BERGESON & CAMPBELL PC

Lynn L. Bergeson is managing partner of Bergeson & Campbell, P.C. She can be contacted on +1 (202) 557 3801 or by email: lbergeson@lawbc.com.

Published by Financier Worldwide Ltd

SPOTLIGHT ARTICLE July 2022

Environmental justice and enforcement in America: what investors need to know

BY LYNN L. BERGESON

By any standard, federal enforcement of environmental laws in the US has been uneven, to say the least. The prevailing perception is that democrats are 'greener' than are republicans when it comes to environmental enforcement. The data is quite scattered, however, and it would seem no party has cornered the environmental protection market. The Trump administration may be the exception that proves the rule.

Most would agree civil and criminal enforcement case numbers were significantly below those of other administrations, all by design. A raft of other actions taken by the Trump administration crystallised that environmental enforcement was definitely not top of mind. Priorities today are decidedly different, and investors need to know the implications of the Biden administration's commitment to the twin goals of environmental protection and environmental justice. This article explores these topics.

Environmental enforcement

The US Environmental Protection Agency (EPA) and the US Department of Justice (DOJ) enforce environmental laws in the US. The EPA addresses most instances of non-compliance through the issuance of administrative actions initiated either by its headquarters in Washington, DC, or any of its 10 regional offices located throughout the US. The DOJ initiates civil and criminal judicial actions and relies upon EPA inspectors and lawyers for their technical understanding of the statutes and their application to the facts.

US environmental laws empower the EPA to impose administrative, civil and criminal penalties. While criminal cases are decidedly less frequent, the Biden administration has vowed to enforce these laws strictly and to punish violators harshly. We focus here on the more routine administrative and civil penalties because they are far more typical and much more likely to be a significant factor in corporate compliance practices.

At a very general level, US environmental laws authorise the payment of penalties to

achieve at least two goals: to punish the violator and to deter others from violating the law. To achieve either, penalties must be significant, and their imposition, broadly and publicly communicated. Typically, the enabling environmental statute establishes base penalty amounts. The Federal Civil Penalties Inflation Adjustment Act mandates that these base amounts be adjusted annually to keep pace with inflation and maintain the deterrent effect of statutory civil monetary penalties.

Some may be labouring under the misapprehension that administrative actions are trivial 'slaps on the wrist'. Civil penalties are anything but trivial. The most recent penalty amount adjustment was in January 2022, and penalties for air, water and toxics violations are around $50,000, $60,000 and $44,000, respectively, per day, per violation. Under most environmental laws, the EPA may assert non-compliance going back five years.

Since reporting requirements arising under legislative provisions are often compelled on a daily, weekly, monthly, annual or quadrennial basis, penalties rack up quickly. Assessed penalties in the hundreds of thousands or millions of dollars are common. While various EPA administrative 'penalty policies' offer opportunities to reduce these penalties by rewarding good faith efforts to comply, how these policies are applied varies considerably, and needing to retain counsel to argue they should apply adds to the bottom line.

Payment of sticker shock-inducing penalties is only one of the pain points. The reputational damage a company may incur is equally painful, more lasting thanks to social media and far more difficult to remedy. The EPA tends to broadcast settlement of enforcement actions in press releases and in EPA compilations of enforcement actions issued by EPA regional offices. Print and social media outlets pick up these releases and distribute the news broadly, ensuring that employees, neighbours, shareholders and competitors are aware of the infractions.

In addition to reputational injury, often overlooked is the probability that the EPA and state enforcement agencies are likely to scrutinise a company more closely post-enforcement. Its chances of being on the receiving end of an inspection request also increase. Opportunities for penalty mitigation diminish under the penalty policies noted above once a company has a record of non-compliance.

There are also significant commercial consequences, and none of them is good. Financing may be more difficult to secure, due diligence will be more complicated if one of the parties to a transaction was party to a high-profile enforcement action, and negotiating supplier agreements could be adversely impacted, as some companies just do not want to do business with a perceived 'bad actor'.

