OCTOBER 2020
VOL. 20-9

PRATT'S

ENERGY LAW REPORT

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Pratt's Energy Law Report

VOLUME 20 **NUMBER 9** **October 2020**

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ISBN: 978-1-6328-0836-3 (print)
ISBN: 978-1-6328-0837-0 (ebook)
ISSN: 2374-3395 (print)
ISSN: 2374-3409 (online)

Cite this publication as:

[author name], [*article title*], [vol. no.] PRATT'S ENERGY LAW REPORT [page number] (LexisNexis A.S. Pratt);
Ian Coles, *Rare Earth Elements: Deep Sea Mining and the Law of the Sea*, 14 PRATT'S ENERGY LAW REPORT 4 (LexisNexis A.S. Pratt)

Editorial Office
230 Park Ave., 7th Floor, New York, NY 10169 (800) 543-6862
www.lexisnexis.com

MATTHEW BENDER

(2020–Pub.1898)

Editor-in-Chief, Editor & Board of Editors

Hydraulic Fracturing Developments
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Partner, O'Melveny & Myers LLP

Pratt's Energy Law Report is published 10 times a year by Matthew Bender & Company, Inc.

POSTMASTER: Send address changes to *Pratt's Energy Law Report*, LexisNexis Matthew Bender, 230 Park Ave. 7th Floor, New York NY 10169.

Preparing for Increased Focus on Environmental Justice in Project Permitting

By Kerry L. McGrath and Alexandra K. Hamilton*

In this article, the authors discuss the National Environmental Policy Act ("NEPA") and environmental justice review requirements for federal agency actions, recent challenges and court decisions showcasing the increased scrutiny and focus on environmental justice reviews for project permitting, recent NEPA regulation and other environmental justice developments, and what the recent cases and other recent regulatory and political developments may mean for project permitting and environmental justice.

Before a major project requiring a federal permit can be commenced or built, the federal permitting agency must review the environmental impacts of its decision to grant the permit under the National Environmental Policy Act ("NEPA"). While there are numerous aspects to a NEPA review, for more than two decades, NEPA reviews—like other federal agency decisions—have often entailed environmental justice considerations.

Recent challenges to major permits and resulting court decisions have shown an increased focus on environmental justice in NEPA reviews and related litigation. These decisions may portend a trend in challenges to federal permitting on the basis of environmental justice concerns. In addition, in light of both the national discourse on racial justice, a key component of environmental justice, and the first update to the NEPA regulations in over 40 years, there is likely to be an increased focus on environmental justice issues in NEPA reviews.

This article offers a brief legal background of both NEPA and environmental justice review requirements for federal agency actions; discussion of recent challenges and court decisions showcasing the increased scrutiny and focus on environmental justice reviews for project permitting; review of the recent NEPA regulation update and other environmental justice developments; and, finally, analysis of what these cases and a host of other recent regulatory and political

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* Kerry L. McGrath, a partner in the Washington, D.C., office of Hunton Andrews Kurth LLP, has experience with permitting and litigation under the Clean Water Act, the Endangered Species Act, the National Environmental Policy Act, and other environmental statutes. Alexandra K. Hamilton, an associate in the firm's Washington, D.C., office, focuses her practice on environmental issues involving regulation, compliance, enforcement, and litigation. The authors may be contacted at kmcgrath@huntonak.com and ahamilton@huntonak.com, respectively.

developments may mean for project permitting and environmental justice moving forward.

BRIEF HISTORY OF ENVIRONMENTAL JUSTICE IN NEPA REVIEWS

Widely recognized as the first major federal environmental law, NEPA was enacted and signed into law a half century ago to require federal agencies to consider the environmental impacts of their proposed major federal actions before making decisions, including whether to grant a permit for a proposed project.[1] It imposes primarily procedural, rather than substantive, requirements and "does not mandate particular results."[2]

Under NEPA, federal agencies must determine if their proposed major federal actions (including permit authorizations for projects sponsored by private entities) will significantly affect the human environment and consider the environmental and related social and economic effects. NEPA also established the Council on Environmental Quality ("CEQ") and gave it primary responsibility for implementing NEPA, predominantly by promulgating regulations to implement the procedural requirements of NEPA.

