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ENVIRONMENTAL LAW

Recent Developments of Environmental Justice Initiatives at the Federal, State Level

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Environmental justice has been a focal point of the Biden administration's environmental policy objectives. Although the movement stretches as far back as the 1960s and the EPA created the first environmental justice working groups in the early 1990s, environmental justice has seen renewed attention at both the federal and state levels. With major environmental justice reforms and lawmaking viewed by some as a partisan issue, reforms at the federal level are expected to occur mostly within the executive branch, while state legislatures have taken the lead in advancing environmental justice legislation. This article reviews the latest developments in federal and state efforts to advance environmental justice initiatives.

FEDERAL DEVELOPMENTS

The 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." See Environmental Protection Agency, "Learn About Environmental Justice." Within that definition, "fair treatment" refers to the concept that "no group of people should bear a disproportionate share of the negative environmental consequences from industrial, governmental, and commercial operations



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or policies." "Meaningful involvement" entails providing people the opportunity to participate in decisions about activities that affect their environment, and that community concerns will be considered in the decision-making process.

President Joe Biden issued the first significant executive orders addressing environmental justice since the Clinton administration directed federal agencies to develop strategies that addressed environmental justice impacts. See Executive Order No. 12,898, 59 Fed. Reg. 7629 (Feb. 16, 1994). Biden first pledged to advance environmental justice particularly where "the federal government has failed to meet that commitment in the past." Through another executive order the Biden administration established the White House Environmental Justice Advisory Council, whose role is to advise the existing Interagency Council

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on efforts to address current and historic environmental injustice. See Exec. Order No. 14,008, 86 Fed. Reg. 7619 (Feb. 1, 2021).

It is worth noting in particular that Executive Order 14008 directed the EPA to "develop a comprehensive environmental justice enforcement strategy" and initiated the creation of an Office of Environmental Justice within the Department of Justice. Pursuant to that directive, the EPA issued memoranda in June and July 2021 that seek to strengthen environmental justice through criminal enforcement and cleanup enforcement actions. See EPA, memoranda "Strengthening Environmental Justice Through Criminal Enforcement," (Jun. 21, 2021); "Strengthening Environmental Justice Through Cleanup Enforcement Actions," (Jul. 1, 2021). The EPA's stated enforcement priorities include plans to expedite remedial design/remedial action negotiations, utilize injunctive relief to compel response actions,

engage more extensively with community members, and conduct more compliance reviews of post-cleanup controls in environmental justice communities, among other prioritized actions.

STATE DEVELOPMENTS

While environmental justice developments at the federal level stem mostly from executive branch action, many state legislatures have passed fulsome and impactful environmental justice reforms. Key features in most of that legislation involve either mandating state agencies to evaluate how state actions impact environmental justice, or requiring state environmental agencies to establish a separate permitting and review process that assesses whether certain proposed facilities will cause or contribute to environmental or public health stressors in environmental justice communities. To provide a better understanding of these trends in state-level environmental justice legislation, below is a summary of three recently enacted bills.

New Jersey's environmental justice law enacted on Sept. 18, 2020, N.J.S.A. 13:1D-157 et seq., is among the first pieces of legislation that have added a review process to certain environmental permitting decisions. The law applies to named categories of new or expanding facilities located in overburdened communities that seek environmental permits or the renewal of a major source permit. The law requires an applicant to complete an environmental justice impact statement that assesses the potential environmental and public health stressors associated with the new or expanded facility. The applicant must then organize and conduct a public hearing in the overburdened community that allows written and oral public comment on the proposed application.

Importantly, the law requires the denial of a new permit if the New Jersey Department of Environmental Protection (NJDEP) finds that approval of the permit would, together with other environmental or public health stressors affecting the overburdened community, "cause or contribute to adverse cumulative environmental or public health

stressors" in the community that are higher than those borne by comparison communities within the state, county, or other geographic point of comparison. Facility owners and operators now have even less certainty that a new permit will be obtainable if the proposed facility will operate in an overburdened community. More specifically, the cumulative addition of environmental or public health stressors will require permit denial if the level of those stressors is higher than comparison communities, even if the permit application otherwise complies with all existing permitting requirements. For permit expansions or renewals, however, the NJDEP cannot deny permits based on the new law. The NJDEP may only apply conditions to the permit if it finds the facility will contribute to existing stressors higher than those borne by other communities.

Washington state's "Healthy Environment for All Act," E2SSB 5141, signed into law May 17, tasks executive level agencies with implementing a number of internal procedures aimed at addressing potential environmental justice impacts from agency actions. Agencies covered under the law must include an environmental justice implementation plan within its strategic plan, create a community engagement plan that describes how the agency will engage with overburdened communities, and conduct an environmental justice assessment that informs and supports an agency's consideration of overburdened communities when considering "significant agency actions." Agency rulemaking, agency legislation requests, and capital projects above \$12 million are considered significant agency actions. The law does not expressly include the issuance of permits as a significant agency action, but the law allows agencies to define additional actions that would trigger environmental justice assessments.

Colorado's environmental justice law, HB 21-1266, signed into law July 2, combines concepts found in both New Jersey and Washington legislation. The law establishes an environmental justice task force whose purpose is to provide recommendation to the general assembly and promote strategies for

incorporating environmental justice into how state agencies discharge their responsibilities. However, the law requires the task force to consider a requirement that environmental permits must be issued and renewed only after an environmental equity analysis determines that the terms and conditions of the permit or renewal are sufficient to ensure, to a reasonable certainty, that any harm to the health and environment of disproportionately impacted communities is either avoided or minimized to the extent practicable and, to the extent any harm remains, is mitigated. That the task force must consider this specific requirement suggests that Colorado may soon establish an environmental justice review process over permitting decisions similar to New Jersey.

CONCLUSION

In summary, given the unlikelihood of significant environmental justice legislation coming from Congress, the federal government will continue to advance its environmental justice initiatives in large part through increased criminal and cleanup enforcement action in environmental justice communities. In contrast, at the state level, legislatures have taken the lead in advancing environmental justice reforms that will result in more scrutiny of the impact that state actions have on disproportionately impacted communities and, in particular, additional scrutiny of permitting decisions that impact those communities. Given these trends, focus on environmental justice likely will intensify, and the regulated community should prioritize environmental justice considerations where state authorizations or permits are needed. •

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