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3 Environmental Enforcement Trends To Watch Under Biden

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The incoming Biden administration has made clear that addressing climate change and mitigating the effects of environmental harm are top priorities. Among the ways the Biden administration is poised to effect these priorities is through a significant uptick in criminal and civil enforcement of U.S. environmental laws.

In this article, we discuss how we expect to see environmental justice playing an increasingly prominent role in enforcement resolutions; stricter scrutiny of companies' compliance programs with respect to environmental laws; and new risks relating to potential environmental disclosure requirements.

Background

According to data summarized by the nonprofit Public Employees for Environmental Responsibility and cited by the Biden-Harris campaign, the number of criminal referrals from the U.S. Environmental Protection Agency to the U.S. Department of Justice under the Trump administration has dropped to its lowest level in 30 years.[1]

President-elect Joe Biden plans to reverse this trend, and his campaign expressly stated its intention to "hold polluters accountable," "increase enforcement," and direct the EPA and DOJ to pursue cases involving environmental harm "to the fullest extent permitted by law."[2]

In tandem with this focus on increased enforcement is a renewed emphasis on environmental justice — the ideal that no group of people should bear a disproportionate share of the negative environmental consequences that result from commercial or governmental actions or policies.

The Biden administration intends to implement these priorities in part through the creation of an environmental and climate justice division within the DOJ to supplement the work of the Environmental and Natural Resources Division, or ENRD, which is responsible for enforcing U.S. civil and criminal environmental laws, including the Clean Air Act, Clean Water Act and hazardous waste laws. Companies can also expect significant increases in inspections alongside more active civil and criminal enforcement.

Below are three key trends to watch for as the Biden administration ramps up environmental enforcement:

1. Environmental enforcement resolutions will increasingly promote environmental justice.

Under the Trump administration, the DOJ has taken a hard line against entering into settlements that require defendants to expend funds for the benefit of third parties in lieu of the payment of penalties — thereby significantly curtailing the use of so-called supplemental environmental projects, or SEPs,[3] in resolving environmental enforcement actions.

In a March 12 memorandum, the assistant attorney general for the ENRD, Jeffrey Bossert Clark, challenged the use of SEPs, based on the argument that SEPs violate budgeting laws and certain constitutional principles.[4]

Together with previous DOJ policy statements — including former Attorney General Jeff Sessions' June 5, 2017, memorandum prohibiting settlement payments to third parties — Clark's ENRD memorandum reflects a hostility by Trump administration officials to settlements that provide for payments other than civil and criminal penalties to the government and restitution to victims.

The ENRD memorandum marked a significant change from prior DOJ and EPA environmental settlement practices, which often utilized SEPs to remedy disproportionate impacts of environmental harm, and promote green energy priorities. For example, as part of Volkswagen's 2016 "Dieselgate" settlement, the company committed to investing $2 billion in promoting zero-emissions vehicles and expanding electric vehicle charging infrastructure.

And in 2019, the DOJ and EPA entered into a settlement with Dow Silicones Corp. that required the company to spend $1.6 million on lead abatement projects to protect children from lead-based paint hazards, and donations of air monitoring equipment to local governments.

State environmental regulators have similarly included environmental justice provisions in recent settlements — for example, Kohler Co.'s January 2020 settlement with the California Air Resources Board, in which Kohler agreed to pay $4.2 million to fund air pollution research, and an additional $1.8 million to supply solar-powered generators to low-income residents in California who live in areas subject to public safety power shutoffs.

We expect the incoming Biden administration to take steps to retract the ENRD memorandum, and to prioritize and expand the use of SEPs, alongside monetary penalties, to resolve environmental enforcement actions. SEPs closely align with the incoming administration's focus on utilizing enforcement to lower greenhouse gases and promote environmental justice, by allowing the government flexibility in bringing about a broader range of environmental benefits than penalties alone — including benefits to vulnerable communities disproportionately affected by environmental harm.

SEPs also offer opportunities for companies to partner with the government to achieve mutually desirable resolutions to pending investigations, through investments that promote long-term community health benefits and help rehabilitate a company's environmental credentials.

2. The government will evaluate corporate compliance programs with a sharper focus on environmental laws.

In the DOJ's most recent version of its Evaluation of Corporate Compliance Programs document, the department makes clear that it expects companies under investigation for potential criminal violations to answer detailed questions regarding the design, resourcing and implementation of their compliance programs, which should be tailored to the particular circumstances of any given company.

