



# National Association of Environmental Professionals

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# Environmental Justice Updates

Prepared and presented by:  
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# Fred Wagner

**NAEP Elected At-Large Board Member  
Partner, Venable LLP**

- Chairs Transportation Research Board Policy and Organization Group
- Primary focus is major infrastructure and project development, NEPA reviews, and federal resources permitting
- Served as Chief Counsel at Federal Highway Administration
- Drafted NEPA reform measures in MAP-21 and the Fast Act
- Served as a trial attorney at US Department of Justice, Environmental Division
- JD UVA Law School



# Stacey Sublett Halliday

**Principal, Beveridge & Diamond**

- Co-leads B&D's Environmental Justice Practice Group and co-founded B&D's Corporate Environmental Justice Network
- Advises clients on environmental justice strategy, policy development, and project specific implementation; ESG strategy, sustainability reporting, and green marketing risk mitigation; product stewardship, right-to-repair, and circular economy strategy; and navigation of U.S. EPA investigations, enforcement, and strategic policy engagement
- Served as Special Counsel to the EPA General Counsel





# **Emily Gulick**

## **Environmental Planner, Jacobs**

- 5+ years experience in environmental planning
- Primary focus on NEPA projects for a variety of federal agencies (DoD, NSF, and NASA)
- NAEP Environmental Justice Working Group Lead
- Jacobs Environmental Justice Subgroup Lead
- Member of NAEP since 2018
- B.A. Environmental Studies, University of Colorado Boulder
- B.A. Geography/GIS, University of Colorado Boulder

# Agenda

- EO 14096
- Proposed rulemaking NEPA Phase II
- Cumulative impact methodology in NEPA
- EJ in state and local permitting decisions
- Emerging defenses to EJ/civil rights enforcement and litigation
- Ongoing Title VI investigations
- Bipartisan Infrastructure Law & Inflation Reduction Act Funding Opportunities
- Community Benefits Plans
- Questions and answers

# EO 14096 Revitalizing Our Nation's Commitment to Environmental Justice for All

- Advance environmental justice for all by implementing and enforcing the Nation's **environmental and civil rights laws**, preventing pollution, addressing climate change and its effects, and working to clean up legacy pollution that is harming human health and the environment”
- Communities with environmental justice concerns exist in all areas of the country and experience **disproportionate and adverse** human health or environmental burdens
- Advancing environmental justice can only occur by
  - Conducting **meaningful engagement and collaboration** with underserved and overburdened communities
  - Making decisions based on informed **by scientific research and high-quality data**
  - Removing barriers, including those related to **disability, language access, and lack of resources**
  - Respecting **tribal sovereignty** and self-governance
- This EO builds on and is consistent with previous environmental justice EOs (including EO 12898)
- CEQ and WHEJIC are considering whether additional guidance or materials will be issued

# EO 14096 – Section 3 Government-Wide Approach to Environmental Justice

Identify, analyze, and address federal activities

- Disproportionate and adverse human health and environmental effects
- Historic inequalities, systemic barriers, or actions that impair achievement of health
- Barriers that impair communities to receive equitable access to human health or environmental benefits

Evaluate relevant legal authorities to take steps to address

- Disproportionate and adverse human health and environmental effects
- Opportunities for workforce training to support high-quality and well-paying jobs
- Take steps to address disproportionate and adverse human health and environmental effects and hazards unrelated to Federal activities, including cumulative impacts of other environmental and other burdens already experienced by the community

Provide opportunities for meaningful engagement through

- Timely opportunities for public engagement and outreach
- Consideration of public input in decision making processes
- Removal of barriers for individuals with limited English proficiency or with disabilities



# EO 14096 – Section 3 Government-Wide Approach to Environmental Justice (Cont'd)

## NEPA implementation

- Analyze **direct, indirect, and cumulative effects** of actions on communities with environmental justice concerns
- Considers best available science and information on any **disparate health effects** (including risks) arising from exposure to pollution and other environmental hazards, such as information related to race, national origin, socioeconomic status, age, disability, and sex of the individuals exposed
- Provides opportunities for **early and meaningful involvement** in the environmental review process

## Reinforces the EPA's authority under **section 309 of the Clean Air Act**

- Assess whether each agency analyzes and avoids or mitigates disproportionate human and health and environmental effects
- Report to the CEQ on the EPA's reviews

# Proposed Revisions to NEPA

On July 31, 2023, CEQ proposed the “*Bipartisan Permitting Reform Implementation Rule*” to revise its regulations for implementing the procedural provisions of NEPA, including to implement the Fiscal Responsibility Act's amendments to NEPA.



CEQ published a redline version

# Proposed Rule NEPA Phase II

## **Codifies new definition of environmental justice (section 1508.1(k))**

Environmental justice means **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 so that people:

- (1) **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
- (2) 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

# Theme Verbatim language in NEPA Phase II Proposed Rule

Meaningful engagement	Encourage and facilitate public engagement in decisions... <b>including meaningful engagement with communities with environmental justice concerns</b> , which often include communities of color, low-income communities, indigenous communities, and Tribal communities.
Alternatives	Use the NEPA process to identify and assess the reasonable alternatives to proposed actions that will avoid or minimize adverse effects of these actions upon the quality of the human environment, such as <b>alternatives that will reduce climate change-related effects or address adverse health and environmental effects that disproportionately affect communities with environmental justice concerns.</b>
Significance threshold	The potential for <b>disproportionate and adverse</b> human health and environmental effects on communities with environmental justice concerns.



