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Justice Department Sets Stage for More Aggressive Environmental Enforcement

*By Stacey H. Mitchell, David H. Quigley, Kenneth J. Markowitz, John B. Lyman, and Bryan C. Williamson **

The authors discuss the Justice Department's withdrawal of nine Trump-era environmental law policy and guidance documents and potential areas of greater enforcement in the Biden administration.

The Justice Department has withdrawn nine Trump-era policy and guidance documents that shaped how the Department's Environment and Natural Resources Division ("ENRD") enforced environmental law during the past several years.

The Department's action came in a memo issued by Deputy Assistant Attorney General Jean Williams¹ and follows President Biden's Day One executive order that directs federal agencies to immediately review—and take action, as necessary—any agency actions that conflict with the new administration's "important national objectives" to confront climate change, prioritize environmental justice, and protect human health and the environment.²

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¹ Memorandum to ENRD Section Chiefs and Deputy Section Chiefs from Jean E. Williams, Deputy Assistant Attorney General (Feb. 4, 2021), <https://www.justice.gov/enrd/page/file/1364716/download>.

² Exec. Order 13990, 86 Fed. Reg. 7037 (2021), <https://www.govinfo.gov/content/pkg/FR-2021-01-25/pdf/2021-01765.pdf>; *see also* Exec. Order 14008, 86 Fed. Reg. 7620 (2021), <https://www.govinfo.gov/content/pkg/FR-2021-02-01/pdf/2021-02177.pdf> (directing agencies to "make achieving environmental justice part of their missions" for EPA; that means, in part, "strengthen[ing] enforcement of environmental violations with disproportionate impact on underserved communities"). *See, e.g.*, Uhlmann, David M., *New Environmental Crimes Project Data Shows That Pollution Prosecutions Plummeted During the First Two Years of the Trump Administration* (October 1, 2020). Environmental Crimes Project Report, 2020, U of Michigan Public Law Research Paper No. 685, *available at* SSRN: <https://ssrn.com/abstract=3710109> (finding 70 percent and 50 percent decreases in Clean Water Act and Clean Air Act prosecutions, respectively, under President Trump); Environmental Integrity Project, *New EPA Enforcement Data Show Continued Downward Trend During Trump Administration* (January 14, 2021), <https://environmentalintegrity.org/news/epa-enforcement-data-downward-trend-during-trump-administration/> (finding that, for FY 2020, EPA had the lowest number of civil judicial environmental cases concluded (82), the lowest number of civil judicial cases referred for prosecution (81), the lowest number of inspections (8,544), and the fourth lowest Superfund

THE WITHDRAWN POLICIES

Collectively, the withdrawn policies contributed to a dramatic decrease in environmental enforcement during the Trump administration, by whatever metric one applies.³ The nine policies restricted the Department's use of popular settlement tools and cautioned against the aggressive use of judicial and criminal enforcement to address environmental violations.⁴

In withdrawing the Trump policies, Williams stated they were “inconsistent with longstanding Division policy and practice” and potential “imped[iments to] the full exercise of enforcement discretion in the Division's cases.” Four of the most controversial—and consequential—policies related to removing the prior administration's prohibition on the use of EPA-approved projects (supplemental environmental projects, or SEPs), and community service payments to third parties as components of negotiated settlement or plea agreements.⁵

Proponents have long viewed these as useful tools to deliver real and immediate environmental benefits to communities that are harmed or other-

cleanup and cost recovery totals (\$815 million) in the last 20 years, adjusted for inflation).

³ See, e.g., Uhlmann, David M.; Environmental Crimes Project Report, 2020, U of Michigan Public Law Research Paper No. 685; and Environmental Integrity Project, New EPA Enforcement Data Show Continued Downward Trend During Trump Administration, *supra* note 2.

⁴ The withdrawn policies and their issuance dates are as follows:

- 1) “Enforcement Principles and Priorities,” January 14, 2021;
- 2) “Additional Recommendations on Enforcement Discretion,” January 14, 2021;
- 3) “Guidance Regarding Newly Promulgated Rule Restricting Third-Party Payments, 28 C.F.R. § 50.28,” January 13, 2021;
- 4) “Equitable Mitigation in Civil Environmental Enforcement Cases,” January 12, 2021;
- 5) “Civil Enforcement Discretion in Certain Clean Water Act Matters Involving Prior State Proceedings,” July 27, 2020;
- 6) “Supplemental Environmental Projects (“SEPs”) in Civil Settlements with Private Defendants,” March 12, 2020;
- 7) “Using Supplemental Environmental Projects (“SEPs”) in Settlements with State and Local Governments,” August 21, 2019;
- 8) “Enforcement Principles and Priorities,” March 12, 2018; and
- 9) “Settlement Payments to Third Parties in ENRD Cases,” January 9, 2018.

⁵ The Department under the previous administration had argued that the use of SEPs violated the Miscellaneous Receipts Act, suggesting that funding such projects amounted to illegal diversions of monies that would have otherwise been deposited into the Treasury, so that Congress can decide how to appropriate the funds.

wise disadvantaged by the environmental violations being resolved, and so their return effectuates the Biden administration’s environmental justice goals.⁶

The other rescinded policies addressed other aspects of enforcement.

