.* at 7,631.

⁷ For an analysis and timeline of federal environmental justice-related actions between 1983 and 2020, see EELP’s analysis [EPA Undermines its Own Environmental Justice Programs](#).

⁸ [Revitalizing Our Nation’s Commitment to Environmental Justice for All](#), Exec. Order 14,008, 88 Fed. Reg. 25,251 (Apr. 21, 2023). The council includes representatives from the attorney general’s office and the secretaries of Agriculture, Commerce, Defense, Energy, Health and Human Services, Housing and Urban Development, Interior, Labor, Transportation, and the Environmental Protection Agency (EPA).

⁹ [White House Environmental Justice Advisory Council](#), EPA (last updated June 14, 2023).



considerations for people with disabilities and subsistence lifestyles; and give agencies specific mandates regarding environmental assessment, monitoring, and reporting, among other recommendations.

On April 21, 2023, President Biden signed [EO 14096, “Revitalizing Our Nation’s Commitment to Environmental Justice for All.”](#) The order supplements the 1994 order by making explicit how agencies should address environmental injustice and promote meaningful community engagement in their activities. The 2023 EO also includes specific recommendations for agencies engaged in federal permitting under the National Environmental Policy Act (NEPA) and enforcing nondiscrimination protections under Title VI of the Civil Rights Act of 1964. These and other changes are summarized in Table 1.

To guide agencies’ implementation of the 2023 EO, CEQ is working to issue interim guidance by October 2023, including recommendations on how to synchronize efforts with related mandates under other EOs. After soliciting feedback from the WHEJAC, CEQ intends to issue final guidance by October 2024.¹⁰

Table 1: Key Differences Between the 1994 EO and the 2023 EO

Topic	1994 EO (EO 12898)	2023 EO (EO 14096)
Expanded Application and Scope of Review		
Covered Executive Agencies	Applies to 13 agencies, with the option for the president to add more	Applies to all executive agencies, including several not named under the 1994 order: the Departments of Education, Treasury, State, and the Small Business Administration.
Covered Federal Activities	Applies to agency “programs, policies, and activities”	Applies to any agency “rulemaking, guidance, policy, program, practice, or action” and “may include” permitting-related actions, including reissuance of licenses and permits
Populations of Concern	Agencies must analyze relevant impacts on “minority populations and low-income populations.”	Expands communities of concern to all “with environmental justice concerns” including geographically dispersed populations (e.g., migrant farmworkers)
Covered Effects	Agencies must identify and address “disproportionately high and adverse human health or environmental effects”	Lowens the threshold and broadens the scope of relevant effects by requiring agencies to identify, address, and analyze “disproportionate and adverse human health and environmental effects (including risks),” including cumulative impacts and effects related to climate change.
Independent Agencies	Requests independent agencies to comply	CEQ to create public accountability mechanism by posting list of independent agencies that commit to voluntarily comply with the order
Definition of “Environmental Justice”	None	Establishes the first government-wide definition of environmental justice, with an explicit focus on Tribes and people with disabilities, and consideration of cumulative environmental impacts and climate change-related effects.

¹⁰ 88 Fed. Reg. at 25,260.



Topic	1994 EO (EO 12898)	2023 EO (EO 14096)
Statute-Specific Provisions		
NEPA	Not discussed	Requires agencies to consider disparate impacts on communities with environmental justice concerns in their NEPA reviews, including sex- and disability-specific impacts, and requires EPA to review other agencies' EJ analyses under section 309 of the Clean Air Act
Nondiscrimination in Federally Funded Activities	Not discussed	Reaffirms federal agencies' duty under Title VI of the Civil Rights Act of 1964 to ensure state agencies and other recipients of federal funding do not discriminate on the basis of race.
Emergency Planning and Community Right-to-Know Act (EPCRA)	Agencies must collect and publish data on the race, national origin, and income of communities near facilities that have a "substantial" environmental effect and are subject to EPCRA.	Agencies must hold a public meeting following an EPCRA-qualifying release within 6 weeks, with at least 72 hours' notice. EPA will submit an annual report to the White House on trends in toxic releases to inform the White House's EJ Research Plan.
Public Engagement and Implementation Provisions		
Public Engagement	Agencies "may" translate crucial documents for people with limited English proficiency	Shifts the burden onto federal agencies to ensure meaningful community engagement, including by providing "timely opportunities" for communities to participate in agency decisions, "fully consider[ing]" communities' input, and ensuring information is accessible to people with limited English proficiency or disabilities
Public Accountability Mechanisms	Agencies must develop an internal EJ strategy but are not required to update the strategy or share it publicly.	Requires agencies to publish EJ Strategic Plans (to be updated every four years), and self-assessments of progress made on the plans (published every two years). These will likely include opportunities for public comment and feedback.
New Implementation Capacity	None	Creates new White House EJ offices and subcommittees to coordinate order implementation and assess data gaps essential to identifying EJ impacts. Requires agencies in the Interagency Council to designate an EJ Officer
Filling Data Gaps	Agencies must "assist" in coordinating interagency data collection and allow minority and low-income populations to comment on the design of agencies' research strategies.	New White House Subcommittee to host annual summit on EJ-related science, data, and research, and prepare and update biennially an EJ Research Plan with recommendations for agencies.



