

Reforming Regulatory Review: Environmental Lawyers Take Note

By Kenneth J. Warren | *The Legal Intelligencer*

Upon assuming office in January 2021, President Joe Biden identified reforming regulatory review as a key priority. Recently, the Biden administration issued an executive order and guidance documents designed in part to increase participation of members of underserved communities in the regulatory process and ensure that they do not disproportionately bear adverse effects of regulatory action. While clearly important to environmental lawyers focused on the development and administration of environmental regulations, the recent changes apply broadly across the larger regulatory landscape.

Modernizing Regulatory Review

On April 6, Biden issued Executive Order 14094, Modernizing Regulatory Review. The order promotes more inclusive regulatory policy and public participation, and requires federal agencies to examine how the burdens and costs of regulatory actions fall on members of disadvantaged and vulnerable communities. It also contains more technical provisions applicable to reviews of significant regulations conducted by the Office of Information and Regulatory Affairs (OIRA).

The order expands opportunities for underserved communities to participate in the regulatory process. It instructs regulatory agencies developing regulatory actions such as issuance of rules or creating their regulatory agenda and plans setting forth the agency's future actions to obtain community input by utilizing proactive community-based outreach and best practices for information accessibility and engagement. Agencies must also clarify the right of interested persons to petition for issuance, amendment, or repeal of a rule. Technological changes to the notice-and-comment process used for adoption of federal regulations, such as employing tools to address computer-generated comments, are encouraged.

To prevent companies or groups with sophistication and resources from unduly influencing regulatory actions, the order instructs the OIRA administrator when reviewing significant federal regulatory actions to facilitate meetings with members of underserved communities and others who have not historically participated. Meetings should not be duplicative, and meeting requests from persons or entities with similar views may be consolidated. To promote transparency, the identity of participants and the subject matter of all meetings with interested members of the public should be disclosed.

The order also requires regulatory analysis, as practical and appropriate, to recognize distributive impacts and equity. As discussed below, the OIRA's parent agency, the Office of Management and Budget (OMB), is proposing a revision to Circular A-4, its guidance to federal agencies on development of regulatory analysis, to encompass these impacts.

Circular A-4

Simultaneous with the president's issuance of Executive Order 14094, OMB issued a proposed update to Circular A-4 (Circular). The Circular guides federal agencies in evaluating likely consequences of potential regulatory actions. One tool used for this purpose is benefit-cost analysis, a technique which provides information on which regulatory alternative maximizes net benefits, i.e., total benefits minus total costs. Although benefit cost analysis is most readily performed where benefits and costs can be monetized, the Circular cautions that professional judgment should be used to consider nonmonetized and nonquantified effects such as environmental, public health and safety, distributive and equity impacts. Alternatively, measures of the cost effectiveness of a regulation may be used.

Evaluating distributional effects may be difficult. The Circular acknowledges that commonly used tools to measure benefits and costs, such as monetizing a person's willingness to pay for a benefit, or willingness to accept loss of a benefit, do not adequately measure the value of human dignity, civil rights and liberties, or indigenous cultures, or how these values are disproportionately affected by a regulatory action. Likewise, these tools may not fully measure the value of ecosystem services, water quality, and aquatic life, or costs that are difficult to quantify, such as those arising from regulations restricting companies from shifting to new products or innovative production techniques.

To perform a distributional analysis, the selection of the groups whose benefits and costs will be examined is critical. The Circular suggests, where appropriate, consideration of income, race, ethnicity, sex, geography, sexual orientation, religion, national origin, age, family composition, or veteran status. During the analysis, benefits are added, and costs are subtracted, separately for each group. The agency may give greater or lesser weight to a benefit to account for the fact that an additional unit of a good is more valuable to a person if they have less of it. The same analysis is conducted for each alternative, and the results clearly summarized for the public with support from accessible maps and graphs where appropriate.

According to the Circular, the differences in distribution of benefits of each regulatory alternative may lead the agency to select a regulatory alternative with lower monetized net benefits. This approach may integrate disproportionate impact analysis and protection of underserved communities into many regulatory decisions.

The Circular also encourages agencies to transparently provide to the public, electronically and through other means, its methods, computer codes, data sources, and analytic choices to inform the public of the effects of alternative actions and to allow the agency's analysis to be reproduced. Reviewers should be able to ascertain whether the agency utilized the highest quality scientific, technical, economic and Indigenous knowledge evidence.

Public Participation Guidance

To advance the enhanced public participation goal of Executive Order 14094, on July 19, OIRA issued a guidance to executive departments and agencies, broadening public participation and community engagement in the regulatory process. According to the guidance, effective and meaningful public engagement improves the information available to government agencies to enable them to produce more responsive, effective, durable and equitable regulations. The guidance emphasizes that public engagement will enable an agency to better understand the potential benefits and cost of the regulation, and which subgroups to examine when conducting a distributional analysis. Public input may also help identify impacts of regulatory action to human dignity, equity and fairness and increase the public's perception of the regulatory process as legitimate and responsive to diverse communities.

The guidance advocates providing opportunities for engagement before and in addition to the standard practice of submitting written comments during the formal public comment period required for promulgation of federal regulations. OIRA encourages early engagement with communities during the period agencies are defining regulatory priorities and establishing their regulatory programs to help define problems to address and potential regulatory alternatives. OIRA also advises agencies to publicize past, ongoing, and future public participation and community engagement activities in their submissions to the Unified Agenda of Federal Regulatory Actions. The biannual Agenda identifies the regulations under development by each agency and annually identifies each agency's regulatory priorities and planned regulatory activities. The guidance recommends that the Agenda be written in plain language and discuss how participation and engagement informed its development of priorities.

The guidance encourages agencies to engage early and transparently in ex parte communications such as meetings with persons interested in the regulatory action. It suggests that proactive outreach by the agency may be necessary to involve affected members of groups who would not otherwise participate in the regulatory process. OIRA notes the value of a public regulatory engagement plan identifying potentially affected communities and how the agency will engage with them.

The guidance also provides practical advice to agencies by identifying leading practices for public participation and community engagement in the regulatory process that agencies should consider. Pre-proposal engagement actions to be considered may include allowing federal financial assistance program participants to pay for childcare, personal care attendants, travel, or related expenses for community members. Likewise, agencies could make regulatory material more accessible, understandable, and useable by members of the public and conduct outreach activities such as listening sessions. OIRA commits to acting flexibly to consider many of the leading practices for engagement to be exempt from review under the Paperwork Reduction Act.

The Biden administration's efforts to increase the participation of underserved communities in agency decisionmaking and to discourage regulatory actions with disproportionate effects on disadvantaged or vulnerable populations may have profound consequences. While promoting fairer, more transparent, and more equitable actions, they may lead to more subjective agency judgments. Whether the process set forth in Executive Order 14094 and the guidance documents is compatible with decisionmaking grounded in sound science and reproducible data remains to be seen.

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