Although NEPA itself does not directly mention environmental justice, the NEPA process accommodates other environmental review requirements from other federal statutes and executive orders, including, among other things, those related to endangered species, historic preservation, and environmental justice. One of the key components of the NEPA review is public participation and input.[3]

The environmental justice movement began as early as the 1960s, and was championed by civil rights leaders and underserved, minority communities who protested the frequent siting of projects with adverse environmental effects, such as the disposal of toxic wastes, in minority and low-income communities.

The movement gained a legal foothold in the 1990s, when President Clinton signed Executive Order ("EO") 12898, entitled "Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations."[4] EO 12898 requires federal agencies (and requests that independent federal agencies, like the Federal Energy Regulatory Commission),[5] "to the greatest extent practicable and permitted by law," to "identify[] and address[], as

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[1] 42 U.S.C. § 4321 *et seq.* (1969).

[2] *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989).

[3] *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 371 (1989).

[4] 59 Fed. Reg. 7629 (Feb. 16, 1994).

[5] *Id.* at § 6-604.

appropriate, disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minority populations and low-income populations."[6]

The EO also provides for access to information and public participation of environmental justice communities in the federal decisionmaking process, requiring federal agencies to ensure that their actions "do not have the effect of excluding persons (including populations) from participation in, denying persons (including populations) the benefits of, or subjecting persons (including populations) to discrimination under, such programs, policies, and activities, because of their race, color, or national origin."[7]

Although EO 12898 does not directly discuss NEPA, an accompanying memorandum addressed to federal agencies subject to the EO specifically directed them to use the NEPA process to accomplish environmental justice reviews and to provide for public participation in particular environmental justice communities.[8] Following the issuance of EO 12898, federal agencies including CEQ and the Environmental Protection Agency ("EPA") issued guidance documents articulating their procedures for incorporating environmental justice goals into their NEPA processes.[9]

EPA's guidance, for example, identifies a number of factors to be considered in environmental justice analyses, including demographic, geographic, economic, and human health factors to determine potential exposures and risks associated with environmental hazards; considerations to determine if environmental justice communities have been given adequate opportunities for involvement in the process; as well as factors to assess historical and current conditions and the impact of proposed actions.[10] Neither EPA's nor CEQ's guidance documents offer detailed instruction, however, on how these various factors should be weighed or applied in reviewing a particular proposed project.

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[6] *Id.* at § 1-101.

[7] *Id.* at § 2-2.

[8] White House Memorandum for the Heads of All Departments and Agencies, *Executive Order on Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations* (Feb. 11, 1994).

[9] CEQ, *Environmental Justice; Guidance Under the National Environmental Policy Act* (December 1997); EPA, *Final Guidance For Incorporating Environmental Justice Concerns in EPA's NEPA Compliance Analyses* (April 1998).

[10] *EPA Guidance*, at Ex. 3.

The guidance documents do not provide a specific formula for identifying and addressing environmental justice issues,[11] but the analysis generally contains three steps.

First, the agency identifies whether an environmental justice community—including, generally, minority populations, low-income populations, and Indian tribes[12]—may be affected by a proposed federal action. This step requires the agency to determine the geographic scope of its analysis and analyze the demographics of the population within that area. Agencies typically use EPA's EJSCREEN, which is an environmental justice mapping and screening tool that provides demographic and environmental information for a given geographic area, to inform this analysis.

Second, if an environmental justice community is in fact potentially affected, the agency should provide opportunities for public participation, affording particularly ample engagement opportunities to potentially affected environmental justice communities. The public participation largely overlaps with the initial step of determining scope, as community engagement is sometimes necessary in order to determine whether an environmental justice community will be impacted.

Third, the agency undertakes a substantive analysis to evaluate whether disproportionate impacts to environmental justice communities will result from the proposed federal action.

In the absence of more precise federal guidance on how to undertake environmental justice reviews, project developers largely have been left to guess as best practices. Also, as a result of unspecified criteria, reviewing courts have not taken consistent approaches to reviewing whether environmental justice reviews pass muster.