2023 EO Covers More Agencies, Activities, and Effects

The 2023 EO clarifies and expands agencies' obligations to review, analyze, and address the environmental justice-related effects of federal activities, where consistent with federal law. Specifically, the order redefines which agencies are covered by the order, broadens the scope of federal activities to which the order applies, and specifies the types of impacts that agencies must consider.

Covered Executive Agencies

The 1994 order explicitly applies to twelve executive agencies,¹¹ with the option for the President to designate more. By comparison, the 2023 EO defines "agencies" consistent with the definition under 5 U.S.C. § 105 as all federal non-independent executive agencies, excluding the Government Accountability Office. Several agencies that were not explicitly covered under EO 12898 are now covered, including the Treasury Department, the State Department, the Small Business Administration, and the Department of Education, though many of these agencies have voluntarily opted into complying with the 1994 order.¹²

Covered Federal Activities

The 2023 EO provides greater clarity as to which federal activities are subject to the order. While the 1994 order does not define "federal activity," it requires a covered agency to "identify[] and address[] [relevant effects] of its programs, policies, and activities."¹³ By comparison, the 2023 EO defines "federal activity" as "any agency rulemaking, guidance, policy, program, practice, or action that affects or has the potential to affect human health and the environment, including an agency action related to climate change."

The 2023 order notes that this definition of federal activities "may include" actions related to permitting and the "reissuance of licenses and permits."¹⁴ However, the order does not specify when such activities are covered, or who decides. CEQ's interim guidance, to be released within six months of the order's issuance, may be an opportunity to address these and other questions.

"Communities with Environmental Justice Concerns"

The 1994 order requires agencies to assess relevant impacts on "minority populations and low-income populations."¹⁵ The 2023 EO broadens the scope of relevant populations to "populations with environmental justice concerns." These include low-income communities and communities of color who "experience disproportionate and adverse human health or environmental burdens." The order also explicitly states that these populations include "geographically dispersed and mobile populations, such as migrant farmworkers."¹⁶

¹¹ Under EO 12898, the Working Group includes the Departments of Defense, Health and Human Services, Housing and Urban Development, Labor, Agriculture, Transportation, Justice, Interior, Commerce, Energy, EPA, Office of Management and Budget, Office of Science and Technology Policy, Office of the Deputy Assistant to the President for Environmental Policy, Office of the Assistant to the President for Domestic Policy, National Economic Council, Council of Economic Advisers, and "such other Government officials as the President may designate." Order 14008 replaced the Working Group with the White House Environmental Justice Interagency Council. [Tackling the Climate Crisis at Home and Abroad](#), Exec. Order 14,008, 86 Fed. Reg. 7,619, 7,629 (Jan. 27, 2021).

¹² See, e.g., [Memorandum of Understanding on Environmental Justice and Executive Order 12898](#) (Aug. 4, 2011) (enabling signatory agencies that are not members of the Interagency Working Group to become a "Participating Agency" that agrees to carry out Order 12898).

¹³ 59 Fed. Reg. at 7,629.

¹⁴ 88 Fed. Reg. at 25,253.

¹⁵ Specifically, "minority populations and low-income populations in the United States and its territories and possessions, the District of Columbia, the Commonwealth of Puerto Rico, and the Commonwealth of the Mariana Islands." 59 Fed. Reg. 7,629.

¹⁶ 88 Fed. Reg. at 25,252.



