

Biden Administration Announces Major Environmental Justice Enforcement Initiatives

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Earlier this month, the U.S. Department of Justice (“DOJ”) announced three new environmental justice initiatives: (i) the return of the use of supplemental environmental projects (“SEPs”) as an enforcement tool; (ii) a comprehensive strategy for environmental justice enforcement; and (iii) the launch of the new Office of Environmental Justice. This *Alert* outlines the key takeaways from DOJ’s announcement, including political context and background, and provides recommendations for companies interested in proactively assessing and addressing environmental justice impacts for their businesses.

Environmental Justice Under the Biden Administration

The federal government defines environmental justice as “the fair treatment and meaningful involvement of all people regardless of race, color, national origin or income, with respect to the development, implementation and enforcement of environmental laws, regulations and policies.”¹ As discussed in a [prior Alert](#), environmental justice has been a focal point of President Biden’s policy agenda since his first week in office, when he directed federal agencies to work proactively toward achieving environmental justice in Executive Order 14008 (Tackling the Climate Crisis at Home and Abroad). The DOJ’s announcement this month implements Executive Order 14008, which directed the Attorney General to coordinate with the Administrator of the Environmental Protection Agency to develop an environmental justice strategy for addressing systemic environmental violations and contaminations.

This announcement is the latest in a series of actions by the Biden administration related to environmental justice. This includes establishing the first-ever White House Environmental Justice Advisory Council, consisting of national environmental justice leaders; launching new or strengthening existing equity and justice offices, task forces and strategies at agencies ranging from the EPA, DOE, DOI, DOL, GSA, HHS and USDA; and establishing the “Justice40 Initiative,” which seeks to ensure at least 40% of benefits from federal investments in climate and clean energy are delivered to disadvantaged communities. Under this initiative, the federal government is maximizing the delivery of benefits to underserved communities under hundreds of federal programs, representing billions of dollars in annual investment, including programs funded under the Bipartisan Infrastructure Law. For example, on May 12, 2022, the EPA announced \$254.4 million in grants for 265 communities to clean up contaminated, polluted or hazardous brownfield properties. According to the announcement, roughly 86% of the communities receiving funding are in historically underserved areas. The announcement is also consistent with EPA’s Draft Strategic Plan released last fall, which outlines increased or expedited enforcement actions and has a corresponding \$1.5 billion budget request in EPA’s FY 2023 budget proposal.

The remainder of this *Alert* reviews the latest set of reforms announced by DOJ this month, which will strengthen environmental justice enforcement.

New and Modified/Revived Tools for Environmental Justice Enforcement

Return of the SEPs

EPA and DOJ are taking the long-anticipated step of reviving the use of SEPs as part of environmental justice policy and settlements. An [interim final rule](#) that became effective on May 10, 2022, provides more detail and limits on the practice and requests comments to both the interim final rule, as well as the Attorney General's memo discussed further below, with comments due by July 11, 2022.

The general premise of SEPs is that DOJ may allow a party with alleged violations to undertake a project to provide tangible environmental or public health benefits to the affected community or the environment. DOJ stated that this policy "furthers the aims of the federal environmental laws the [DOJ] is responsible for enforcing by remedying the harms to communities most directly affected by violations of those laws."² The project may be closely related to the violation being resolved, but would go beyond what is required under environmental laws. Some examples of recent SEPs range in the millions of dollars, with attendant significant reductions in civil penalties, and result in the installation of energy efficient technologies designed to benefit affected communities.

The Trump administration ended the use of SEPs in 2017, but Attorney General Merrick Garland reinstated it in a May 5, 2022 memo, calling the Trump administration's outright ban on SEPs "more restrictive and less tailored than necessary." Attorney General Garland's memo provides that DOJ can utilize SEPs with some limitations. Settlement agreements that utilize SEPs must define "with particularity" the nature and scope of the specific project, projects must have a "strong connection" to the underlying violation and the DOJ must not propose the selection of any particular third party to receive payments. The DOJ can specify the type of beneficiary of the SEP, or can disapprove of a suggested third-party beneficiary. The DOJ must also approve projects before making a finding of liability in favor of the federal government. EPA Administrator Michael Regan noted that this recommitment to SEPs might help alleviate the concerns of environmental justice advocates have raised – mainly that the harms caused to affected communities go unrectified.

