



Environmental Justice, Climate Change Enforcement Is Ramping Up

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The Biden administration has made clear its environmental enforcement goals—with environmental justice and climate topping the list. Sidley Austin LLP attorneys look at the path ahead and predict increased and timely enforcement, more inspections, greater cooperation with state and local governments, and faster case development on the path ahead.

As the Biden administration progresses through its first year in office, its unique agenda for environmental enforcement is advancing. The Environmental Protection Agency has announced that increased and timely enforcement is a priority, which may be manifested in more inspections, greater cooperation with state and local governments, and faster case development.

The administration also intends to focus enforcement resources on environmental justice and climate change, which the agency featured for both civil and criminal enforcement in its Draft Strategic Plan for Fiscal Years 2022 to 2026. This will likely be matched with renewed interest in environmental projects as part of enforcement settlements.

Overall, with enforcement political leadership now in place at the Department of Justice and EPA, regulated parties should anticipate increased enforcement.

Environmental Justice Moves to the Fore

While prior administrations made commitments to environmental justice, the Biden administration is prioritizing “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” well beyond past actions.

In April, EPA Administrator Michael Regan announced that the agency will promote environmental justice as a top priority—including to “strengthen enforcement of violations of cornerstone environmental statutes and civil rights laws in communities overburdened by pollution.” DOJ’s Todd Kim, assistant attorney general for the Environmental and Natural Resources Division, has echoed the prioritization of environmental justice in enforcement in his remarks.

EPA’s Office of Enforcement and Compliance Assurance followed up the administrator’s direction with April guidance that sets enforcement goals to advance environmental justice through increased inspections and civil enforcement near overburdened communities and resolving noncompliance with remedies that provide tangible local benefits, address past harms, and include early and “innovative relief” such as fence-line monitoring.

Then, earlier this month EPA Region V issued a notice of violation based on a September inspection at a facility in “an historically overburdened community.” In June, EPA also issued guidance specifically expanding the office’s criminal enforcement program to increase detection of crimes in environmental justice communities. And, in July, it issued guidance calling for increased contaminated site enforcement near such communities, in part through using its mapping tool, EJSCREEN.

EPA has indicated two other paths. First, it has acted already on the intersection of environmental and civil rights laws, demonstrated by a recent EPA announcement of its investigation into a complaint that various agencies discriminated against a predominantly African-American and Latinx community in Brooklyn, New York, in permitting a new gas pipeline.

Second, EPA is expanding state and tribal partnerships to enhance enforcement in overburdened communities with joint, targeted inspections and enforcement actions, as in its September Memorandum of Understanding with the California Environmental Protection Agency.

Across these various efforts, environmental justice will be a prevalent concern across all EPA's main program areas. EPA has targeted doubling the rate of annual inspections at facilities near environmental justice communities to 55% by September 2026—meaning half all such facilities would be inspected annually by EPA.

Increasing Focus on Climate Change, Mobile Sources

EPA took early initiative this year on environmental justice, but climate change will feature heavily in EPA's enforcement strategies in coming years.

In its Draft Strategic Plan, EPA announced its intention to address climate change by enforcing carbon dioxide, hydrofluorocarbons, and methane emission regulations. EPA also indicated it plans to target sources with the most potential for noncompliant emissions of greenhouse gases.

In addition, EPA has continued its ongoing National Compliance Initiative against mobile sources under Title II of the Clean Air Act with particular focus on aftermarket defeat devices. In 2020, EPA settled 31 tampering and defeat device cases as part of this initiative.

As of this writing, so far in 2021, at least 33 such cases have been settled, and more are currently in negotiations. There have also been criminal indictments in this area, and we expect this trend to continue. This falls in line with EPA's stated priority of addressing greenhouse gas emissions from the transportation sector.

Return of Environmental Projects in Settlements

For many years, EPA and DOJ have integrated various forms of injunctive relief and environmental projects into enforcement settlements. These come in the form of mitigation projects to address alleged environmental impacts (such as excess air emissions), or environmentally beneficial projects that offset penalty amounts.

The Trump administration's DOJ changed policies to reduce the use of such projects, specifically targeting Supplemental Environmental Projects (SEPs) and issuing new regulations barring their use.

The Biden administration DOJ withdrew those DOJ policies earlier this year, citing the January Executive Order related to climate change. Although the SEP regulations remain in effect, at 28 C.F.R. § 50.28, DOJ has continued to include mitigation measures in settlement agreements and is reviewing rules from the prior administration, with the SEP regulations included.

In the interim, EPA has stated it plans to rely on SEPs moving forward, subject to review and action by DOJ. Some state agencies also have equivalent policies, which may present a further basis for incorporating environmental projects into some settlements.

Outlook for Industry

During the pandemic, EPA relied less on onsite inspections, but expanded off-site compliance monitoring techniques, including remote and virtual inspections, increased use of information requests, and desk audits.

As pandemic restrictions recede, expect EPA to return to more onsite inspections, especially for facilities with high greenhouse gas emissions and high-risk chemicals—and particularly in communities with environmental justice concerns.

Facilities with these concerns should consider internal audits to identify and correct any potential noncompliance, especially related to any greenhouse gases.

Regulated facilities also should consider ways to enhance engagement with their local communities and review EPA's screening tools as a proactive measure to evaluate how to address potential enforcement risk. For example, consider designating compliance staff with responsibility for environmental justice screening, for which EPA has published training materials.

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