While the 2023 EO does not explicitly define “environmental justice concerns,” it recognizes that environmental injustice is driven by “entrenched disparities that are often the legacy of racial discrimination and segregation, redlining, exclusionary zoning, and other discriminatory land use decisions or patterns.” The order names relevant burdens these communities face, including “inequitable access to clean water, clean air, natural places, and resources for other basic human health and environmental needs; the concentration of pollution . . .; and underinvestment in affordable housing that is safe and in basic infrastructure and services to support such housing.”¹⁷

The 1994 EO provided limited guidance to agencies on how to identify minority and low-income populations. Agencies have also historically lacked the capacity or tools to identify these communities in a consistent manner when conducting EJ analyses. In implementing the 2023 EO, agencies will be able to rely on several federal mapping tools developed and updated since the start of the Biden administration to identify communities with EJ concerns. These include:

- [CEQ’s Climate & Economic Justice Screening Tool \(CEJST\) Version 1.0](#) identifies “disadvantaged” communities for purposes of implementing the administration’s Justice40 Initiative. The CEJST does not include geographically dispersed populations, race or ethnicity data, people with disabilities, or illustrate the cumulative impacts of multiple burdens. CEQ continues to accept feedback and additional data sources to [improve the CEJST through their online form](#).
- [EPA’s EJSCREEN](#) maps environmental and other health effects on communities. EPA updated EJSCREEN in February 2022 and again in June 2023 to include new health inequity metrics as well as disparities in food access, medical services, and broadband internet, Toxic Release Inventory (TRI) data, and new EJ and supplemental indexes including data on cancer, people with disabilities, and critical service gaps in housing, health, insurance, and transportation accessibility. The June 2023 EJSCREEN update allows users to compile multiple datasets into one document to show cumulative impacts.
- [DOT’s Equitable Transportation Community \(ETC\) Explorer](#) is designed as a complement to CEQ’s CEJST, and maps cumulative burdens related to transportation insecurity, climate and disaster risk burden, environmental burden, health vulnerability, and social vulnerability.
- [The Center for Disease Control and Prevention’s \(CDC\) Agency for Toxic Substances and Disease Registry’s Environmental Justice Index](#) maps cumulative environmental burdens through the lens of human health and health equity. The index uses data from the Census Bureau, EPA, the Mine Safety and Health Administration, and the CDC to measure and rank the cumulative impacts of environmental burdens at the census tract-level based on 36 factors, including transportation infrastructure, pollutant exposure, preexisting health conditions, walkability, race, and housing type.
- [The Federal Emergency Management Agency’s \(FEMA\) National Risk Index](#) maps community vulnerability to 18 natural hazards. FEMA updated the Index in March 2023 to incorporate data from the [CDC’s Social Vulnerability Index](#) and expand results to all US territories.

For more on agencies’ EJ mapping tools, visit [EELP’s Federal EJ Tracker](#).

“Disproportionate and Adverse” Effects

Under the 1994 order, agencies must “identify[] and address[], as appropriate, disproportionately high and adverse human health or environmental effects” of relevant federal activities.¹⁸ By comparison, the 2023 EO requires agencies to “as appropriate and consistent with applicable law . . . identify, analyze, and address disproportionate and adverse human health and environmental effects (including risks) and hazards of

¹⁷ 88 Fed. Reg. at 25,251–52.

¹⁸ 59 Fed. Reg. at 7,629.



Federal activities, including those related to climate change and cumulative impacts of environmental and other burdens on communities with environmental justice concerns.”¹⁹

This change is significant for three reasons. First, the 2023 EO lowers the threshold for which environmental justice concerns must be considered from “disproportionately high and adverse” to “disproportionate and adverse.” This shift is consistent with the order’s recognition that “the cumulative impacts of exposure to [human health and environmental] burdens . . . further disadvantage communities with environmental justice concerns.”²⁰ Therefore, new disproportionate impacts that contribute to a cumulative burden must be assessed, regardless of the scale of the disparity.

Second, the 2023 EO broadens which effects constitute EJ concerns to include “human health and environmental effects (including risks)” and “those related to climate change and cumulative impacts. . .”²¹ The inclusion of “risks” suggests agencies must conduct *both* an environmental impact assessment, which can provide broad qualitative and quantitative analyses of effects from the project or activity, as well as risk assessments, which quantitatively assess the likelihood of a specific event or hazard.²² The order’s inclusion of cumulative impacts then requires agencies to look at the totality of a community’s or population’s exposure to both chemical and non-chemical stressors (e.g., social determinants of health or extreme weather events), and their effects on health, well-being, and quality of life.²³ This analysis is especially important for agency activities affecting overburdened communities already exposed to other pollution sources or public health hazards.²⁴

Third, the 2023 EO requires agencies to not only identify and address these concerns, but to also “analyze” them. By requiring agencies to analyze this broader scope of concerns, the 2023 EO discourages agencies from merely “checking the box” by identifying EJ impacts without meaningfully considering those results. This analysis may also encourage agencies to explain in straightforward language complex modeling results so that the public can better understand how agency activities might affect them.

While these requirements on their own do not have any legal effect, requiring agencies to identify, analyze, and address the specific and cumulative effects of their actions on communities with EJ concerns ensures agencies consider the heightened, localized impacts of proposed actions in addition to impacts on the general population. Considering these impacts can, in turn, support more stringent pollution standards when federal law requires agencies to set those standards based on public health and environmental considerations.

