



Biden Administration Announces New Environmental Justice Initiatives

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On May 5, 2022, Attorney General Merrick B. Garland, along with Environmental Protection Agency (EPA) Administrator Michael S. Regan, announced a series of initiatives intended to “secure environmental justice for all Americans.” These initiatives include the creation of the Office of Environmental Justice within the Justice Department (DOJ), a new environmental justice enforcement strategy and the restoration of the use of supplemental environmental projects (SEPs) in civil settlement agreements.

EPA 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.” Consistent with President Biden’s Executive Order 14008, Tackling the Climate Crisis at Home and Abroad, in which the President emphasized the role of environmental justice in the administration’s policymaking, the announcement is a step forward for the administration’s goal of “provid[ing] timely remedies for systemic environmental justice violations and contaminations, and injury to natural resources[.]” Environmental justice concerns arise in situations such as the siting of industrial and transportation facilities near historically marginalized and low-income neighborhoods and schools, resulting in increased incidences of cancer, asthma or other adverse health effects in the impacted community.

The Office of Environmental Justice, housed within the DOJ Environmental and Natural Resources Division (ENRD), will help DOJ implement the new environmental justice strategy. ENRD Assistant Attorney General Todd Kim named Cynthia Ferguson, an experienced ENRD environmental justice attorney, as Acting Director of the new office. Implementing the new environmental justice strategy will involve the enforcement of federal laws by DOJ litigators, investigators and U.S. Attorneys’ Offices that remedy systemic environmental violations, releases and contamination impacts in historically marginalized and overburdened low-income communities, communities of color and Tribal and Indigenous communities.

The strategy is framed by four principles:

- Prioritization of cases that reduce public health and environmental harms to overburdened and underserved communities;
- Maximizing the use of all available legal tools to address environmental justice concerns;
- Ensuring meaningful engagement with impacted communities; and
- Promotion of transparency regarding environmental justice enforcement efforts and their results.

Finally, restoration of the use of SEPs in civil settlement agreements will provide the administration another tool to redress the impacts of systemic environmental violations in overburdened communities. SEPs allow settling parties to agree to conduct environmentally beneficial actions and projects in exchange for lowered or even waived civil monetary penalties. Before the Trump administration formally ended ENRD's use of SEPs, ENRD and EPA frequently sought to use them to provide direct, tangible benefits to the community harmed by the violation or adverse health condition that was the subject of the enforcement action.

Notably, DOJ's new policy may re-open the door to allowing SEP payments to be made to non-governmental third parties performing or managing the approved project. Currently, EPA's SEP policy explicitly bans such payments, effectively requiring settling parties to hire contractors to implement or manage the work. The limits Attorney General Garland imposed on DOJ's new SEP policy, including a requirement that all projects have a strong connection to the underlying violation and be consistent with the statute being enforced, mirror EPA's SEP policy, suggesting DOJ will not allow projects with third-party payments often. However, DOJ's new SEP policy requires the Deputy Attorney General to approve an SEP involving payment to a third party, which could be an arduous process. This is another indication SEPs involving third-party payments may be relatively rare.

Environmental justice is expected to be a priority for the Biden administration going forward, picking up where the Obama administration left off after the issue was largely abandoned by the Trump administration. DOJ will accept comments on the rule until July 11, 2022.