

Business Better (Season 3, Episode 6): An Update on Environmental Justice Under the Biden Administration

Speakers: Lea Phillips and Alyssa Domzal

Steve Burkhart:

Welcome to Business Better, a podcast designed to help businesses navigate the new normal. I'm your host, Steve Burkhart. After a long career at global consumer products company BIC – where I served as Vice President of Administration, General Counsel, and Secretary – I'm now Special Counsel in the Litigation Department at Ballard Spahr, a law firm with clients across industries and throughout the country.

In today's episode, we focus on environmental justice and how President Biden's initial environmental justice policies and executive orders are playing out two years later. We also provide an update on the latest policies from the EPA and DOJ. Participating in this discussion are Lea Phillips, a Partner in Ballard's Phoenix office who focuses her practice on environmental and natural resources law and serves clients in the renewable energy, manufacturing, and waste/recycling industries; and Alyssa Domzal, an Associate in Ballard's Baltimore office who represents owners, developers and investors in a wide range of commercial real estate transactions.

Alyssa Domzal:

Hi, I'm Alyssa Domzal in Ballard Spahr's Baltimore office. I'm here today with my colleague Lea Phillips. Lea, it's been almost two years since we sat down to discuss environmental justice as an emerging topic in real estate development. A lot has happened since then.

Lea Phillips:

Yes, definitely.

Alyssa Domzal:

So I'm excited for you to catch us up, but first, can you remind everyone what environmental justice is?

Lea Phillips:

Sure. So, 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 development, implementation, and enforcement of environmental laws, regulations, and policies, which is a little bit of a mouthful. If you were sitting here in the room, you would've seen that I read from my cheat sheet on that. But what it means is that every person is entitled to clean natural resources like water and air, and no singular group of people should be disproportionately impacted by pollution and waste, because, unfortunately, historically, low-income communities and communities of color have been disproportionately impacted by and exposed to pollution, and historically benefit the least from government regulation and investment. So environmental justice is the concept of equalizing exposure to pollution, and the advantages and access to our natural resources.

Alyssa Domzal:

So what I'm hearing, really, is that this is a civil rights movement.

Lea Phillips:

Absolutely. The origin of the environmental justice movement can be traced back to the 1960s. So, even though listeners may be hearing this term more recently, it's something that's been around for a long time. But the recent developments really took hold in 2020 during this moment in history where the country was grappling with systemic racism, and the Trump

administration had rolled back a number of federal environmental policies, including policies that were aimed at promoting environmental justice. President Biden made environmental justice part of his campaign platform, and states began to take action to fill the void. So when we spoke about this, Alyssa, a couple of years ago, in just the first couple of months of the Biden administration, we were telling our clients that regulation, enforcement actions, and legislation to address environmental justice were on the horizon. And now, two years later, they're here. It's arrived. It's here. It's happening.

Alyssa Domzal:

Can you explain how so?

Lea Phillips:

Sure. So you may remember that immediately upon taking office, Biden ordered every federal agency to review the state of equity in the agency and come up with a plan to remedy unequal barrier to opportunity. Biden also instructed the Justice Department to increase enforcement against polluters, and ordered all agencies to address any disproportionate environmental injustice that results from their programs. He also created the White House Environmental Justice Advisory Council that advises on how to increase the federal government's efforts to address current and historic environmental injustice through strengthening environmental justice monitoring and enforcement, and created something called the Justice 40 Initiative, which sets a goal for disadvantaged communities most impacted by climate change and pollution to receive at least 40% of the overall benefit from federal investments in climate and clean energy.

Alyssa Domzal:

So I think what we're seeing, or what we were expecting to see, was some really top-down action, and we were really expecting the Biden administration to have a lot of impact on the agencies. Can you talk more about that?

Lea Phillips:

Sure. So just this past May, we saw two agencies come out with enforcement strategies and environmental justice strategies that I think signal where these agencies are going and have gone in the six months after that. So in May, we saw the US Department of Justice issue its comprehensive Environmental Justice Enforcement Strategy. So this strategy basically says three things. It says that DOJ will prioritize cases that reduce public health and environmental health impact to overburdened communities, basically saying they're going to prioritize environmental justice cases. They also said they're going to make strategic use of all available legal tools to address environmental justice, and that they're going to ensure meaningful engagement with impacted communities, meaning they want to hear from these communities themselves and make sure that the remedies that they create as a result of these enforcement actions have a positive impact on those communities.

