



Addressing Environmental Justice Through NEPA

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Some Members of Congress and the Biden Administration are exploring how to use the environmental review process under the National Environmental Policy Act (NEPA) to ensure that environmental laws and policies fairly treat and reflect input from all people regardless of race, color, national origin, or income. This principle is commonly referred to as “environmental justice.” Congress enacted NEPA in 1969 to require federal agencies to assess the environmental effects of proposed federal actions prior to making decisions. Currently, NEPA does not require agencies to consider environmental justice, but some agencies do consider it as part of their NEPA processes as a result of [Executive Order 12898](#), issued in 1994.

In its [review](#) of NEPA regulations, the Biden Administration plans to consider how to incorporate environmental justice analyses into the NEPA process. Some Members of Congress have also shown an interest in this topic by holding [hearings](#) or proposing legislation [requiring consideration](#) of environmental justice during agency NEPA process. This Sidebar describes (1) how environmental justice is considered during the NEPA process; (2) how the federal courts have reviewed agency evaluations of the environmental justice effects of proposed projects in their NEPA processes; and (3) considerations for Congress.

NEPA and Executive Order 12898

[NEPA](#) requires federal agencies to identify and evaluate the impacts of “major Federal actions significantly affecting the quality of the human environment.” The Supreme Court has explained that NEPA requires agencies to “[take a hard look at environmental consequences](#)” of their proposed actions, consider alternatives, consult with stakeholders, and publicly disseminate their analyses and proposals before taking final action. While NEPA prescribes the process for environmental review, it does not “[mandate](#)” that federal agencies alter their proposed actions because of the review.

NEPA also established the [Council on Environmental Quality](#) (CEQ), which issues [regulations](#) and [guidance](#) detailing how federal agencies must implement NEPA. In 2020, under the Trump Administration, CEQ finalized [revisions](#) to its 1978 NEPA regulations. In one of several legal challenges to the 2020 NEPA regulations, the Biden Administration has asked a federal court to [remand](#) the 2020

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regulations as it reviews them, citing environmental justice as one of the issues being considered in the review. For further information on NEPA and its regulations, see this [CRS In Focus](#).

Executive Order 12898: Requiring Agencies to Consider Environmental Justice

[Executive Order \(E.O.\) 12898](#), “*Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations*,” is a foundational document for environmental justice policies. On February 11, 1994, President Clinton issued the Order, directing each federal agency “[t]o the greatest extent practicable and permitted by law” to “make achieving environmental justice part of its mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minority populations and low-income populations.” To implement this overarching direction, agencies were required to develop environmental justice strategies that included lists of actions or policies that needed to be revised to

- promote enforcement of all health and environmental statutes in areas with minority populations and low-income populations;
- ensure greater public participation;
- improve research and data collection relating to the health of and environment of minority populations and low-income populations; and
- identify differential patterns of consumption of natural resources among minority populations and low-income populations.

The Order also created an Interagency Working Group on Environmental Justice of the covered agencies to develop guidance for and to coordinate agency actions and assessments of environmental justice issues. The Order states, however, that it is limited to “the internal management of the executive branch and is not intended to create” any enforceable rights to challenge “the compliance or noncompliance” of federal agencies.

Although E.O. 12898 remains in effect, the Biden Administration is examining how E.O. 12898 should be updated to increase the federal government’s efforts to address environmental justice. In E.O. 14008, *Tackling the Climate Crisis at Home and Abroad*, President Biden addressed E.O. 12898 in several ways. First, E.O. 14008 amended E.O. 12898 by changing the name of the Interagency Working Group on Environmental Justice to the White House Environmental Justice Interagency Council (EJ Interagency Council) and moving the Council into the Executive Office of the President. It also tasked the EJ Interagency Council with recommending further updates to E.O. 12898 to address environmental justice. Additionally, E.O. 14008 amended E.O. 12898 by creating the White House Environmental Justice Advisory Council (EJ Advisory Council) within the U.S. Environmental Protection Agency (EPA) to advise the EJ Interagency Council and CEQ on environmental justice matters. In March 2021, CEQ [charged](#) the EJ Advisory Council to recommend further [revisions](#) to E.O. 12898.

Applying Executive Order 12898 to NEPA

Executive Branch Guidance

The executive branch has attempted to marry NEPA with environmental justice goals through a series of guidance documents and practice guides. President Clinton’s 1994 [memorandum](#) accompanying E.O. 12898 directed each agency to “analyze the environmental effects, including human health, economic and social effects, of Federal actions, including effects on minority communities and low-income communities, when such analysis is required by” NEPA. The memorandum also instructed agencies to “provide opportunities for community input in the NEPA process” as a way of “identifying potential effects and mitigation measures.” In a 2011 [Memorandum of Understanding](#), the Interagency Working

Group created the NEPA Committee and [reaffirmed](#) the covered agencies' obligation to identify and address environmental justice issues, including "disproportionately high and adverse human health or environmental effects" on minority and low-income populations when, among other things, implementing NEPA.