RECENT CHALLENGES AND COURT DECISIONS IMPLICATING ENVIRONMENTAL JUSTICE

NEPA is the most litigated environmental statute in the United States.[13] The Supreme Court has directly addressed NEPA in 17 decisions, and the U.S. district and appellate courts issue approximately 100 to 140 decisions each year involving NEPA.[14] Environmental justice issues typically have not been the

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[11] *CEQ Guidance*, at 8.

[12] *Id.* at 9.

[13] James E. Salzman and Barton H. Thompson, Jr., *Environmental Law and Policy* 340 (5th ed. 2019).

[14] *See* 85 Fed. Reg. 43,304, 43,309 (July 16, 2020); Daniel R. Mandelker et al., NEPA Law and Litigation, Table of Cases (2d ed. 2019).

predominant factor in court decisions finding NEPA reviews to be insufficient. Recent legal challenges and court decisions concerning NEPA and other environmental justice reviews, however, may indicate a shift toward increased scrutiny of and focus on environmental justice reviews.

Recent NEPA Cases Involving Environmental Justice Review

Recent court decisions involving NEPA reviews illustrate a trend in increased attention to environmental justice in federal project permitting, particularly for pipeline projects.

In 2017, the U.S. Court of Appeals for the District of Columbia Circuit rejected environmental justice claims challenging an environmental impact statement ("EIS") issued by the Federal Energy Regulatory Commission ("FERC") for a natural gas pipeline in the southeast in *Sierra Club v. FERC*, although the court ultimately remanded to the agency after finding other inadequacies in its NEPA review.[15]

Petitioners alleged that FERC failed to adequately consider the project's impact on low-income and minority communities, but the court found that FERC had met its environmental justice obligations under NEPA by addressing the project's environmental effects and disproportionate impact on environmental justice communities, explaining that "an agency is not required to select the course of action that best serves environmental justice," so long as it "take[s] a 'hard look' at environmental justice issues."[16] The court noted that FERC took seriously commenters concerns about locating a compressor station in an area argued to be already overburdened with pollution sources, reopening the comment period on the EIS to seek input on relocating the compressor station and securing an agreement to relocate the station, in part to avoid potential impacts to environmental justice communities. The court held, the "EIS . . . gave the public and agency decisionmakers the qualitative and quantitative tools they needed to make an informed choice for themselves. NEPA requires nothing more."

Another prescient example is the protracted litigation over the U.S. Army Corps of Engineers ("Corps") granting of an easement for the Dakota Access Pipeline's crossing under Lake Oahe and the Missouri River. The Native American tribes' challenges to the Corps' granting of the easement include environmental justice concerns related to potential adverse impacts to culturally important water resources.

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[15] *Sierra Club v. FERC*, 867 F.3d 1357 (D.C. Cir. 2017).

[16] *Id.* at 1368.

In a 2017 decision, the U.S. District Court for the District of Columbia held that the Corps' decision not to prepare an EIS "largely complied with NEPA," save for three "substantial exceptions,"[17] one of which was the Corps' failure to conduct an adequate environmental justice analysis of disproportionate impacts to the Standing Rock tribe in the event of a spill.[18] The court remanded to the Corps to address this issue, as well as the two others.

Earlier this year, the court reviewed the Corps' revised NEPA analysis and determined it was insufficient, although the court did not reach the environmental justice claim, and remanded to the Corps to complete an EIS for the project.[19] Most recently, the court issued an order to require the Dakota Access Pipeline to shut down while the Corps completes the EIS.[20] This litigation is of particular import for environmental justice issues related to infrastructure projects, given its high-profile nature, and could have implications for future projects undergoing NEPA reviews.

