

U.S. Justice Department Unveils New Efforts to Tackle Environmental Justice Concerns

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In this article, the authors review the series of actions announced by Attorney General Merrick B. Garland and Environmental Protection Agency Administrator Michael Regan to advance environmental justice, including the launch of the Office of Environmental Justice within the Justice Department, the implementation of a “comprehensive environmental justice strategy” and the issuance of an interim final rule restoring the use of supplemental environmental projects in settlements to provide redress to communities affected by environmental violations.

The U.S. Department of Justice (“DOJ”) has joined the Biden-Harris Administration’s efforts to address environmental justice concerns.

Attorney General Merrick B. Garland and Environmental Protection Agency (“EPA”) Administrator Michael Regan recently announced¹ a series of actions to advance environmental justice, including the launch of the Office of Environmental Justice within the DOJ, the implementation of a “comprehensive environmental justice strategy” and the issuance of an interim final rule restoring the use of supplemental environmental projects (“SEP”) in settlements to provide redress to communities affected by environmental violations.

While the impact on the regulated community remains to be seen, businesses located in or near environmental justice communities (“EJ Communities”)² should prepare for heightened regulatory scrutiny and enhanced enforcement efforts, and should consider taking advantage of SEPs to mitigate enforcement penalties.

OFFICE OF ENVIRONMENTAL JUSTICE³

One aspect of the DOJ’s recent efforts is the formation of a new office - the Office of Environmental Justice (“Office”) - within the DOJ’s Environment and Natural Resources Division. Cynthia M. Ferguson,⁴ the DOJ’s Senior Litigation Counsel for Environmental

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Justice, will serve as the Office's Acting Director, leading her team in advancing the environmental justice movement, which began in the 1960s as part of the Civil Rights Movement.

Although the Office's responsibilities are still being developed, it has been charged with defending the rights of EJ Communities, improving relations with EJ Communities and stakeholders, and serving as a resource for other governmental entities that are also pursuing environmental justice. Notably, this Office - like the EPA and other divisions within the DOJ - will be relying heavily on the remedies provided by Title VI of the Civil Rights Act. Therefore, businesses should review their compliance with the Act's requirements.

ENVIRONMENTAL JUSTICE ENFORCEMENT STRATEGY⁵

The DOJ has also developed a "Comprehensive Environmental Justice Enforcement Strategy" (the "Strategy") as a mechanism to advance the Biden-Harris Administration's environmental justice goals. The Strategy identifies four "principles" and accompanying concrete steps that the DOJ will use in implementing the Strategy. The four principles are:

1. Prioritize cases that will reduce public health and environmental harms to overburdened and underserved communities;
2. Make strategic use of all available legal tools to address environmental justice concerns;
3. Ensure meaningful engagement with impacted communities; and
4. Promote transparency regarding environmental justice enforcement efforts and their results.

To prioritize cases in line with the first principle, the DOJ will collaborate with other agencies through a newly formed steering committee, refine existing or develop new methodologies for identifying and assessing environmental justice impacts during investigations, and work with newly designated environmental justice coordinators within each of the U.S. Attorney's Offices.

To realize the second principle, the DOJ has instructed regulators to apply Title VI of the Civil Rights Act and other civil rights authorities, in addition to the environmental statutes. Because Title VI prohibits recipients of federal funding from discriminating on the basis of race, color, or national origin, it provides the DOJ with a statutory mechanism to address disparities identified by the environmental justice movement.

These first two principles will have the most immediate impact on businesses.

Accordingly, businesses should anticipate more frequent and stringent investigations and enforcement activities, citizen suits brought by NGOs, as well as demands for greater community participation in industry operations. To mitigate the risk of facing legal action and attendant potential liability, businesses should proactively confirm their compliance with their environmental and Title VI obligations, engage with neighboring communities, and identify and address the potential effects of their operations on these communities in their business plans.

SUPPLEMENTAL ENVIRONMENTAL PROJECTS⁶

Finally, the DOJ announced an Interim Final Rule to reincorporate the use of SEPs in

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settlement negotiations. SEPs are projects that generally benefit public health and the environment, which respondents may perform as part of a settlement with the EPA or a state environmental agency. By completing these projects, which often exceed their compliance obligations, defendants may receive a reduced penalty.

This measure reverses the prior administration's rule that prohibited the use of SEPs in federal consent decrees, on the ground that funding SEPs amounted to illegal diversions of money that would have otherwise been deposited into the U.S. Treasury. SEPs will once again become an important tool in settlement negotiations, with the added benefit that regulators view well-crafted SEPs "as particularly powerful tools for advancing environmental justice."⁷ The Department is currently accepting public comments on the rule. The comment period closes on July 11, 2022.⁸

The first two years of the Administration has shown that President Biden is serious about actively pursuing environmental justice. While the DOJ is the latest agency to announce concrete measures to further the Administration's environmental justice objectives, their implementation remains a work in progress. Regulated entities, however, should ensure they are prepared for renewed and vigorous enforcement of environmental laws, as well as civil rights laws. For example, facilities should consider conducting an environmental audit, ensure that the business is up-to-date on its environmental monitoring and reporting requirements, and that the business is proactively taking steps towards being a "good neighbor" to surrounding environmental justice communities.

In addition, the Administration's environmen-

tal justice measures may also affect a business' corporate obligations. In recent years, the Securities and Exchange Commission ("SEC") has been expanding reporting requirements related to environmental, social, and governance ("ESG") criteria. While the SEC has not directed businesses to disclose environmental justice risks in their corporate reporting, it has directed businesses to disclose climate-related risks, which have been directly correlated with environmental justice.⁹

NOTES:

¹ <https://www.justice.gov/opa/pr/justice-department-launches-comprehensive-environmental-justice-strategy>.

²The White House Environmental Justice Advisory Council defines EJ Communities as "geographic location[s] with significant representation of persons of color, low-income persons, indigenous persons, or members of Tribal nations, where such persons experience, or are at risk of experiencing, higher or more adverse human health environmental outcomes." The EPA uses the EJ Screening Tool, <https://ejscreen.epa.gov/mapper/>, to designate EJ Communities based on seven factors: (1) people of color; (2) low income; (3) unemployment rate; (4) linguistic isolation; (5) people whose education is short of a high school diploma; (6) people under the age of 5; (7) people over the age of 64.

³ <https://www.justice.gov/oej>.

⁴Acting Director Ferguson has served as the DOJ's Senior Litigation Counsel for Environmental Justice for a decade. She also participates in the White House Environmental Justice Interagency Council as a senior staff representative.

⁵ <https://www.justice.gov/asg/page/file/1499286/download>.

⁶ <https://www.govinfo.gov/content/pkg/fr-2022-05-10/pdf/2022-10036.pdf>.

⁷Guidelines and Limitations for Settlement Agreements Involving Payments to Non-Governmental Third Parties, 50 Fed. Reg. 27,936. 27,937 (to be codified at 28 C.F.R pt. 50).

⁸Fed. Reg at 27,936.

⁹See, e.g., EPA Climate Change, Health, and Environmental Justice, available at <https://www.cmu.edu/steinbrenner/EPA%20Factsheets/ej-health-climate-change.pdf> ("Climate change is an environmental justice issue because certain groups of people in the United States are disproportionately affected by climate change and

are less able than others to adapt to or recover from climate change impacts. These groups include people of

color, low-income communities, immigrants, and people who are not fluent in English.”).