¹⁹ 88 Fed. Reg. at 25,253.

²⁰ *Id.* at 25,252.

²¹ *Id.* at 25,253.

²² Glenn W. Suter II et al., *Treatment of Risk in Environmental Impact Assessment*, 11 ENV. MGMT. 295 (1987).

²³ [EPA Researchers Release Cumulative Impacts Report, Prioritizing Environmental Justice in New Research Cycle](#), EPA (Oct. 11, 2022).

²⁴ Under President Biden, EPA has taken steps to streamline the incorporation of cumulative impact assessment into its activities. See [Message from the Administrator](#), EPA (Apr. 7, 2021) (requiring EPA’s leadership team to “take immediate and affirmative steps to incorporate environmental justice considerations into their work, including assessing impacts to pollution-burdened, underserved, and Tribal communities . . .”); [E.O. 13985 Equity Action Plan](#), EPA (Apr. 2022) (naming priority action #1 to develop a “comprehensive framework for considering cumulative impacts in relevant EPA decisions and operationalize that framework in EPA’s programs and activities.”); [Consultation on Cumulative Impact Assessments](#), EPA Sci. ADVISORY BD. (Apr. 25, 2022) (providing guidance to EPA on how cumulative impact assessments can inform agency decision-making).



Definition of “Environmental Justice”

The 1994 order requires covered agencies to make achieving “environmental justice part of its mission,” but does not define environmental justice. As of 2004, [EPA defined environmental justice](#) for the purposes of its programs and activities as the “fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income with respect to the development, implementation and enforcement of environmental laws, regulations, and policies.”²⁵ Most federal agencies have since adopted EPA’s definition when addressing EJ-related issues.²⁶

The 2023 EO establishes, for the first time, a government-wide definition of EJ that builds on EPA’s definition while integrating feedback from the WHEJAC. The 2023 EO defines environmental justice as “the *just* treatment and meaningful involvement of all people, regardless of income, race, color, national origin, *Tribal affiliation*, or *disability*, in agency decision-making and other Federal activities *that affect human health and the environment . . .*” (emphasis added to highlight changes from EPA’s definition).²⁷

This expanded definition further informs agencies’ analysis of relevant actions and effects subject to the order. First, the order requires agencies to consider the potential impacts of their activities on Tribes and people with disabilities. Second, the order broadens the relevant scope of activities to any federal activity that affects human health and the environment. This expansion reflects the administration’s whole-of-government approach to achieving EJ, in contrast to past administrations that have largely concentrated EJ efforts within EPA and the CEQ. (For more on federal EJ efforts in preceding administrations, see EELP’s analysis [EPA Undermines its Own Environmental Justice Programs](#)).

Third, the 2023 EO adopts a recommendation from the WHEJAC to replace “fair treatment” in EPA’s definition with “just treatment.”²⁸ In addition, the order clarifies that the outcome of achieving environmental justice is “that people [] are fully protected from 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.”²⁹ The order thus ties agencies’ commitment to achieving EJ to the need to identify, analyze, and address cumulative impacts as well as systemic barriers faced by communities with EJ concerns, including barriers that stem from structural racism.

²⁵ EPA’s definition has since been expanded, stating that environmental justice “will be achieved when everyone enjoys [t]he same degree of protection from environmental and health hazards, and [e]qual access to the decision-making process to have a healthy environment in which to live, learn, and work.” [Environmental Justice](#), EPA (last updated Apr. 24, 2023).

²⁶ See, e.g., [Environmental Justice](#), DEP’T OF TRANSP. (last updated June 4, 2019); [What is Environmental Justice?](#), DEP’T OF ENERGY OFF. OF LEGACY MGMT. (last visited June 13, 2023).

²⁷ 88 Fed. Reg. at 25,253.

²⁸ While the 2023 EO does not define “just treatment,” the WHEJAC defines this term as “ensur[ing] that no group of individuals (including racial, ethnic, or socioeconomic groups) experience a disproportionate burden of adverse human health or environmental outcomes . . . as determined through consultation with, and with the meaningful participation of, individuals from the [affected] communities.” [Final Recommendations: Justice40, Climate and Economic Justice Screening Tool & Executive Order 12898 Revisions](#), WHEJAC 80 (May 21, 2021).

²⁹ By comparison, EPA’s definition states that “[Environmental justice] will be achieved when everyone enjoys [t]he same degree of protection from environmental and health hazards, and [e]qual access to the decision-making process to have a healthy environmental in which to live, learn, and work.” [Environmental Justice](#), EPA (last updated on May 12, 2023).