In a non-pipeline example, in *California v. Bernhardt*, the U.S. District Court for the Northern District of California recently vacated the Bureau of Land Management's ("BLM") rescission of its previous rule regarding oil and gas resource waste.[21]

A coalition of plaintiffs challenged BLM's rescission on several grounds, including an alleged failure to comply with NEPA by issuing a brief Environmental Assessment and finding of no significant impact that, plaintiffs argued, neglected to address concerns raised by commenters about disproportionate health risks to Native Americans in low-income communities from oil and gas emissions.[22] The court agreed with the challengers, finding BLM's assertion that most federal oil and gas development occurs in "sparsely populated areas" unsupported by the record and determining that NEPA requires consideration of "the localized impacts to people for whom the public health impacts are of clear significance."[23]

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[17] *Standing Rock Sioux Tribe, et al. v. U.S. Army Corps of Engineers*, 255 F. Supp. 3d 101, 147 (D.D.C. 2017).

[18] *Id.* at 136–40.

[19] *Standing Rock Sioux Tribe, et al. v. U.S. Army Corps of Engineers*, 440 F. Supp. 3d 1 (D.D.C. 2020).

[20] *Standing Rock Sioux Tribe, et al. v. U.S. Army Corps of Engineers, et al.*, No. 16-1534 (D.D.C. July 6, 2020).

[21] *Cal. v. Bernhardt*, No. 4:18-cv-05712-YGR, 2020 U.S. Dist. LEXIS 128961 (N.D. Cal. July 15, 2020).

[22] *Id.* at *99–100.

[23] *Id.* at *101–02.

Environmental Justice Decisions on Non-NEPA Project Permitting

Considerations of environmental justice in project permitting decisions are not limited to NEPA challenges. Complex infrastructure projects can often implicate both state and federal permitting requirements. Several recent court decisions have evidenced an emerging trend in environmental justice claims under state law requirements. These federal court decisions are grounded in state law, but they could nonetheless influence future courts' analyses of environmental justice issues in NEPA and other contexts.

In *Friends of Buckingham, et al. v. State Air Pollution Control Board, et al.*, a group of Virginia residents challenged a state air permit to build and operate a compressor station in their community approved by the Virginia State Air Pollution Control Board ("Board") based on an application to the Virginia Department of Environmental Quality ("DEQ").[24] The compressor station was planned to facilitate natural gas transmission through a new natural gas pipeline. The residents challenged the permit, alleging that the compressor station would exacerbate the health conditions already suffered by the largely African-American Union Hill community's occupants. The U.S. Court of Appeals for the Fourth Circuit ultimately found that the environmental justice review was inadequate and vacated the permit approval.

The Fourth Circuit's *Friends of Buckingham* decision focuses on the first step of environmental justice review: identifying whether an environmental justice community is implicated in the proposed action. Although Virginia had no statute or regulation expressly requiring an environmental justice review at the time of the permit issuance, Virginia law required the Board to consider site suitability, which the litigants agreed entailed the environmental justice consideration of disproportionate impacts to minority and low-income communities.

The court found that the record before the Board contained conflicting evidence with respect to the environmental justice community.

On the one hand, census data and EPA's EJSCREEN, a tool indicating population demographics often relied upon by agencies, indicated that the community's minority population did not exceed the threshold (50 percent) to be deemed a minority environmental justice community. Information submitted by community members, including a door-to-door household survey, on the other hand, showed a much higher minority population at more than 80 percent, including more than 60 percent African Americans.

Rather than deciding on the record whether an environmental justice community was present, the Board conservatively assumed that an environ-

[24] No. 19-1152 (4th Cir. Jan. 7, 2020).

mental justice community was implicated and determined that the environmental justice community would not face disproportionate adverse impacts based on statewide air quality considerations. The Fourth Circuit found that the Board's assumption that an environmental justice community was present gave insufficient attention to the community.

In particular, the court found that the Board failed to consider localized effects of the proposed project on that community, including unique sensitivities such as increased asthma prevalence and other health conditions, which could lead to a disproportionate, adverse impact on the identified environmental justice communities even if the project did not cause pollutant concentrations to exceed applicable state and national ambient air quality standards. The court deemed this failure to analyze the particularized health effects of the environmental justice community insufficient.

Friends of Buckingham is fairly specific to the air permitting context and Virginia state environmental justice requirements and may not translate to future success on environmental justice-related challenges to other projects. Nonetheless, the Fourth Circuit's decision provides relevant discussion of environmental justice reviews that may bear on future NEPA and other agency reviews of proposed project permits. The Fourth Circuit's decision makes clear the importance of specific and fulsome considerations of potential impacts on and public comments addressing environmental justice communities, as it asserts that environmental justice is "not merely a box to be checked."