Other companies may be disallowed from doing business with 'violators' as a result of company policies. Stock prices could be impacted, shareholders agitated and, depending upon materiality levels, public reporting could be required, creating a lasting stain on a company's reputation. Competitors, too, find these casualties a target-rich area for corporate misinformation mischief.

There is some good news. The Biden administration, in May 2022, reinstated the ability to mitigate penalties with supplemental environmental projects (SEPs). In 2017, the prior administration prohibited SEPs. The EPA intends these projects to allow a violator to undertake a project to provide a tangible environmental or public health benefit to the affected community. SEPs can go a long way in assuaging the ill will a high-profile, high-dollar enforcement action can generate. This is because a SEP is uniquely local, and a project that area residents can see and relate to reaps significant benefits with respect to shoring up the reputational damage occasioned by a high-profile enforcement action.

Environmental justice

When the Biden administration took office in 2021, it announced an "all-of-government" commitment to achieving environmental justice. In Executive Order 14008, 'Tackling the Climate Crisis at Home and Abroad' (27 January 2021), president Biden directed the attorney general to ensure "comprehensive attention" to environmental justice throughout the DOJ and to develop a "comprehensive environmental justice enforcement strategy". The DOJ did so and released it on 5 May 2022. The eight-page 'Comprehensive Environmental Justice Enforcement Strategy' is interesting and a must-read for corporations.

It comes at a time when the DOJ and the Biden administration are under heavy fire from civil rights advocates for a perceived failure to deliver on president Biden's commitment to environmental justice. The DOJ strategy seeks to change the narrative, if not turn the ship around. It also goes a long way in answering the question of how the government intends to promote environmental justice through enforcement scrutiny. Noted below are a few practical implications of the strategy.

First, under the strategy, the DOJ and the EPA will target for enforcement "overburdened and underserved communities". What this means is the DOJ and the EPA will make good use of a growing number of mapping tools to identify targets on which to focus their enforcement resources. These tools include the EPA's EJScreen 2.0 and the White House Council on Environmental Quality's (CEQ) Climate and Economic Justice Screening Tool (CEJST), a new tool CEQ released in February of this year to measure the cumulative effects of pollution on disadvantaged communities.

Importantly also, the EPA is poised to release imminently an updated 'roadmap' identifying all the legal tools it intends to use to promote environmental justice. The document will update a 120-page document the Obama administration issued in 2011.

Second, the DOJ intends to use creatively and expansively its authority under other enforcement tools "outside of the traditional environmental statutes". Specifically, the DOJ notes actions "under the civil rights laws, worker safety and consumer protection statutes, and the False Claims Act (FCA)". The FCA is interesting because it provides for treble damages that, according to the DOJ, "may provide significantly greater deterrence than

penalties under the environmental statutes alone".

The FCA allows the government to use civil investigative tools to investigate potential violations of material public health-related grant or contract conditions pertaining to impacted communities. This would allow the DOJ to take on some of the investigative burden that otherwise would fall exclusively on administrative agencies.

Third, the DOJ strategy will promote accountability and transparency in terms of how exactly the government is measuring up to achieving the administration's goals. The release of the strategy set off a relentless push to deliver on a promise, and the best way to show progress is to do so quantitatively – by the numbers. Enforcement will intensify.

Finally, heightened outreach by the government to engage communities, particularly those underserved traditionally, will jump-start enhanced community awareness and thus increased activism. This activism could well energise a new wave of environmental, community and worker awareness of chemical releases and real or perceived environmental and human health harm.

Getting with the programme

Investors, bankers, asset managers and C-suite members across the board should take this message to heart and be mindful of the new sheriff in town, the corporate imperative to be compliant, the enhanced sophistication of mapping tools and the growing importance of environmental justice. It is more than an aspiration.

It is a policy directive that is emerging as a meaningful lever that the EPA and others are using to identify historic inequities through the use of an expanding arsenal of legal tools and non-traditional federal authorities to achieve improved environmental outcomes. While the Biden administration may have had a slow start, it is definitely making up for lost time. ■