



The Federal Government Expands Environmental Justice Strategy Including New Equity Action Plan and Reinstatement of SEPS

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The Biden Administration and EPA continue to strengthen and expand the federal Environmental Justice (EJ) strategy as evidenced by the President's April 2022 Equity Action Plan (Plan) and the United States DOJ's May 2022 "Comprehensive Environmental Justice Strategy" and related revised policy on Supplemental Environmental Projects (SEPs). These two recent steps further illustrate that EJ is becoming an effective tool for groups to stop or delay environmental permits and to make those accused of pollution pay for community improvements. What this means for clients is new projects will be harder to get done, and the costs of siting and operating manufacturing plants, landfills, quarries, farms, power plants, and other like facilities in America are going up.

Biden's Equity Action Plan

On April 14, 2022, President Biden announced his Equity Action Plan which sets forth specific actions to ensure EPA is inserting itself into state and local environmental permitting and enforcement programs to prevent disparate impacts on disadvantaged communities. These specific actions include:

- Cumulative Impacts: Requiring EPA and states to consider cumulative impacts in regulatory decision-making processes;
- Community Aid & Projects: Build the capacity of underserved communities to provide their experience to EPA and implement community-led projects.
- EPA's EJ Office: Develop EPA's internal capacity to engage underserved communities and implement clear and accountable processes to act based on communities' input.
- Title VI of the Civil Rights Act: Strengthen EPA's external civil rights compliance program and ensure that civil rights compliance is an agency-wide responsibility.
- Community Science: Integrate participatory (community) science into EPA's research and program implementation.
- Procurement: Make EPA's procurement and contracting more equitable.

All of six of the above-listed required actions are part of the 2022-2026 EPA Strategic Plan. In fact, in the Strategic Plan, EPA discusses specific metrics it will use to ensure it is implementing the actions listed above, as well as others. Among the most important to watch will be how EPA requires states and local environmental regulatory authorities to review "cumulative impacts" and to put in place extensive environmental justice considerations in state and local permitting and enforcement programs. What this means for the regulated community is two major changes to what your state permitting agency will be required to consider (or be threatened with losing federal funding for its air, water, and land programs). First, your state agency will be required to review not just your company's impact on air, water and land resources if you are given a new or modified permit, but the impacts of operations around you over which you have no control. Second, your state agency will be required to have a review process in place for each permitting program, whereby it considers whether the community around the proposed project could be considered "disadvantaged" and, if so, whether that community will be disparately impacted by the project as compared to other, less disadvantaged, communities. What this means is that your state and local regulators are going to have to add two more layers to the permitting and enforcement programs which gives those opposing your project or unhappy with your facility more tools to fight them. With vague terms like "cumulative" and "disparate" impacts, it will be hard to know how your specific project could be viewed in the permitting or enforcement arena.

Supplemental Environmental Projects

On May 5, 2022, DOJ announced a series of actions to secure environmental justice by launching a new Office of Environmental Justice within the Justice Department, publishing a "Comprehensive Environmental Justice Enforcement Strategy" Memorandum prioritizing enforcement for "polluters" affecting "overburdened and underserved communities," and reinstating the use of SEPs in DOJ settlements.

In its Memorandum, DOJ emphasizes it and other federal agencies, including EPA, should increase public participation, provide training on EJ to its partners, implement tools in all environmental and health statutes to bring justice to penalize "polluters," look at using Title VI of the Civil Rights Act to ensure state and local agencies that receive federal grant money do not create a disparate impact on minority and underserved populations, and "mitigate" pollution by providing temporary and permanent resources to these communities by considering Supplemental Environmental Projects (SEPs) as a requirement for settlement.

What are SEPs? SEPs are projects that are not required by applicable laws or regulations. Some projects deemed to benefit the local community are offered by EPA to regulated entities to mitigate portions of civil penalties. The DOJ under Trump abolished their use in most cases, but, with the new emphasis on EJ, on May 5, 2022, the US DOJ announced that SEPs are an important part of its EJ strategy. This is consistent with EPA's Strategic Plan and Biden's Equity Action Plan in that SEPs are projects that benefit local communities, some of which may be considered disadvantaged populations. In the past, there has been concern that SEPs and other settlements that provide for payments to non-governmental third parties violate certain federal laws that require accountability by any federal agency receiving money as part of enforcement. However, DOJ believes this is not a concern and is giving

guidance to its attorneys as to what must be in these SEPs including the following: payments to third parties must define with particularity the nature and scope of the specific project, have a strong connection to the underlying violation, be consistent with the underlying statute being enforced and advance at least one of the objectives of that statute, and reduce the detrimental effects of the underlying violation and the likelihood of similar violations in the future. The policy also states DOJ is prohibited from identifying any particular third party to receive payments or to implement or benefit from a payment and must not retain post-settlement control over the disposition or management of project funds ?except for ensuring that the parties comply with the settlement.? Finally, no third party payment can ?require payments to non-governmental third parties solely for general public educational or awareness projects; solely in the form of contributions to generalized research, including at a college or university; or in the form of unrestricted cash donations.? These restrictions are meant to protect DOJ against claims they violate federal law by having the government control money that has not been appropriated.

Conclusion

Facilities and companies regulated by environmental laws should expect to see their state and local regulators feeling the pressure from EPA and DOJ to put environmental justice at the top of their permitting and enforcement strategies. Things are evolving quickly, and there will be more changes to come. For now, if you need a new or modified permit to expand your company?s capabilities or you are in the middle of an enforcement action, don?t be surprised to see a different approach with an emphasis on ?justice? for those who live around your facility.

EPA Equity Action Plan (April 2022).

DOJ Comprehensive Environmental Justice Enforcement Strategy (May 5, 2022).

DOJ Guidelines and Limitations for Settlement Agreements Involving Payments To Non-Governmental Third Parties (May 5, 2022).

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