To assist agencies with complying with E.O. 12898, CEQ and the Interagency Working Group have issued various guidance documents. In 1997, CEQ issued "[Environmental Justice: Guidance under the National Environmental Policy Act.](#)" The document sets out general principles and examples for agencies of how to incorporate environmental justice concerns during each step of the NEPA process. Although the document is not legally binding on agencies, CEQ [stated](#) that "[a]gencies should apply, and comply with, this guidance prospectively," as part of CEQ's objective was to "improve the internal management of the Executive Branch with respect to environmental justice under NEPA." The NEPA Committee and Interagency Working Group released a 2016 report on [Promising Practices for EJ Methodologies in NEPA Reviews](#) to disseminate best practices across the federal government for engaging with and protecting historically underrepresented groups during the NEPA process. The Working Group also released the 2019 [Community Guide to Environmental Justice and NEPA Methods](#) to aid communities in participating in the NEPA process.

In May 2021, President Biden's newly created EJ Advisory Council made several recommendations to draw on these prior efforts and revise E.O. 12898 to integrate NEPA more fully into the Order. The recommended revisions include [incorporating](#) into E.O. 12898 the NEPA directives from President Clinton's 1994 memorandum. The revised E.O. 12898 would also require the EJ Interagency Council [to review](#) every five years how agencies have considered impacts on environmental justice communities in their NEPA process and recommend to the President legislative, regulatory, or policy options for advancing environmental justice through the NEPA review process. The proposed revisions would also [require](#) federal agencies to develop and update their environmental justice strategic plans to include strategies to "fully implement NEPA."

Agency Practice to Implement E.O. 12898

While the term "[environmental justice](#)" is not defined in federal law, federal agencies have adopted varying definitions in response to E.O. 12898. EPA, which plays a leading role in implementing environmental justice policies, defines "[environmental justice](#)" as the "fair treatment and meaningful involvement of all people regardless of race, color, culture, national origin, income, and educational levels with respect to the development, implementation, and enforcement of protective environmental laws, regulations, and policies." According to EPA, "[fair treatment](#)" means "no group of people should bear a disproportionate share of the negative environmental consequences resulting from industrial, governmental and commercial operations or policies." EPA has described "[meaningful involvement](#)" as a multifactor determination that should assess various considerations including public access, publicity, cultural expectations, and access to understandable information.

Agency NEPA processes implement environmental justice principles and directives in different ways. For instance, some agency [environmental justice strategies](#), such as the [Department of Commerce's strategy](#), stress the need to ensure that traditionally underrepresented communities are able to participate in the public notice and comment process required by NEPA. Some strategies, such as the [Department of Defense's strategy](#), also direct the agency programs to consider disproportionate and adverse environmental effects of proposed actions on low-income or minority populations during NEPA reviews. Other agencies, including the [Department of Transportation](#), seek to require these effects are taken into account when identifying alternatives or take steps to mitigate any such effects.

Judicial Review of Environmental Justice in NEPA Cases

The courts have played a limited role in reviewing environmental justice analyses in NEPA cases. Much of this reflects the fact that E.O. 12898, by its own language, does not create enforceable rights to challenge federal agency compliance with the Order in court. Six federal courts of appeals (U.S. Courts of Appeals for the [First](#), [Fifth](#), [Sixth](#), [Eighth](#), [Ninth](#), and [D.C.](#) Circuits) have confirmed this, and at least [one federal district court](#) has gone further, foreclosing all judicial review of environmental justice analyses based on its reading of E.O. 12898.

However, because agencies have included environmental justice analyses in their NEPA documents following the [1994 presidential memorandum](#), a number of courts have reviewed these analyses. These courts have generally reasoned that, although E.O. 12898 does not itself create a right of action, the agencies have included analysis of environmental justice considerations in their NEPA documents. Thus, those analyses are subject to “arbitrary and capricious” review under the [Administrative Procedure Act](#) (APA). Like most APA review, this judicial review does not enforce any particular substantive requirements of E.O. 12898—that is, it does not require an agency to reach any particular outcome dictated by environmental justice concerns—but ensures that the agency take a “hard look” at those concerns during its NEPA process. The U.S. Courts of Appeals for the [Sixth Circuit](#) and [Eighth Circuit](#) have suggested, without expressly deciding, that the APA provides a legal basis for judicial review of environmental justice analysis in NEPA reviews. For more information on judicial review of NEPA actions, see CRS In Focus, [National Environmental Policy Act: Judicial Review and Remedies](#).