EJ Analyses in NEPA Reviews

The 2023 EO clarifies agencies' obligations under the National Environmental Policy Act (NEPA). As an executive order, the 2023 EO cannot add new legal requirements or obligations under NEPA or CEQ's implementing regulations. Rather, the EO states that agencies should "carry out environmental reviews under [NEPA] . . . in a manner that [] analyzes direct, indirect, and cumulative effects of Federal actions on communities with environmental justice concerns[,] considers best available science and information on any disparate health effects [, and] provides opportunities for early and meaningful involvement in the environmental review process by communities with environmental justice concerns" potentially affected by a proposed action.³⁰ The order therefore affirms agencies' existing obligations under NEPA, while clarifying that agencies' analyses must account for impacts on and input from communities with EJ concerns.

Furthermore, the order's reference to "Federal actions" suggests this requirement applies to all environmental reviews under NEPA, i.e., environmental impact statements (EISs), which are required for "major Federal actions,"³¹ as well as no significant impact (FONSI) and environmental assessments (EAs).

These requirements are consistent with CEQ's regulations implementing NEPA and [recent amendments to NEPA under the Fiscal Responsibility Act \(FRA\) of 2023](#).³² For example, the FRA requires agencies to assess "the reasonably foreseeable environmental effects" of a proposed major federal action.³³ CEQ similarly requires agencies to assess the direct, indirect, and cumulative effects "that are reasonably foreseeable."³⁴ The 2023 EO clarifies that in fulfilling these mandates, agencies must explicitly consider these effects on communities with EJ concerns. Notably, this language is also reflected throughout CEQ's proposed Phase 2 revisions to its NEPA regulations.³⁵

The 2023 EO is also consistent with, and supports, agencies satisfying the FRA's new time and page limits for EAs and EISs.³⁶ The FRA's page limits encourage agencies to make their analyses and conclusions more concise, potentially making them more accessible to the public, but do not limit footnotes or appendices, allowing agencies to include additional analyses or data. The 2023 EO also promotes "early and meaningful involvement" of communities with EJ concerns in the NEPA process, which helps to speed up the permitting process and satisfy the FRA's time limits, while producing better project outcomes.³⁷

³⁰ 88 Fed. Reg. at 25,254–55.

³¹ See 42 U.S.C. § 4332(2)(C) (requiring federal agencies to create a "detailed statement . . . [on] the environmental impact" of proposed "major Federal actions"); 44 C.F.R. § 1502.4.

³² Fiscal Responsibility Act, Pub. L. No. 118-5, tit. III, § 323 (2023).

³³ 42 U.S.C. § 4332(C)(i). This change codifies provisions in CEQ's current regulations implementing NEPA requiring the same. See, e.g., 40 C.F.R. § 1508.1 (defining "effects" or "impacts" as "changes to the human environment from the proposed action or alternative that are reasonably foreseeable").

³⁴ *Id.*

³⁵ National Environmental Policy Act Implementing Regulations Revisions Phase 2, 88 Fed. Reg. 49,924, 49,986 (proposed July 31, 2023) (defining "effects" to include "disproportionate and adverse effects on communities with environmental justice concerns").

³⁶ Under the FRA, EISs must be 150 pages or less, and EISs of "extraordinary complexity" must be 300 pages or less, not including any citations or appendices. EAs must be 75 pages or less, not including citations or appendices. Fiscal Responsibility Act, Pub. L. No. 118-5, tit. III, 137 Stat. 41–42 (2023).

³⁷ In hearings leading up to the passage of the FRA, [agency leadership at CEQ, OMB, and the Federal Permitting Improvement Steering Council](#) explained that early community involvement helps speed up the federal permitting process while producing better project outcomes.



EPA to Review Agencies' NEPA EJ Analyses Under its Section 309 Authority

Section 309 of the Clean Air Act (CAA) requires EPA to review all draft and final EISs prepared by other federal agencies; EPA then [publishes those reviews online](#).³⁸ EPA's section 309 reviews primarily address ways that agencies can avoid or mitigate significant environmental and public health impacts.³⁹ While the 1994 order does not mention NEPA, the 2023 EO requires EPA to “assess whether each agency analyzes and avoids or mitigates disproportionate human health and environmental effects on communities with environmental justice concerns” in their NEPA reviews.⁴⁰ The 2023 EO also requires EPA to submit annual reports summarizing its EJ-specific section 309 reviews to CEQ and the Interagency Council, and recommend “legislative, regulatory, or policy options to advance environmental justice in Federal decision-making.”⁴¹

Like other parts of the 2023 EO, these NEPA-specific provisions are not judicially enforceable on their own. However, by requiring agencies to analyze a proposed project's effects on EJ communities, including impacts that disproportionately affect different demographic groups, the 2023 EO ensures that these impacts are included in the administrative record and considered in agencies' permitting and mitigation decisions. Also, by explicitly requiring EPA to review agencies' EJ analyses under its section 309 authority, the 2023 EO creates a public evaluation mechanism through which both EPA and advocates can pressure agencies to conduct these analyses in a robust, consistent manner.