Notably, not all federal courts to address similar issues have agreed, and not all recent permit challenges grounded in environmental justice concerns have prevailed. In *Weymouth v. Massachusetts Department of Environmental Protection*, the U.S. Court of Appeals for the First Circuit recently considered a similar challenge to another natural gas compressor station project in Massachusetts, which included environmental justice claims.[25] There, the court found the project did not implicate (and, therefore, did not violate) Massachusetts' environmental justice policy because the project's emissions would not exceed threshold levels triggering enhanced analysis.

The First Circuit declined to follow the *Friends of Buckingham* decision, noting that state laws have different requirements.[26]

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[25] 961 F.3d 34 (1st Cir. 2020).

[26] *Id.* at 55.

Challenges Invoking Environmental Justice Considerations in Agency Rulemakings

In addition to litigation over project permitting decisions, agencies are also facing increased scrutiny related to environmental justice in the rulemaking context. This tension is particularly apparent as agencies grapple with how best to engage environmental justice communities while at the same time adopting public-health minded accommodations to public participation opportunities in light of the ongoing COVID-19 pandemic. For example, a recently filed suit challenges EPA's virtual public hearing procedures on proposed revisions to its coal ash disposal rule.[27] The plaintiffs allege that EPA's decision to provide only virtual hearings deprived stakeholders, particularly those from low-income communities, of the opportunity for sufficient participation given limited internet access and not being able to present concerns in person.

Moving forward, in light of these recent challenges and decisions, as well as the increased national focus on environmental justice issues, agencies are likely to solicit and receive more information from applicants and the public on environmental justice impacts and more detailed environmental justice reviews, provide more opportunities and methods for public input, and engage in more specific analyses geared to the localized impacts to environmental justice communities.

AMENDED CEQ NEPA REGULATIONS

On July 16, 2020, CEQ issued a final rule amending its NEPA regulations.[28] The overhaul of the existing regulations is the first significant change in more than 40 years and became effective on September 14, 2020. Following promulgation of the amended CEQ regulations, each agency will update its own NEPA implementing procedures as necessary. Among the changes the revised regulations may have on project permitting and NEPA reviews generally, the revisions could have a bearing on environmental justice reviews conducted as part of the NEPA process.

Evaluation of Environmental Justice Impacts

The new rule could result in different agency approaches to evaluating environmental justice impacts. For instance, aspects of environmental justice reviews, including analysis of repeated and cumulative exposures of environmental justice communities to environmental hazards, has at times been

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[27] Complaint, *Labadie Environmental Organization et al. v. Andrew Wheeler et al.*, No. 1:20-cv-01819 (D.D.C. July 6, 2020).

[28] CEQ, *Update to the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act, Final rule*, 85 Fed. Reg. 43,304 (July 16, 2020).

incorporated into the cumulative effects analysis required under CEQ's existing NEPA regulations.[29] The new regulations provide a new definition of "effects" of the proposed action that eliminates the references to separate categories of direct, indirect, and cumulative effects, and instead requires consideration of all effects caused by an agency action.[30]

Agencies are to analyze effects that are "reasonably foreseeable" and have "a close causal relationship" with the proposed action, which do not include effects that are remote in time, geographically remote, the product of a lengthy causal chain, or that the agency has no ability to prevent.[31] The new regulations also revise the provision requiring agencies to address the "affected environment" to clarify that the NEPA review should "describe the environment of the area(s) to be affected . . . including the reasonably foreseeable environmental trends and planned actions in the area(s)."[32]

Some commenters expressed concern that eliminating the requirement for a separate cumulative effects analysis would hinder agencies' analysis of environmental justice impacts because a "[c]umulative impact analysis is essential to identifying whether and how low income and frontline communities of color may be overburdened by additional environmental impacts posed by an action because these communities may already be disproportionately burdened by existing sources of pollution."[33] The final rule's preamble clarifies that the rule "does not preclude consideration" of "cumulative impacts" or "impacts of a proposed action on any particular aspect of the human environment."[34]

Instead, the rule is designed to require consideration of all effects caused by the action (which arguably would include environmental justice and other effects caused by the action that previously would have been considered in a cumulative effects analysis).