The 2017 D.C. Circuit decision in [Sierra Club v. Federal Energy Regulatory Commission \(FERC\)](#) provides an example of how the courts have reviewed environmental justice claims under the APA. In this case, plaintiffs challenged the decision to approve a proposed pipeline project, arguing the environmental impact statement (EIS) prepared by FERC insufficiently considered environmental justice issues. The EIS determined that while 83.7% of the proposed pipeline would cross through “environmental justice communities,” the alternative proposals would “affect a relatively similar percentage.” Further, the EIS determined that the project “would not have a ‘high and adverse’ impact on *any* population” and thus “not have a ‘disproportionately high and adverse’ impact on any population.” The D.C. Circuit rejected the plaintiffs’ argument, finding that FERC’s analysis was sufficient, as it “discussed the intensity, extent, and duration of the pipelines’ environmental effects, and also separately discussed the fact that those effects will disproportionately fall on environmental-justice communities.” In other words, the agency “grappled with the disparate impacts of the various possible pipeline routes,” and its EIS was therefore not arbitrary or capricious.

Although NEPA is considered one of the [most frequently litigated statutes](#) in the history of environmental law, there have been relatively few challenges to environmental justice analyses in NEPA cases given the lack of any statutory mandate for agencies to consider environmental justice. Of the federal courts of appeals that reached the merits (D.C. Circuit, [2004](#), [2017](#), [2021](#); [Fifth Circuit](#); [Sixth Circuit](#); [Eighth Circuit](#)), most have rejected claims that the environmental justice analyses in NEPA documents were arbitrary and capricious or that the relevant agency failed to take the requisite “hard look” in the analysis. In August 2021, however, the D.C. Circuit issued a decision in [Vecinos para el Bienestar de la Comunidad Costera v. FERC](#). Plaintiffs in that case challenged, among other things, FERC’s environmental justice analysis of two liquefied natural gas export terminals and associated pipelines in Cameron County, Texas. The court [held](#) that FERC failed to analyze adequately the environmental justice impacts of the project in its NEPA review. The court [concluded](#) that FERC’s decision to limit its environmental justice analysis to communities within two miles of the facilities was arbitrary and capricious because FERC also determined that environmental impacts would extend beyond this two-mile radius. The D.C. Circuit [ordered](#) FERC to explain why it chose to limit the scope of its environmental

justice analysis to this limited area or expand its analysis to communities within a different radius of each project site. The court [remanded](#) without vacating FERC’s approval of the project.

In the federal district courts, stakeholders have had some limited success in challenging environmental justice analyses in the approximately 30 cases reaching the merits. Of those, three courts ruled in favor of the plaintiffs, finding that the agencies failed to take a “hard look” at the impacts of their proposed projects before concluding that they do not adversely affect environmental justice populations. In 2017, an [Idaho federal district court](#) held that the U.S. Air Force failed to consider adverse noise impacts from proposed training missions on minority and low-income populations and lacked adequate support for its “ cursory” conclusion that such populations were not affected by the project. Similarly, in 2020, a [D.C. district court](#) found that the U.S. Army Corps of Engineers failed to support its “bare-bones” conclusion that the environmental justice communities would not be disproportionately affected by a potential oil spill from a proposed oil pipeline project. Another 2020 decision from a [California district court](#) found that the Bureau of Land Management failed to address environmental justice impacts of rescinding a rule to reduce methane from federal oil and gas leases despite evidence in the record of such impacts.

Considerations for Congress

Some Members of Congress have introduced legislation to clarify how environmental justice should be considered under NEPA. For example, H.R. 2434, the Environmental Justice Act of 2021, would codify existing guidance on how to incorporate environmental justice analyses into NEPA processes and require federal agencies to develop environmental justice strategies to incorporate into their NEPA implementation. Other proposals, such as H.R. 2021, the Environmental Justice for All Act, would [require](#) agencies to take specific steps in their NEPA reviews to address environmental justice. While these proposals seek to expand NEPA’s scope to address environmental justice, other bills, such as S. 717, the UNSHACKLE Act, seek to reform NEPA to streamline the review process and transparency requirements.

As Members of Congress consider whether or how to address environmental justice in NEPA, they may seek to clarify the divergent approaches taken by the federal courts in response to E.O. 12898. E.O.12898 indicates an intent not to create enforceable rights, and the federal courts have therefore refused to consider legal claims based on alleged violations of the Order. However, the courts have been less clear as to whether an agency’s consideration of environmental justice as a part of its NEPA review is reviewable under the APA. One potential method of addressing the divergent approaches taken by the courts is for Congress to address expressly whether environmental justice analyses must be part of the NEPA process and, if so, whether those analyses are judicially reviewable and under what legal standards.

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