Alyssa Domzal:

So when DOJ says that phrase, making strategic use of available legal tools, what does that really mean?

Lea Phillips:

So that's a great question because I think that's a critical part of this strategy. What it means is that in addition to using the traditional methods of promoting environmental justice through enforcement actions under your traditional environmental laws, DOJ is going to use things like civil rights laws, worker safety and consumer protection statutes, the False Claims Act, to promote environmental justice.

Alyssa Domzal:

So I think we've talked and covered a lot of what DOJ is doing. What about EPA?

Lea Phillips:

In 2022, EPA took a number of steps to, in the words of Administrator Reagan, "bake environmental justice and civil rights into the DNA of the agency." So just like DOJ, EPA also issued a policy document in May of 2022. The EPA Office of the General Counsel released what they called the EPA Legal Tools to Advance Environmental Justice, which updated a document that was originally issued back in 2014. So it's thick, it's almost 200 pages, and it explores how EPA can address environmental justice concerns under existing federal environmental statutes like the Clean Air Act, the Clean Water Act, CERCLA.

And what it does is it emphasizes in instances where EPA has the authority to assess, consider, and address cumulative impacts and risks to these underserved communities. So for example, in this document, EPA gives examples of places where, for instance, by implementing additional permitting conditions, they may be able to affect change and affect environmental justice through the statutes that already exist, in other words, without additional legislation, things that they are already authorized to do.

And then most recently, just this past January, January 2023, EPA released additional guidance on assessing cumulative impacts to these environmental justice communities as an addendum to their legal tools document. And the addendum was intended to provide, as it described, further detail and analysis, and some examples of the agency's authority to advance environmental justice. And what I think is critical here is the agency is using laws that are already in place, no new legislation is needed. The agency is signaling that they are going to increase enforcement and use other types of tools like permitting conditions and things that maybe they haven't fully taken advantage of before to promote environmental justice.

Alyssa Domzal:

So that's really interesting. What other kinds of things are EPA doing?

Lea Phillips:

So one thing that's really critical, and that was very interesting to see, I think, for everyone in the environmental law community, is that EPA announced in September the establishment of a new Office of Environmental Justice and External Civil Rights. So this new office combines three existing, or preexisting, environmental justice related offices, and is headed by a new assistant administrator that will be nominated by the president and confirmed by the Senate. And this is important because these actions elevate the Environmental Justice and External Civil Rights Office to the same level as the traditional major EPA programs, like the Office of Water and the Office of Air and Radiation. So you're seeing the agency put environmental justice up there with their other big priorities to the point where it gets its own office. It's prioritized in the same way as the Office of Water.

Alyssa Domzal:

So what specifically will that office do?

Lea Phillips:

So the new office will be responsible for working directly with communities with environmental justice concerns. The office will also enforce federal civil rights laws. Again, you're seeing civil rights laws come into play in this environmental justice space. The office will provide environmental conflict resolution services, and offer grants and technical assistance. And perhaps most importantly, and most immediately right out of the gate, this office will oversee the implementation of the three billion dollar Climate and Environmental Justice Block Grant program that is part of the Inflation Reduction Act. So it will ensure funding from recent legislation like that Inflation Reduction Act funding complies with Biden's Justice 40 Initiative, which is that executive order that delivers 40% of federal agency benefits to disadvantaged communities.

Alyssa Domzal:

Great. So with all of these policies in effect, did we see an uptake in environmental justice based enforcement in 2022?

Lea Phillips:

Absolutely. This was a prediction from the last time we spoke that really did come true. EPA continued to become more aggressive in its oversight of state environmental permitting processes, for instance. So for example, as part of its evaluation of civil rights complaints filed by Louisiana residents this past October, EPA issued a letter of concern stating that their initial investigation of the Louisiana Department of Environmental Quality and Department of Health raises concerns that the administration of their air permitting program may have an adverse and disparate impact on black residents. As another example, where I live in Arizona, we saw EPA accepting complaints to its External Civil Rights Compliance Office alleging environmental racism, and challenging the environmental justice analysis and public participation process that state and county agencies took to issue permits.

There are a number of other examples as well. In July, DOJ announced that it had begun an investigation of Houston city agencies in response to complaints that the agencies had policies that resulted in discriminatory responses to reports of illegal dumping in black and Latino neighborhoods as compared to more affluent, predominantly white neighborhoods. Specifically in that case, DOJ was going to examine whether the Houston Police Department, and the Department of Neighborhoods, and the Solid Waste Management Department had violated Title VI of the Civil Rights Act when implementing their illegal dumping policies.