Two related policies had set a higher standard for seeking judicial—as opposed to administrative—civil enforcement against polluters, limiting such actions to cases that involve “intentional, knowing, or willful wrongdoing,” the standard typically applicable to criminal enforcement.⁷ Those policies also encouraged restraint in pursuing criminal charges for violations of environmental laws.

Another policy prevented the Department from pursuing civil penalties in cases where states had already taken action.

Similarly, a fourth policy would have generally kept the federal government out of state civil enforcement matters under the Clean Water Act.

NO NEW POLICIES, YET

Importantly, the memo does not establish new policies; it simply withdraws Trump administration policies that the new administration saw as impediments to enforcement. However, Williams also noted that the Department would continue to assess the matters addressed by the withdrawn policies and might issue new guidance in the future.

While ENRD will further clarify its enforcement approach once the Division’s leader takes office, some next steps seem inevitable given two key campaign promises of President Biden—addressing climate and environmental justice issues.

POTENTIAL AREAS OF GREATER ENFORCEMENT

In that vein, one area to watch is greater enforcement of the Clean Air Act (“CAA”). Biden’s EPA and the Department of Justice already decided not to appeal a recently approved settlement between Sierra Club and utility DTE

⁶ Trump’s Justice Department had also issued a rule finalized in December 2020 that codified its ban on third-party payments; the new administration is reviewing that rule and likely will withdraw or revise it in the near future.

⁷ Compare, e.g., 33 U.S.C. § 1319(b) (authorizing EPA Administrator to “commence a civil action . . . for any [Clean Water Act] violation for which he is authorized to issue a compliance order,” without any mens rea requirement) *with id.* § 1319(c) (authorizing criminal fines and imprisonment for “negligent” violations, and greater fines and imprisonment for “knowing” violations); 42 U.S.C. § 7413(b) (authorizing EPA Administrator to commence a civil action where a party has violated a provision of the Clean Air Act, without any mens rea requirement) *with id.* § 7413(c) (allowing for criminal fines and imprisonment for “knowing” violations, as well as for “negligent” violations in certain circumstances).

Energy that the Trump administration had opposed, thereby supporting citizen groups' ability to pursue CAA enforcement.⁸

We also expect the new administration to withdraw EPA's December 7, 2017, policy memo detailing the Agency opting not to pursue New Source Review enforcement against modifications to a stationary facility unless the post-project actual emissions indicate a significant net increase.⁹

We will also likely see the return of EPA's Obama-era Startup, Shutdown, and Malfunction ("SSM") State Implementation Plan ("SIP") policy, which, among other things, directed states to revise their SIPs to "rectify . . . enforcement discretion provisions [relating to SSM periods] that have the effect of barring enforcement by the EPA or through a citizen suit and affirmative defense provisions that are inconsistent with CAA requirements."¹⁰ Now-former EPA Administrator Wheeler had issued new guidance on October 9, 2020 that superseded the 2015 SSM SIP policy with regard to exemption and affirmative defense provisions.¹¹

Likewise, we expect the Justice and Labor Departments to revive their joint Worker Endangerment Initiative, first announced in December 2015 under the Obama administration but largely dormant under the Trump administration.¹²

Under the initiative, prosecutors are encouraged to consider charging other serious offenses that often occur with Occupational Safety and Health Act ("OSHA") violations, such as false statements, obstruction of justice, and environmental and endangerment crimes, which typically carry stiffer penalties and therefore greater deterrence. The initiative helped effectuate the Labor

⁸ News Release: US Will Not Appeal District Court Decision Allowing Sierra Club-DTE Energy Settlement (Feb. 4, 2021), <https://www.epa.gov/newsreleases/us-will-not-appeal-district-court-decision-allowing-sierra-club-dte-energy-settlement>.

⁹ Memorandum from E. Scott Pruitt to Regional Administrators (Dec. 17, 2017), https://www.epa.gov/sites/production/files/2017-12/documents/nsr_policy_memo.12.7.17.pdf.

¹⁰ 80 Fed. Reg. 33840 (June 12, 2015), <https://www.govinfo.gov/content/pkg/FR-2015-06-12/pdf/2015-12905.pdf>.

¹¹ Memorandum from Andrew R. Wheeler to Regional Administrators 1–10 (Oct. 9, 2020), https://www.epa.gov/sites/production/files/2020-10/documents/placeholder_0.pdf.

¹² See Memorandum of Understanding Between the U.S. Departments of Labor and Justice on Criminal Prosecutions of Worker Safety Laws (Dec. 17, 2015), <https://www.justice.gov/enrd/file/800526/download>; Memorandum for All United States Attorneys (Dec. 17, 2015), <https://www.justice.gov/enrd/file/800431/download>.

Department's 2012 Environmental Justice Strategy, which may itself see an update in the next four years.¹³

CONCLUSION

Regulated entities should take steps now to ensure they are prepared for renewed and vigorous enforcement of environmental laws.

For example, facilities should ensure that they have a robust and up-to-date environmental audit system in place and that employees and managers are current on environmental monitoring and reporting training.

Systems such as these allow for early detection, voluntary disclosure, and remediation of potential non-compliance, which often pays significant dividends down the road in the event of an enforcement action.

¹³ Department of Labor, Environmental Justice Strategy (Feb. 2012) <https://www.dol.gov/sites/dolgov/files/OASP/ej/ej-strategy.pdf>.