Among other things, this guidance document emphasizes the DOJ's expectation that companies will undertake meaningful, periodic risk assessments and take concrete steps to enhance compliance programs based on the information learned. Moreover, companies under investigation must undertake a root cause analysis of any misconduct at issue, and enhance their compliance programs accordingly.

As the U.S. government continues to resolve major environmental enforcement cases — including, most recently, the settlement between Daimler AG/Mercedes-Benz USA LLC and the DOJ, the EPA and the California Air Resources Board — it will increasingly be in a position to benchmark companies' compliance programs, and form views on best practices for ensuring compliance with environmental laws.

Notably, unlike prior DOJ settlements with Volkswagen and Fiat-Chrysler Automobiles US LLC, the DOJ did not require Daimler to appoint an external compliance monitor, after Daimler made significant compliance enhancements prior to the resolution, and agreed to implement additional compliance measures going forward as part of a consent decree.

Although companies will have different circumstances, and there is no one-size-fits-all approach to compliance, companies should consider the following questions that are particularly important in the context of environmental compliance:

- Do compliance and other control personnel have sufficient technical competence to analyze engineering and research and development decisions being made with respect to activities that affect environmental regulatory compliance?

- Conversely, are business and technical personnel receiving sufficient training and information regarding environmental laws, regulations and industry-specific developments to understand their responsibilities with respect to compliance, and do they have access to resources who can answer technical compliance questions?

- Is there an appropriate segregation of duties in place to ensure the integrity of any regulatory certification processes?

- Is the company doing enough to promote a culture of compliance with respect to environmental laws?

- Is the company providing sufficient access to reporting channels, publicizing the existence of such channels and encouraging employees to raise concerns relating to compliance with environmental laws?

As the Biden administration clamps down on violations of U.S. environmental laws, companies will see even greater benefits from strategically investing in their environmental compliance programs. Such investments will be particularly important as the new administration seeks to implement ever more stringent environmental regulations, such as stricter emissions standards and fuel economy requirements.

3. Companies may face enforcement risks connected with climate-related disclosure requirements.

For years, the U.S. Securities and Exchange Commission has faced increasing calls to require public companies to make more robust climate-related disclosures and incorporate climate risks as part of the agency's regulatory agenda. These calls became even more acute after the United Kingdom became the first country to make certain climate change-related disclosures mandatory.

Along these lines, the Biden administration has pledged to "requir[e] public companies to disclose climate risks and the greenhouse gas emissions in their operations and supply chains," and to "take action against fossil fuel companies and other polluters who ... conceal information regarding potential environmental and health risks."[5]

Given the support previously expressed by two of the SEC's commissioners for new climate risk disclosure rules, it is likely that Biden's SEC chair will have sufficient votes among the SEC commissioners to impose such environmental disclosure requirements. Further, the SEC should be able to approve meaningful new environmental disclosure requirements through its regular rulemaking process, without the need for legislation, which will make the requirements relatively easy to implement.

Many companies have already started thinking about climate-related disclosures in the context of voluntary sustainability reports, which are currently being filed by 86% of S&P 500 companies. As disclosure requirements evolve, we expect companies to face enforcement risks relating to their disclosures of environmental risks and business practices. There are several standards and initiatives for corporate disclosure in this area that can help companies plan for and navigate new disclosure requirements as they arise.

Conclusion

The Biden administration is likely to make an immediate and noticeable impact on environmental enforcement. This will include a change in the number of cases being pursued. But it will also likely include a renewed focus on using SEPs to promote environmental justice in how those cases are resolved.

We also expect the government to apply enhanced scrutiny to environmental compliance programs. And companies should anticipate new corporate sustainability disclosure requirements. Given these expectations for an increased emphasis on environmental enforcement, companies would be well served by taking a fresh look at all of their risks in this area.

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[1] The Biden Plan for a Clean Energy Revolution and Environmental Justice, https://joebiden.com/climate-plan/; The Biden Plan to Secure Environmental Justice and Equitable Economic Opportunity, https://joebiden.com/environmental-justice-plan/.

[2] Id.

[3] The EPA defines an SEP as "an environmentally beneficial project or activity that is not required by law, but that a defendant agrees to undertake as part of the settlement of an enforcement action." 2015 Update to the 1998 United States Environmental Protection Agency Supplemental Environmental Projects Policy, at 1.

[4] Memorandum from Jeffrey Bossert Clark, DOJ ENRD, Supplemental Environmental Projects in Civil Settlements with Private Defendants (March 12, 2020), available at: https://www.justice.gov/enrd/page/file/1257901/download.

[5] The Biden Plan for a Clean Energy Revolution and Environmental Justice https://joebiden.com/climate-plan/.