Public Engagement

The 2023 EO shifts the burden to ensure meaningful public engagement onto federal agencies.⁴² The order requires agencies to “as appropriate and consistent with applicable law . . . provide opportunities for the meaningful engagement of persons and communities with [EJ] concerns who are potentially affected by Federal activities.” The 2023 EO also specifically encourages “early and meaningful involvement” of communities with EJ concerns in NEPA permitting processes, discussed above.⁴³

The 2023 EO further requires agencies to provide “timely opportunities” for members of the public “to share information or concerns and participate in decision-making processes,” and that agencies “fully consider[]” that public input in their decision-making.⁴⁴ Notably, the 2023 EO requires agencies to affirmatively “seek[] out and encourag[e]” public involvement by “ensuring” agencies make information accessible to people with limited English proficiency and people with disabilities, and do outreach to “communities or groups of people” potentially affected by Federal activities and “who are not regular participants in Federal decision-making.”⁴⁵ The order also broadly requires agencies to “address[], to the extent practicable and appropriate, other barriers to participation,” including by “providing technical assistance, tools, and resources” to facilitate “meaningful and informed public participation.”⁴⁶

³⁸ Section 309 of the Clean Air Act (CAA) requires EPA to “review and comment in writing on the environmental impact of . . . any major Federal agency action . . . and [] proposed regulations.” 42 U.S.C. § 7609(a).

³⁹ [EPA Review Process under Section 309 of the Clean Air Act](#), EPA (last updated on May 22, 2023).

⁴⁰ 88 Fed. Reg. at 25,256.

⁴¹ *Id.* at 25,255–56.

⁴² The 1994 order puts the burden of public engagement on “the public” who “may submit recommendations to Federal agencies” and “each federal agency may, whenever practicable and appropriate, translate crucial public documents, notices, and hearings relating to human health or the environment for limited English-speaking populations.” 59 Fed. Reg. at 7,632.

⁴³ 88 Fed. Reg. at 25, 253–54.

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*



These efforts will likely build on commitments made in federal agencies' Equity Plans, required under EO 13985 and released in April 2022, which are designed to assess and address systemic barriers contributing to underserved communities' unequal access to federal funding and other resources.⁴⁷ Agencies will also be able to rely on new or expanded EJ and equity offices created under President Biden, including [EPA's new Office of Environmental Justice and External Civil Rights](#), [DOJ's Office of Environmental Justice](#), [DOE's Office of Economic Impact and Diversity](#), and [FERC's Office of Public Participation](#).

Civil Rights Enforcement

The 2023 EO affirms federal agencies' obligations to enforce foundational civil rights laws as a crucial component of achieving EJ. Notably, the order explicitly includes requirements that agencies enforce civil rights laws with recipients of federal funding, including state agencies. Federal agencies must "ensure that all programs or activities receiving Federal financial assistance that potentially affect human health or the environment do not directly, or through contractual or other arrangements, use criteria, policies, practices, or methods of administration that discriminate on the basis of race, color, or national origin."

The 2023 EO also requires the US attorney general to oversee agencies' compliance with and enforcement of civil rights laws, including "in programs and activities receiving Federal financial assistance." The attorney general must also annually report to the chair of CEQ "regarding any relevant pending or closed litigation."⁴⁸ These requirements include enforcement of Title VI of the Civil Rights Act of 1964 (Title VI), the Americans with Disabilities Act and the Fair Housing Act, among other civil rights statutes.

The order's focus on recipients of federal financial assistance is notable given state environmental agencies often have primary authority over the siting of industrial facilities and enforcement of federal environmental laws. Under Title VI, state agencies, as recipients of federal financial assistance, are required to comply with federal agencies' regulations implementing the statute. Those regulations prohibit actions that are intentionally discriminatory or have a discriminatory effect based on race, color, or national origin.⁴⁹ These regulations are enforced by federal agencies' civil rights offices through the investigation of administrative complaints, often filed by impacted communities, and occasionally through affirmative compliance review. For more on agencies' enforcement of Title VI under President Biden, visit [EELP's Federal EJ Tracker](#).