Consistent with the new rules, instead of addressing environmental justice impacts in a separate cumulative effects analysis, agencies may address environmental trends or planned actions that are relevant to environmental justice communities in the "affected environment" discussion. And, where they

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[29] *See, e.g.*, *EPA Guidance*, at 3.

[30] *Id.* at 43,343 (to be codified at 40 C.F.R. § 1508.1(g)).

[31] *Id.*

[32] *Id.* at 43,331 (to be codified at 40 C.F.R. § 1502.15).

[33] *See, e.g.,* Comments of the Attorneys General of Washington, et al. on Notice of Proposed Rulemaking—Update to Regulations Implementing the Procedural Provisions of the National Environmental Policy Act, at 53 (Mar. 10, 2020), *available at* https://www.regulations.gov/document?D=CEQ-2019-0003-172704.

[34] 85 Fed. Reg. at 43,344.

are reasonably foreseeable and have a close causal relationship to the proposed action, potential environmental justice impacts would be evaluated as part of the "effects of the action" analysis. These changes may result in a different approach for some agencies.

Public Participation and Access

Another potential impact of the new NEPA regulations is with respect to the NEPA process itself.

Provisions in CEQ's revised regulations address when and where agencies can take public comments, and also what they can do with them. Some commenters expressed concerns that proposed provisions limiting time frames for public comment and encouraging use of electronic communications would disproportionately impact environmental justice communities by limiting their opportunities to learn about projects and to comment on them.[35]

The final NEPA rule provides the agencies with more flexibility to design and customize public involvement. It encourages agencies to use methods of electronic communication to publish important environmental information and for public participation, but the final rule clarifies that agencies should consider the public's access to electronic media, such as in rural locations or economically distressed areas, when selecting appropriate methods for providing public notice and involvement.[36] The final rule preamble notes that this flexibility is particularly important in light of the COVID-19 pandemic, which may require agencies to adapt outreach methods.[37]

CEQ's rulemaking process may itself be subject to challenge on the basis of environmental justice concerns. Some commenters asserted that the rulemaking process was lacking from an environmental justice standpoint because they argue that there were insufficient opportunities to participate in public hearings. Some commenters also disagreed with CEQ's determination that the rule would not disproportionately adversely affect environmental justice communities.[38] CEQ rebutted those criticisms in its final rule,[39] but may nonetheless face such arguments in a potential legal challenge.[40]

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[35] *Id.* at 43,356.

[36] *Id.* at 43,337, 43,356 (to be codified at 40 C.F.R. § 1506.6).

[37] *Id.* at 43,338.

[38] *Id.* at 43,456–57.

[39] *Id.*

[40] Indeed, the Southern Environmental Law Center has already announced its intent to challenge the final rule on behalf of 16 organizations. Southern Environmental Law Center, *Feds gut cornerstone environmental protection, Press release* (July 15, 2020), *available at* https://www.

Although CEQ's new regulations will be mandatory for NEPA reviews beginning after the effective date of September 14, 2020,[41] the rule affords agencies discretion to decide whether to apply the new rules to projects that are already underway.[42]

OTHER ENVIRONMENTAL JUSTICE DEVELOPMENTS

Given the nation's increased focus on environmental issues, the national discourse on racial justice issues, and the impending presidential election, environmental justice issues are likely to see increased attention from Congress and campaigns.

Environmental Justice Legislation

Recent efforts in Congress have also placed an increased focus on environmental justice issues.