## Theme Verbatim language in NEPA Phase II Proposed Rule

Mitigation measures	Agency should, where relevant and appropriate, <b>incorporate mitigation measures that address or ameliorate significant adverse human health and environmental effects</b> of proposed Federal actions that disproportionately and adversely affect communities with environmental justice concerns.
Health impacts	Effects include... <b>cultural, economic, social, or health</b> , such as disproportionate and adverse effects on communities with environmental justice concerns, whether direct, indirect, or cumulative.
Extraordinary circumstances	Extraordinary circumstances are factors or circumstances that indicate a normally categorically excluded action may have a significant environmental effect. <b>Examples of extraordinary circumstances include... potential disproportionate and adverse effects on communities with environmental justice concerns.</b>
Project resiliency	Any relevant risk reduction, resiliency, or adaptation measures incorporated into the proposed action or alternatives, informed by relevant science and data on the affected environment and expected future conditions.

# Cumulative Effects Methodology in NEPA

- [Consideration of Cumulative Impacts in EPA Review of NEPA Documents](#) (EPA 315-R-99-002, May 1999)
- EPA's EJ tools
  - [EJScreen](#) and other mapping tools
  - [Environmental Quality Index](#)
  - [Eco-Health Relationship Browser](#)

# EJ in State and Local Permitting Decisions

- Application of cumulative effects analyses to facility siting and expansion proposals
- Basis for Title VI challenges to state/local decisions

# Emerging Defenses to EJ/Civil Rights Enforcement and Litigation

## Louisiana chemical facilities

- Complaints alleged that two Louisiana agencies that receive federal assistance from EPA violated Title VI by discrimination against Black communities through their actions and inactions regarding chemical emitting facilities in “Cancer Alley”
- EPA issued a letter of concern and began Title VI investigation
- Louisiana’s motion for injunctive relief - EPA’s Civil Rights Act enforcement efforts in the state are unlawful because the agency authority is over intentional discrimination, not adverse disparate impacts
- EPA’s closure of Title VI investigation without consequence to the State

## Michigan asphalt plant

- Complaints alleged that the CAA permit the state issued to the Ajax asphalt plant was discriminatory
- EGLE entered into an informal resolution agreement with EPA that requires the state to bolster its outreach and air monitoring near the Ajax site
- Agreement was weaker than community groups had been advocating for and doesn’t require the state to address cumulative impacts in permitting

## Chicago recycling facility

- City officials are appealing an administrative ruling that rejected their denial of a permit for a scrap metal recycler due to cumulative impacts on an overburdened neighborhood.



# Ongoing Title VI Investigations

## **Colorado air permitting programs**

- EPA review of Colorado's air permitting programs
- First “affirmative” compliance review” under Title VI

## **Mississippi public drinking water system**

- City of Jackson and Mississippi State Department of Health settlement to address alleged violations of the State Drinking Water Act

## **Alabama wastewater system**

- DOJ and HHS joint settlement (Informal Resolution Agreement) with Alabama Department of Public Health for a wastewater disposal and management system in Lowndes County
- No formal finding that the program violated Title VI
- Sets the model for other rural counties with similar issues

**And others!**

# Bipartisan Infrastructure Law & Inflation Reduction Act Funding Opportunities

## Bipartisan Infrastructure Law (BIL) or Infrastructure Investment and Jobs Act (IIJA)

- \$1.2 trillion for transportation and infrastructure spending
- \$550 billion to “new investments and programs”
- November 15, 2021

## Inflation Reduction Act (IRA)

- \$500 billion in new spending and tax breaks supporting clean energy, reducing healthcare costs, and boosting tax revenues.
- August 16, 2022

Significant funding to Department of Energy, Department of Transportation, and Environmental Protection Agency (among others)

# Community Benefits Plans (CBPs)

- Requirement for all DOE IRA and BIL Funding Opportunity Announcements (FOAs)
- Usually require coverage of four key areas over life of project
  1. Community & Labor Engagement
  2. Workforce Development
  3. Diversity, Equity, Inclusion & Accessibility
  4. Justice 40 and Local Benefit Distribution
- Scored at 20% of technical merit review of proposal
- Emphasis on binding agreements (community benefits agreements, workforce agreements, etc.)
- Phased funding, with assessment of CBP performance for go/no-go determinations
- DOE often issues specific CBP guidance for each FOA, but frequently-updated general guidance, templates, and FAQs are available [here](#).

# In the future...

- Finalization of NEPA Phase II rules
- EPA issuance of cumulative impact guidance
- EPA will open stand-alone EJ offices in each of the 10 regions and OEJCR waiting on appointee (Senate confirmed position)
- Agencies required to develop EJ Strategic Plans (per EO 14096)
- Additional legal challenges to EJ/Civil Rights actions and funding decisions





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## Questions and Answers



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