

## CLIENT ALERT

### U.S. Department of Justice and U.S. Environmental Protection Agency Poised to Execute “Comprehensive Environmental Justice Enforcement Strategy”

May 6, 2022

The U.S. Department of Justice (“DOJ”) and the U.S. Environmental Protection Agency (“EPA”) released a comprehensive strategy detailing how both agencies plan to secure environmental justice through a first of its kind nationwide environmental justice (“EJ”) enforcement strategy. This plan comes a little over a year after President Biden’s Executive Order, 14008, *Tackling the Climate Crisis at Home and Abroad*, instructed both EPA and DOJ to work together to develop an environmental justice approach to “provide timely remedies for systemic environmental violations and contaminations.” And the time for the long-delayed Senate confirmation of David Uhlmann to lead EPA’s Office of Compliance and Enforcement Assurance (“OECA”) now appears imminent. As a consequence, regulated entities whose operations pose the potential of impacting vulnerable communities should be prepared for increased federal enforcement scrutiny.

#### Key Takeaways

DOJ has announced its creation of a new office – The Office of Environmental Justice. The Office of Environmental Justice will be led by a long-time DOJ Senior Litigation Counselor, Cynthia Ferguson, and the office will be responsible for carrying out four major principles –

1. Prioritization of cases that will reduce public health and environmental harms to overburdened and underserved communities;
2. Strategic use of all available legal tools to address environmental justice concerns;
3. Meaningful engagement with impacted communities; and
4. Transparency regarding environmental justice enforcement efforts and their results.

Under this strategy, DOJ will identify cases where enforcement in EJ communities would achieve significant reduction of environmental harm, public health harm, or injury to natural resources. In these identified cases, DOJ intends to pursue litigation and announced that it will be among the agency’s top enforcement priorities. This new office will also convene a DOJ Environmental Justice Enforcement Steering Committee, designate EJ coordinators in U.S. Attorneys’ Offices, create environmental enforcement task forces, and pursue EJ enforcement with an emphasis on Tribal communities.

This plan also officially reintroduced<sup>[1]</sup> Supplemental Environmental Projects – environmental projects that a defendant agrees to undertake to offset the environmental harm that they caused – as an environmentally beneficial tool in settlement agreements regarding enforcement in EJ communities. The Office of Environmental Justice has also been directed to “maximize any effective synergies” between itself and the Civil Rights Division to pursue environmental enforcement through Title VI<sup>[2]</sup> and other civil rights authorities.

## Next Steps

In its 2023 budget, the Biden Administration requests \$1.4 million to create the Office of Environmental Justice and \$6.5 million to address climate change in EJ communities. To the extent the Administration is able to get this budget approved, enforcement will likely begin to target regulated activities that impact EJ communities.

## How to Prepare for Increased EJ Enforcement

The best strategy for preparing for increased EJ enforcement is three-pronged: Evaluate, Educate, Integrate. Organizations should evaluate the potential environmental hazards associated with their operations as well as assess their proximity to vulnerable populations and EJ communities. Then, organizations should become well-versed in the risks and challenges associated with operating in EJ communities. Unlike other areas of enforcement, mere compliance with cornerstone environmental statutes does not eliminate the risk of environmental justice enforcement. Because localized pollution is often present in EJ areas, even compliant operations may be viewed by EPA and DOJ as causing disproportionate environmental harm and risk, thereby being identified as a potential target of increased EJ enforcement scrutiny. Finally, organizations should begin implementing environmental justice as a consideration in their own decision-making, including new facility siting decisions and community engagement. For example, an organization operating in an EJ community may seek to be proactive in offsetting some of its environmental impact, independent of a facility's compliance status.

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[1] In March 2020, the Trump-era DOJ ended its longstanding practice of including Supplemental Environmental Projects in settlement negotiations.

[2] Title VI of the Civil Rights Act, which prohibits discrimination based on race color, or national origin in any program that received Federal funds or financial assistance.

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