In particular, Representatives Raul Grijalva (D-Ariz.) and Donald McEachin (D-Va.) have put forward a bill entitled the "Environmental Justice for All Act."[43] The bill, which was drafted as a result of significant collaboration with and input from environmental justice communities, would making a number of changes to ingrain environmental justice in various federal laws, including the Clean Air Act, Clean Water Act, and Civil Rights Act. In addition, the bill would revise NEPA to explicitly require consideration of "all potential direct, indirect, and cumulative impacts" of a proposed action on environmental justice communities and require preparation of a "community impact report" for any project with potentially negative impacts on environmental justice communities.[44]

The bill has gained little traction after its initial introduction and has yet to clear the various committees it was referred to for consideration, let alone receive a vote before the full chamber.[45]

Even if it were to pass in the House, it would have little chance of coming up for a vote before the Republican-controlled Senate. The bill's introduction,

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southernenvironment.org/news-and-press/press-releases/feds-gut-cornerstone-environmental-protection.

[41] 85 Fed. Reg. at 43,304.

[42] *Id.* at 43,339.

[43] Rep. Donald McEachin, *McEachin and Chair Grijalva Unveil Landmark Environmental Justice Bill Following Year-Long Collaborative Effort, Press Release* (Feb. 27, 2020), https://mceachin.house.gov/media/press-releases/mceachin-and-chair-grijalva-unveil-landmark-environmental-justice-bill.

[44] Environmental Justice for All Act, H.R. 5986, 116th Cong. Sec. 12.

[45] H.R. 5986—Environmental Justice for All Act, 116th Cong. (2019-2020), https://www.congress.gov/bill/116th-congress/house-bill/5986/all-actions?overview=closed#tabs.

however, showcases an increased attention to environmental justice issues and may lead to similar efforts to enact legislative changes to emphasize environmental justice reviews down the road.

Environmental Justice Issues in Presidential Election

Another area of potential development for environmental justice rests on the presidential election this year.

Former Vice President Joe Biden, the Democratic nominee for president, recently released an environmental justice plan as part of his platform.[46] The plan proposes a number of executive actions that Biden would undertake if elected, including revising EO 12898. Among the plan's numerous proposals, it would create an Environmental and Climate Justice Division within the U.S. Department of Justice, as a complement to the existing Environment and Natural Resources Division. The plan does not clarify which division would oversee litigation over environmental justice aspects of NEPA reviews.

The plan would also elevate environmental justice oversight authorities within CEQ to revise EO 12898, working with environmental justice leaders to address current and past environmental justice issues, as well as expand upon EPA's EJSCREEN tool to better identify environmental justice communities subject to multiple environmental hazards. No NEPA-specific proposals are included in the plan's outline, although revisions to EO 12898 would presumably affect environmental justice reviews incorporated into NEPA processes.

With the election still to come, and the plan's implementation dependent upon the outcome, it is unclear whether any of these reforms will become reality. The prominence of environmental justice in the campaign platform of one of the two major party candidates, however, is telling of its increasing national profile and importance.

CONCLUSION: APPLICANTS AND AGENCIES ARE LIKELY TO INCREASE THEIR FOCUS ON ENVIRONMENTAL JUSTICE ISSUES IN PROJECT PERMITTING AND NEPA REVIEWS

Developing a major infrastructure project requires significant coordination, numerous approvals, and, if a federal permit is required, a NEPA review. NEPA reviews can take a long time to complete—typically years if an EIS is required—often adding substantial time to a project's schedule and are often a target of litigation.

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[46] The Biden Plan to Secure Environmental Justice and Equitable Economic Opportunity in a Clean Energy Future, *available at* https://joebiden.com/environmental-justice/.

In light of the recent NEPA challenges and court decisions, the new NEPA regulations, and other developments, environmental justice is becoming a more and more critical aspect of NEPA reviews.

One result may be a shift toward more comprehensive evaluations of environmental justice impacts in NEPA reviews.

Another may be environmental justice analyses that are more focused on localized effects for environmental justice communities.

Yet another may be an increased focus on public participation during the NEPA process, with special thought given to environmental justice communities' access to NEPA materials and opportunities for providing input.

As agencies' approaches to environmental justice reviews in the NEPA process continue to evolve, and the national spotlight shines on environmental justice issues, project proponents should from the outset of a project proactively engage in helping to identify and address environmental justice issues in the NEPA process and should work with permitting authorities to ensure a thorough environmental justice analysis with adequate opportunities for public participation.