New DOJ "Office of Environmental Justice" Promises Increased and Targeted Enforcement

The reinstatement of SEPs is just one component of the DOJ's larger environmental justice strategy. The Attorney General's May 5 strategy memorandum sets forth several principles that the agency will follow in environmental justice enforcement matters:

i. *Prioritization of cases that will reduce public health and environmental harms to overburdened and underserved communities.* To implement this goal, DOJ has announced the creation of the Office of Environmental Justice ("OEJ"). The OEJ will convene a standing DOJ Environmental Justice Enforcement Committee, which will include representatives from various entities within the DOJ, and will make recommendations to DOJ leadership on all aspects of the DOJ's efforts to further environmental justice enforcement. Interagency cooperation at the federal and local level is a critical piece of the new enforcement strategy.

ii. *Strategic use of all available legal tools to address environmental justice concerns.* The DOJ is required to evaluate all existing authorities and tools that could be used to remedy environmental violations, including those outside of the traditional environmental statutes – such as civil rights laws, consumer protection statutes and the False Claims Act.³

iii. *Meaningful engagement with impacted communities.* The DOJ plans to increase outreach and listening sessions and develop case-specific community outreach plans for cases initiated under the DOJ's environmental justice strategy.

iv. *Transparency regarding environmental justice enforcement efforts and their results.* The DOJ's Environmental Justice Enforcement Steering Committee will develop performance standards for evaluating and tracking its progress in implementing the environmental justice strategy, and will create a plan to increase transparency regarding environmental justice work.

Environmental Justice Considerations for Businesses

DOJ's environmental justice strategy serves as a reminder that companies and investors should be aware of and budget for the potential for greater enforcement – by the DOJ, EPA or other agencies – focused on environmental justice issues. The announcement shows that DOJ is considering environmental justice in its enforcement efforts, and environmental justice-related enforcement actions could increase as a result.

In addressing this risk, companies should also be aware of the intersection of environmental justice with their overall ESG (environmental, social and governance) strategy. Investors, regulators and other stakeholders are increasingly focused on the types of social issues and impacts – the “S” in ESG – that are integral to the concept of environmental justice.⁴ Where appropriate, companies should therefore consider integrating environmental justice into their ESG policy and processes, in order to mitigate reputational and legal risk.⁵

On a practical level, companies may need to take environmental justice into consideration in allocating resources to existing facilities and operations in affected communities. Many businesses should consider environmental justice as a factor at the outset of project planning as well, critically examining proposed locations and local communities. For example, as discussed in our prior [environmental justice Alert](#), projects or operations in or near communities most impacted by environmental impacts, called “environmental justice communities,” may receive more scrutiny from regulators and the general public. Further, companies may need to strategize and develop a plan to address environmental justice concerns more directly and broadly, and plan on early community engagement, consultation with legal and technical advisors, as well as more communication with the applicable governmental agencies. There are screening tools (such as EPA's geospatial climate and environmental justice platform, EJScreen) that companies can use to evaluate whether any of their facilities are at elevated risk of enforcement by the DOJ. Companies concerned about increased enforcement can reach out proactively to legal counsel to discuss their needs and obtain counseling to develop an environmental justice strategy.

1. See, e.g., <https://www.epa.gov/environmentaljustice>.↵

2. <https://www.justice.gov/ag/page/file/1499241/download#:~:text=Such%20projects%20further%20the%20aims,affected%20by%20violations%20of%20those%20laws>.↵

3. Environmental justice issues have been raised in climate-related litigation. See, e.g., *Mayor & City Council of Baltimore v. BP p.l.c.* (lawsuit seeking to hold oil and gas companies liable for climate change harms, including claims under Maryland's Consumer Protection Act) Complaint, at paras 86–90 (Md. Cir. Ct. 2018).↵

4. [Environmental justice-type issues may become subject to mandatory regulation in certain jurisdictions](#). See, e.g., Kirkland & Ellis, European Commission Publishes Proposed Law Requiring Value Chain Human Rights and Environmental Due Diligence (March 7, 2022), <https://www.kirkland.com/publications/kirkland-alert/2022/03/ec-human-rights-and-environmental-due-diligence>. ↵

5. Soft law standards used to guide ESG strategies, including the U.N. Guiding Principles on Business and Human Rights, OECD Guidelines for Multinational Enterprises and U.N.'s Sustainable Development Goals include principles relevant to environmental justice. For example, the U.N. Guiding Principles on Business and Human Rights include the corporate responsibility to respect human rights, which can guide ESG strategies and approaches to environmental justice. The OECD Guidelines for Multinational Enterprises include guidelines related to human rights as well as guidelines related to the environment, and the U.N.'s Sustainable Development Goals include the goals of Climate Action (Goal 13) and Reduced Inequalities (Goal 10). ↵

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Suggested Reading

- 19 May 2022 Press Release Kirkland Advises Colgate Energy on its Combination With Centennial Resource Development; Creating \$7 Billion Delaware Basin Pure-Play
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