Agencies to Address Historical Inequities, Systemic Barriers

The 2023 EO requires agencies to "identify, analyze, and address historical inequities, systemic barriers, or actions related to any Federal regulation, policy, or practice that impair the ability of communities with [EJ] concerns to achieve or maintain a healthy and sustainable environment"⁵⁰ and "receive equitable access to human health or environmental benefits" including "natural disaster recovery and climate mitigation, adaptation, and resilience." This requirement mirrors language in EO 13985, issued on President Biden's first day in office, which requires agencies to review their programs to identify potential barriers that "underserved communities" might face in trying to access federal benefits, services, and programs.⁵¹

The 2023 EO encourages federal agencies to "evaluate [their] relevant legal authorities" and "as available and appropriate, take steps to address disproportionate and adverse human health and environmental

⁴⁷ To learn more about agencies' equity plans, visit [EELP's Federal EJ Tracker](#).

⁴⁸ 88 Fed. Reg. at 25,256.

⁴⁹ See, e.g., 6 C.F.R. § 21.5 (Department of Homeland Security regulations implementing Title VI barring the administration of programs in a manner that would have a "discriminatory effect" on the basis of race, color, or national origin); 40 C.F.R. § 7.35 (EPA regulations implementing Title VI barring the same); 49 C.F.R. § 21.5 (Department of Transportation regulations implementing Title VI barring the same).

⁵⁰ *Id.* at 25,253–54.

⁵¹ 86 Fed. Reg. 7009, 7010.



effects (including risks) and hazards unrelated to Federal activities.”⁵² This includes requiring agencies to use their existing legal authorities and “where available and appropriate . . . avoid, minimize, or mitigate disproportionate and adverse human health and environmental effects (including risks) and hazards of Federal activities on communities with environmental justice concerns, to the maximum extent practicable.”⁵³ In other words, the 2023 EO expressly encourages agencies to not only address the adverse environmental effects of their own activities, but also look for opportunities to leverage their existing authority to reduce disparities in the distribution of environmental burdens, including climate change-related impacts.

Notably, the 2023 EO explicitly calls out equitable access to federal disaster assistance, including mitigation and adaptation funds. Under President Biden, the Federal Emergency Management Agency’s (FEMA) own National Advisory Council has reported that FEMA disaster funds exacerbate wealth inequality by disproportionately benefiting higher-income households, while “those that started with less receive disproportionately less.”⁵⁴ FEMA was not explicitly named under the 1994 order, though the agency included EJ analyses in some of its proposed rulemakings by 2002.⁵⁵ In 2022, FEMA released a fact sheet for applicants and subapplicants to FEMA grants on compliance with EO 12898.⁵⁶

Independent Agencies Encouraged to Voluntarily Comply via Public Reporting

In general, independent agencies are not required to comply with EOs, but the 2023 EO encourages voluntary compliance through a new public reporting mechanism. The 1994 order “request[s]” independent agencies to comply.⁵⁷ The 2023 EO, by comparison, “strongly encourage[s]” these agencies to comply and allows independent agencies to notify the chair of CEQ whether they intend to comply with the order. CEQ will then make those notices public, and list participating agencies online.⁵⁸ This public list can be used to hold independent agencies accountable to their EJ commitments.

Several independent agencies have jurisdiction over key environmental justice concerns, including permitting decisions regarding natural gas infrastructure, overseen by the Federal Energy Regulatory Commission; nuclear infrastructure development and waste disposal, overseen by the Nuclear Regulatory Commission; labor disputes processed by the National Labor Relations Board; and potential corporate environmental, social, and governance disclosure requirements imposed by the Securities and Exchange Commission.⁵⁹

New Offices and Obligations to Promote Accountability and Fill Data Gaps

New Public Accountability Mechanisms

The 2023 EO adds public accountability mechanisms and explicitly requires agencies to develop “internal mechanisms” to achieve the order’s goals. These include additional performance metrics, identifying and dedicating “staff, funding, and other resources,” and providing “appropriate professional development and training.”⁶⁰ Agencies must also create and publish Environmental Justice Strategic Plans, to be updated

⁵² *Id.* at 25,253.

⁵³ 88 Fed. Reg. at 25,254.

⁵⁴ [National Advisory Council Report to the FEMA Administrator](#), FEMA NAT’L ADVISORY COUNCIL 6 (Dec. 2021).

⁵⁵ See, e.g., [Disaster Assistance; Federal Assistance to Individuals and Households](#), 67 Fed. Reg. 3411 (proposed Jan. 23, 2002) (including a discussion of potential EJ impacts as required under Order 12898).

⁵⁶ [Executive Order 12898: Environmental Justice](#), FEMA (March 2022) (noting FEMA will prioritize development of guidance to assist grant program applicants and sub-applicants to address environmental justice in project implementation).