Alyssa Domzal:

So I think it's really interesting that we're seeing all of this impact all across the country, and not just in different geographic regions, but really in different types of enforcement. We haven't heard, or at least I haven't always heard, about the police enforcement being connected to environmental justice. So I think this trends are really interesting. What kind of things are you expecting to see in 2023?

Lea Phillips:

Well, first, I think we're going to see a continued increase in enforcement actions. And I think we are going to see EPA and DOJ continue to use civil rights laws as a mechanism to promote environmental justice, right along with traditional environmental laws and environmental enforcement. I also think we're going to see EPA take a little bit more of an active role in state permitting actions and increase enforcement of current permit limits and environmental cleanup laws. I also think we're going to see challenges in clients getting, renewing, and expanding their existing permits. This is something that we're already seeing in Arizona where I am. We've seen environmental justice groups protest permit actions by state agencies, and on their own, state agencies are taking a closer look at these issues.

And then finally, I think we're going to see it increased in green investment. One thing we didn't touch on yet that I'll briefly mention is the immense, really unprecedented amount of funding earmarked for environmental justice initiatives, most notably the Inflation Reduction Act that I mentioned earlier, which dedicated some 60 billion in federal spending, and a lot of that advances environmental justice efforts.

Alyssa Domzal:

So there's a lot going on in terms of enforcement, in terms of permits, in terms of potential investment opportunities. What should our clients in the business community be doing to prepare?

Lea Phillips:

So first, I think it's important to acknowledge environmental justice in your messaging. And so the first thing I tell my clients is to acknowledge environmental justice concerns. It is an expression of your corporation's contemporary values, and strategically should be included in your conversations with stakeholders and in the regulatory setting. We can really gain a lot when we lead this conversation when talking to regulators.

But second, I tell our clients to identify and prioritize initiatives that are necessary to advance environmental justice for their business. This may be capital expenditures to ensure a facility is in line with its permit limits, for instance. It could be modifications to plant operations, again, to avoid any type of violations or other types of enforcement actions. It could be

community investment, philanthropy, employee volunteerism. There are a number of different initiatives our clients can take to advance environmental justice in their communities.

Of course, additionally, if this is a concern, an internal corporate audit conducted under privilege is also something that is an option for our clients in the business community. Through an internal audit, we can identify any emerging compliance risks based on the definition of what is an environmental justice community under federal law, but also under state law where a facility is located, and really identify where there might be an issue in the future, depending on the company's goals. And we can do that at a site specific level, or that's something that can be done at a company-wide level, depending on where a concern may be. And once you have that audit, you can develop a risk mitigation strategy.

But, Alyssa, I'm also telling clients to start thinking about developing a corporate environmental justice policy, so implementation plans that align with, for instance, a company's ESG program and policy, so how a defensive enforcement action may be handled, how internal investigations may be handled. As you heard me mention, DOJ and EPA have both indicated that they'll be using civil rights laws to enforce environmental justice. This may mean that internally at your business, you want to make sure that environmental violations, environmental complaints are routed not just through your environmental health and safety team, but team members who know to look for and can assess potential civil rights claims in those types of violations and complaints, as well. So we want to make sure that our team members are educated, and can parse out and identify a potential civil rights or environmental justice concern, as well as the traditional environmental enforcement concerns.

And finally, I would recommend engaging with federal and state government officials, and tracking these developments at the federal level and at the state level. This is something that's changing day-to-day. We didn't even really get into state programming today, but a number of states have proposed their own environmental justice legislation, and I recommend that companies stay on top of what environmental justice legislation may be happening in states where they have facilities.

Alyssa Domzal:

Well, Lea, thank you so much. I am really struck by, what feels like very short time since we last talked about this topic, how much has changed, and how evolving the guidance is, and the strategies that we can advise our clients on. It's really pretty astounding. So thank you so much for your time. I really appreciate it.

Lea Phillips:

Thank you for having me.

Steve Burkhart:

Thanks again to Lea Phillips and Alyssa Domzal. Make sure to visit our website, www.ballardspahr.com where you can find the latest news and guidance from our attorneys. Subscribe to the show in Apple Podcasts, Google Play, Spotify, or your favorite podcast platform. If you have any questions or suggestions for the show, please email podcast@ballardspahr.com. Stay tuned for a new episode coming soon. Thank you for listening.