

Biden Administration Takes Concrete Steps to Prioritize Environmental Justice

Alert

05.10.2022

By Brittany Barrientos, Aimee Davenport, Kristen Ellis Johnson, Caleb Hall and Claire Williams

The Biden Administration has made clear that environmental justice (EJ) is a priority in all aspects of its environmental work, most recently through Department of Justice (DOJ)-led enforcement efforts. To that end, on May 5, 2022, Attorney General Merrick Garland announced the [Comprehensive Environmental Justice Enforcement Strategy](#) (Strategy), designed to guide the Justice Department and U.S. Attorneys nationwide in implementing environmental justice through the enforcement of federal laws.

The Office of Environmental Justice

A major part of the Strategy is the creation of a devoted office within DOJ to address EJ efforts. The [Office of Environmental Justice](#) (OEJ) will be housed within the Environmental and Natural Resources Division at DOJ. The OEJ will have both an internal role shaping practices within DOJ and an external role working with Environmental Protection Agency (EPA) and partner agencies to refine EJ-led efforts. Within DOJ, the OEJ will convene a standing DOJ Environmental Justice Enforcement Steering Committee that will provide guidance for implementing the Strategy and make recommendations to DOJ for how to prioritize EJ in its enforcement actions. The OEJ will also develop training and reference materials relating to EJ issues. Externally, the OEJ will assist agency partners in conducting EJ outreach to communities and develop a mechanism for increasing the transparency of DOJ's EJ work by communicating about enforcements, judgments and remedies.

Biden Administration Takes Concrete Steps to Prioritize Environmental Justice

Supplemental Environmental Projects Reinstated

In addition to announcing a new Office of Environmental Justice, the Strategy also includes a formal statement from DOJ reinstating the use of Supplemental Environmental Projects (SEPs). [SEPs](#) refer to an environmental remediation project or other effort that an alleged violator may undertake as part of a settlement to resolve an EPA enforcement action. The prior administration issued a memo and codified a statement of policy prohibiting the use of SEPs. President Biden had previously issued an Executive Order directing DOJ to review the SEP prohibition, and DOJ is now issuing an [Interim Final Rule](#) revoking DOJ's prior policy. The Interim Final Rule was [published in the Federal Register](#) on May 10. Comments are due July 11, 2022.

In conjunction with this rule, DOJ also issued a [memorandum](#) outlining the guidelines and limitations for the use of SEPs moving forward. In particular, there must be a “strong connection” between the “underlying violation” and the project, meaning that the project “must be consistent with” the statute and “designed to reduce the detrimental effects of the underlying violation,” consistent with EPA’s [2015 Update to the 1998 U.S. EPA Supplemental Environmental Projects Policy](#) (2015 SEP Policy). Unlike the 2015 SEP Policy, the memo seems to contemplate that payments to non-governmental third parties may be acceptable, which is a shift from the 2015 SEP Policy that explicitly disallows payments to third parties as approvable SEPs. While the memo ensures some flexibility for parties in enforcement by ensuring that DOJ cannot select the specific entity to receive the funds, it also limits the types of projects that can be funded. For example, parties in enforcement cannot fund “general public educational or awareness projects” or provide funds to “generalized research.”

Supplemental Environmental Projects and Environmental Justice

We expect to see more SEPs with the Biden Administration’s focus on EJ, though both EPA and DOJ will likely continue to scrutinize SEPs before approval. To identify EJ areas, the agencies will rely, in part, on [EJScreen](#) as an initial step when considering EJ and the use of SEPs.

Both the Strategy and the Interim Final Rule discuss the importance of SEPs in addressing EJ concerns. The Strategy describes SEPs as a tool to “achieve meaningful results for impacted communities.” The Interim Final Rule explains that “harms to communities affected by environmental crime, can be difficult to redress directly in particular cases.” SEPs provide avenues for “remediating the harms to the communities most directly impacted by violations of those laws” making them “particularly powerful tools for advancing environmental justice.”

In recent years, EPA has prioritized inspections related to EJ concerns. In April 2021, EPA released a [memorandum](#) directing staff to strategically strengthen enforcement programs with a focus on EJ communities. EPA later released its Strategic Plan for 2022-2026 on March 28, 2022. The Strategic Plan

Biden Administration Takes Concrete Steps to Prioritize Environmental Justice

similarly focused on strategic enforcement. The Strategic Plan identified EPA's number two priority, just after climate change, as taking "[d]ecisive [a]ction to [a]dvance Environmental Justice." To that end, EPA plans to increase the percentage of inspections in areas of EJ concern from 30% to 45% in fiscal year 2022, to 50% in fiscal year 2023 and 2024, and 55% by 2025 and 2026. With increasing inspections in EJ areas and the reintroduction of SEPs, we expect to see EPA and DOJ approve (good) SEPs as part of their overall focus on redressing environmental noncompliance in EJ communities.

CONTACTS

Brittany Barrientos

Aimee Guzman Davenport

Kristen Ellis Johnson

Claire M. Williams

RELATED CAPABILITIES

Energy

Environmental & Natural Resources

Mining

Transportation

STINSON

STINSON LLP \ STINSON.COM