⁵⁷ 59 Fed. Reg. at 7,631.

⁵⁸ 88 Fed. Reg. at 25,256–57.

⁵⁹ The 2023 EO adopts the definition of independent regulatory agencies under 44 U.S.C. § 3502(5).

⁶⁰ *Id.* at 25,255.



every four years. Agencies must then submit an Environmental Justice Assessment of that Strategic Plan two years after it is published. These processes will be led by a new EJ Officer to be appointed at each agency participating in the Interagency Council.⁶¹ Both the plan and the assessment will be shared online in the administration’s recently-launched [EJ Scorecard](#), and will likely include opportunities for public comment and engagement. While the commitments agencies include in these plans are not judicially enforceable, the plans and assessments will help ensure agencies are transparent about the scope and focus of their EJ programs.

Agencies Directed to Bridge Data Gaps

As stated in the 2023 EO’s Policy section, “gaps in environmental and human health data can conceal [] harms from public view, and, in doing so, are themselves a persistent and pernicious driver of environmental injustice.”⁶² In response, the order creates new requirements to promote the collection and use of data to fill these gaps.

The 2023 EO creates a new EJ subcommittee within the White House National Science & Technology Council, led by the Office of Science and Technology Policy’s (OSTP). The subcommittee is tasked with several new mandates, including developing an EJ Science, Data, and Research Plan to be updated biennially, and integrating Indigenous Knowledge and developing standards on consulting with and obtaining the consent of Tribal Nations. The subcommittee will also host an annual summit on science, data, and research related to EJ, and is tasked with “encouraging participatory science . . . and, as appropriate, integrating such science into agency decision-making processes,” among other areas of focus.⁶³ The Director of the Office of Science and Technology Policy will invite agency representatives to join the Subcommittee, in consultation with the Chair of CEQ.⁶⁴

The order then requires each agency to “take appropriate steps . . . to promote the development of research and data related to environmental justice,” considering recommendations from the EJ Subcommittee.⁶⁵ These steps include enhancing data collection, creating new tools to “improve the consideration of [EJ] in decision-making,” and provide new science needed to “inform decisions that advance [EJ]” including analyses of cumulative impacts and risks.

Finally, the 2023 EO includes specific guidance on agencies’ compliance with the Emergency Planning and Community Right-to-Know Act (EPCRA) regarding the release of toxic chemicals from federal facilities. Agencies must host public meetings within six weeks of a qualifying release and provide notice of the hearing within 72 hours of the release. The order further requires EPA to “evaluate available legal authorities” to “require or encourage” non-Federal facilities to take additional steps consistent with EPCRA reporting requirements.⁶⁶

Expanded Capacity with New Offices and Committees

The 2023 EO establishes a new White House Office of Environmental Justice within CEQ to coordinate interagency activities and “identify[] opportunities for collaboration and coordination” with state, Tribal, territorial, and local governments.⁶⁷ The 2023 EO also expands the White House Environmental Justice Working Group, which was first established under the 1994 order and renamed the Interagency Council

⁶¹ *Id.* at 25,259.

⁶² *Id.* at 25,252.

⁶³ *Id.* at 25,257.

⁶⁴ *Id.* at 25,256.

⁶⁵ *Id.* at 25,258.

⁶⁶ *Id.*

⁶⁷ *Id.* at 25,260.



under EO 14008.⁶⁸ The Interagency Council is tasked with supporting interagency collaboration related to EJ, including training and promoting the meaningful participation in federal activities of communities with EJ concerns.⁶⁹ The 2023 EO further requires each agency participating in the Interagency Council to designate an EJ officer responsible for leading the development and implementation of the agency's EJ Strategic Plan and Assessment.⁷⁰

Conclusion

While the 2023 EO is not judicially enforceable, it has the potential to drive more stringent environmental and public health regulations and permitting decisions by requiring agencies to account for the unique and heightened impacts to communities with EJ concerns. The 2023 EO also fills key gaps in the 1994 order by providing agencies with specific mandates, creating public accountability mechanisms, and expanding agencies' capacity to address EJ-related concerns when fulfilling their statutory obligations.

It will take time for federal agencies to meaningfully implement the order. CEQ intends to issue interim agency guidance on implementing the order by November 2023, and final guidance by November 2024. EELP will continue to track the federal government's implementation of the 2023 EO on our [Federal EJ Tracker](#).

⁶⁸ The 2023 EO adds the following agencies to the Interagency Council: the Department of State, the Department of Veterans Affairs, the Department of Homeland Security, the General Services Administration, and the Federal Permitting Improvement Steering Council.

⁶⁹ *Id.* at 25,259.

⁷⁰ *Id.*