



Environmental Justice and the National Environmental Policy Act

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In spring 2023, Congress [amended](#) the [National Environmental Policy Act](#) (NEPA) as part of the Fiscal Responsibility Act (P.L. 118-5). Weeks earlier, President Biden issued [Executive Order \(E.O.\) 14096](#). Both actions affect how the federal government considers the impacts of federal actions, which may include environmental justice considerations.

E.O. 14096 [defines](#) *environmental justice* to mean the “just treatment and meaningful involvement of all people” in agency decision-making and actions “regardless of income, race, color, national origin, Tribal affiliation, or disability.” NEPA and its implementing regulations provide a procedural framework by which agencies may consider the environmental effects of their actions. Through executive orders, the President has directed or encouraged agencies to include effects that relate to environmental justice during their decision-making processes.

This Sidebar describes procedures for the consideration of community input and impacts under NEPA, explains how E.O. 14096 affects agency consideration of environmental justice during the NEPA process, discusses how the federal courts have reviewed agency evaluations of the environmental justice effects of proposed actions, and offers considerations for Congress.

Agency Decision-Making Under NEPA

[NEPA](#) requires federal agencies to identify and evaluate the impacts of “major Federal actions significantly affecting the quality of the human environment.” The range of agency actions subject to NEPA varies considerably and commonly includes activities such as issuing permits and expanding infrastructure. Prior to finalizing many decisions, NEPA requires federal agencies to assess reasonably foreseeable environmental effects of proposed actions and consider alternatives to those actions.

NEPA also established the Council on Environmental Quality ([CEQ](#)), which issues [regulations](#) and [guidance](#) on the implementation of NEPA. CEQ houses the [Office of Environmental Justice](#) pursuant to E.O. 14096 and has issued [Environmental Justice: Guidance under the National Environmental Policy Act](#). The [2023 NEPA amendments](#) may result in CEQ and other agencies updating their NEPA regulations. For further information on the 2023 NEPA amendments, see this [CRS In Focus](#).

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While NEPA and its implementing regulations prescribe the process for an environmental review, the Supreme Court has explained that it does not “[mandate](#)” that federal agencies alter their proposed actions based on that review. For actions that potentially result in significant environmental impacts, agencies must “[take a hard look at environmental consequences](#)” of proposed actions, consider alternatives, identify unavoidable adverse impacts of a proposed action, and consult with stakeholders before making final decisions. For an action anticipated to have significant impacts, prior to an agency making a decision, [regulations](#) require it to seek comments from other agencies and the public on the scope of the impacts and potential alternatives, and it must prepare an environmental impact statement describing the impacts and alternatives considered.

Because an executive order is an exercise of presidential power, its [legal effect](#) depends upon its reliance on a valid source of presidential authority, such as the Constitution or an act of Congress. The statutory language of NEPA does not expressly define or address environmental justice. Congress in the [original statute](#) stated that its purpose was to provide for the “social, economic, and other requirements” of present and future generations, allowing for “all Americans” to participate in “a wide sharing of life’s amenities.” The text of NEPA requires federal agencies to [integrate the natural and social sciences](#) in planning and decision-making and to [make available](#) advice and information useful in improving the quality of the environment. Furthermore, the 2023 amendments to NEPA codified the existing agency practice of soliciting [public comments](#) on alternatives and additional information to consider in an environmental impact statement. Although NEPA itself does not expressly require consideration of environmental justice per se, some individual agencies do so through their own [procedures and regulations](#) to implement NEPA.

Federal Agency Environmental Justice Requirements

Two executive orders instruct agencies on how to integrate environmental justice into decision-making: [E.O. 14096](#) and [E.O. 12898](#). These orders draw from non-discrimination and environmental protection principles. For example, E.O. 14096 refers to communities that experience “disproportionate and adverse human health or environmental burdens,” often in tandem with “remnants of discrimination” that “persist today.”

[E.O. 12898](#), issued in 1994, required federal agencies to integrate environmental justice into their missions and develop strategies in support of environmental justice, and it ordered coordination of environmental justice assessments and agency actions across agencies. After E.O. 12898 was issued, the executive branch (through individual agencies and inter-agency working groups) issued a variety of reports and guidance documents outlining how agencies could incorporate or [enhance practices](#) for incorporating environmental justice in the NEPA process. Those documents, for example, [clarified](#) agency obligations to identify and address environmental justice issues and provided a [Community Guide to Environmental Justice and NEPA Methods](#).

Federal agencies have sought to implement the directives in E.O. 12898 in different ways. For example, some do so [explicitly under NEPA](#), and some provide for analysis in [other parts](#) of their decision-making processes (such as a [civil rights impact analysis](#)). [Dozens of federal regulations](#) contain provisions that expressly address environmental justice. Some agencies (such as the [Air Force](#)) direct compliance with environmental justice executive order provisions. Other agencies (such as the [Department of Commerce](#)) have adopted [environmental justice strategies](#) prioritizing the inclusion of underrepresented communities in the public notice and comment process required by NEPA. Still others direct consideration of [disproportionate and adverse effects of](#) proposed actions on low-income or minority populations to identify alternatives and mitigate harms.

[E.O. 14096](#) refers to several of these approaches, directing agencies to [analyze and address](#) impacts, burdens, and historical inequalities of federal activities; provide [opportunities for engagement](#) in agency

decision-making; and develop environmental justice [strategic plans](#). E.O. 14096 explicitly discusses NEPA reviews and [directs](#) agencies to:

- analyze the direct, indirect, and cumulative effects of federal actions on communities;
- consider disparate health effects and risks from pollution and other health hazards, such as information related to race, national origin, age, sex, disability, and/or socioeconomic status;
- provide opportunities for early and meaningful community involvement; and
- share information on planning and permitting, implementation, regulatory actions, compliance, and enforcement actions related to human health and the environment.

E.O. 14096 also directs CEQ and its newly established Office of Environmental Justice to advance environmental justice initiatives, including by working with state, tribal, territorial, local governments, the [White House Environmental Justice Advisory Council](#), and the [White House Environmental Justice Interagency Council](#) on environmental justice matters. E.O. 14096 further directs the heads of all federal agencies to [support and cooperate with](#) the Office of Environmental Justice.

E.O. 14096 identifies some [approaches](#) that can be incorporated into strategic environmental justice plans, regulations, policies, and permitting. These include actions to mitigate harm and removing exemptions or waivers that could “undermine” a full understanding of human health or environmental standards. This could include, for example, changes in the use of categorical exclusions and other permitting decisions that might bypass or limit analysis of impacts.

Judicial Review of Environmental Justice in NEPA Cases

Courts are playing an increasing but still limited role in reviewing environmental justice analyses in NEPA cases. When agencies include environmental justice analyses in their NEPA documents, courts may review these analyses like other NEPA content under the [Administrative Procedure Act](#) (APA). Decisions from the U.S. Courts of Appeals for the [First](#), [Fifth](#), [Sixth](#), [Eighth](#), [Ninth](#), and [D.C.](#) Circuits have determined that an executive order on environmental justice is not itself a basis to challenge an agency’s NEPA compliance. NEPA analysis of environmental justice considerations, however, may be [reviewable under the APA](#) to consider whether the agency decision was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law. Under the APA, a reviewing court can ensure that the agency has followed the appropriate NEPA procedure and has taken a “hard look” at environmental impact concerns on a case-by-case basis. Courts, however, have generally not dictated the substance of the agency’s decision. For more information on judicial review and NEPA, see [this CRS In Focus](#).

Although NEPA is one of the most frequently litigated statutes in environmental law, there have been a limited number of challenges to environmental justice analyses in NEPA cases. Of the federal courts of appeals that have squarely considered environmental justice claims under NEPA (the D.C. Circuit [in multiple decisions](#); the [Fifth Circuit](#); the [Sixth Circuit](#); and the [Eighth Circuit](#)), most have held that the environmental justice analyses in NEPA documents were not arbitrary and capricious and that the relevant agency had taken the requisite “hard look” in the analysis. For example, in *Sierra Club v. Federal Energy Regulatory Commission (FERC)*, the D.C. Circuit upheld an agency’s determination that a proposed action would not have a disproportionate impact on low-income and predominantly minority communities where alternative proposals would affect a similar number of communities and where in no case was there a high number of communities affected.

In the federal district courts, several dozen cases have considered environmental justice claims under NEPA, and most of those decisions have upheld the agencies’ analyses and methodologies in considering environmental justice. For example, a [D.C. District Court](#) has determined that environmental justice

analysis of impacts to the local economy does not mandate a specific substantive outcome, while a [District of Nevada Court](#) has ruled that purely economic impacts are outside the scope of NEPA analysis.

While courts have often decided environmental justice challenges in favor of the agency, plaintiffs have seen some success in claims alleging that agencies failed to take a “hard look” at environmental justice impacts of proposed projects. For example, based on E.O. 12898, the D.C. District Court required the U.S. Army Corps of Engineers to [include more than a “bare-bones” environmental justice analysis](#) in a NEPA review, although it [deferred to the agency’s preferred methodology](#) for doing so. Courts have come to similar conclusions in [Idaho](#), where an agency issued a “cursory” dismissal of concerns about noise impacts on minority and low-income populations, and in [California](#), where an agency ignored evidence of environmental justice impacts when rescinding a rule on oil and gas leases. At the appellate level, in 2021 the D.C. Circuit considered a case in which FERC had decided to limit its analysis of impacts to a two-mile radius. The court [remanded](#) to FERC to reconsider its environmental justice analysis, [concluding](#) that FERC was arbitrary and capricious to adopt a two-mile limit when the agency knew that impacts would extend further. In another case, the Ninth Circuit directed an agency to [add an environmental justice analysis](#) when revising its NEPA analysis to address other deficiencies.

Considerations for Congress

In the first six months of the 118th Congress, more than 100 introduced bills reference NEPA, [over 40](#) of which expressly include community considerations. Additionally, more than 30 bills in the 118th Congress explicitly include *environmental justice* in the legislative text. Although Congress passed amendments to NEPA in the Fiscal Responsibility Act of 2023, other permitting reform matters remain under consideration at the committee level. [H.R.1705](#) and [S.919](#) would expand NEPA reviews by [requiring](#) agencies to take specific steps to address environmental justice, including preparing community impact reports. Other bills would restrict the scope of environmental justice considerations: [H.R.3526](#) would repeal E.O. 14096 in its entirety, while [S.1449](#) would limit the ability of a plaintiff to challenge an agency’s NEPA determination in court.

In the absence of explicit legislative direction, environmental justice consideration within NEPA analysis is presently driven by action at the executive level. As Members of Congress consider whether or how to address environmental justice, they may seek to define *environmental justice* by statute or to provide legislative direction to federal agencies concerning the procedural or substantive dimensions of environmental justice in a NEPA analysis.

Congress retains the prerogative to provide for judicial review of agency decision-making under NEPA. E.O. 14096 and E.O. 12898 expressly state that they do not create enforceable rights, and the federal courts have therefore refused to consider legal claims based on alleged violations of an executive order alone. Instead, the courts apply the general standard of review that the APA provides for agency decisions, and they have generally considered environmental justice claims on the facts and administrative record of each particular case. Congress could choose to provide a more detailed standard for judicial review either of claims under NEPA or claims based on environmental justice considerations.

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