



**SOUTHEASTERN LEGAL FOUNDATION, INC.**

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May 16, 2016

**VIA U.S. MAIL AND EMAIL**

Environmental Justice  
U.S. Department of the Interior  
Office of Environmental Policy and Compliance (MS-2462)  
1849 C Street N.W.  
Washington, D.C. 20240  
[environmental\\_justice@ios.doi.gov](mailto:environmental_justice@ios.doi.gov)

Re: Draft 2016-2020 Environmental Justice Strategic Plan; Docket No. 2016-08671

Dear Sir or Madam:

Southeastern Legal Foundation (SLF) is a national public interest law firm advocating for individual freedom, limited government, and the free enterprise system. Our clients include individuals, companies, trade associations, and elected representatives. We have represented such clients in numerous environmental cases, including the recent and successful challenge to the Environmental Protection Agency's (EPA) greenhouse gas regulations ruled on by the United States Supreme Court, and the ongoing challenge to the Army Corps of Engineers and EPA's new definition of waters of the United States.

SLF submits its comments to the U.S. Department of Interior's (DOI) Draft 2016-2020 Environmental Justice Strategic Plan (Docket No. 2016-08671), 81 Fed. Reg. 22,303 (Apr. 15, 2016) (the "Proposed EJ Plan"). The public comment period for the Proposed EJ Plan runs through May 16, 2016, and our comments are timely submitted.

### **Introduction.**

For more than two decades, under the banner of environmental justice, federal administrative agencies, including the DOI have sought to expand their jurisdiction, influence, and control through various means. Resulting from the unlimited discretion to determine whether a community may be adversely impacted by an environmental regulatory decision, combined with broad and undefined terms such as “disproportionate effects,” actions taken in the name of “environmental justice” have become both infinite in jurisdiction and boundless in scope.

While it is SLF’s position that the Proposed EJ Plan is simply another example of the ongoing attempt by the Executive Branch to bring about enormous and transformative expansion in its regulatory authority without Congressional authorization, the comments that follow address particular infirmities of the Proposed EJ Plan.

### **The Proposed EJ Plan affords the DOI limitless discretion.**

Implementation of the Proposed EJ Plan requires the DOI to identify, amend and/or address programs, policies, activities and/or impacts of those programs that may result in disproportionately high and adverse effects on minority, low-income, or tribal populations. Inherent in this requirement are several infirmities that provide the DOI limitless discretion to expand its jurisdiction, influence, and control.

First, the Proposed EJ Plan allows the DOI to take any action it sees fit under the guise of “environmental justice” without any requirement that it establish any actual effect, let alone any actual disproportionately high and adverse effect, on a particular population. To remedy this infirmity, the Proposed EJ Plan should require that the DOI identify, amend and/or address programs policies, activities and/or impacts of those programs only if they actually result in disproportionately high and adverse effects, not if they simply may. Use of the term “may” affords

the DOI a level of discretion that exceeds the scope of Executive Order 12898. It further affords DOI limitless discretion to take actions such as denying permit applications, imposing additional regulatory requirements that have not been subject to the Administrative Procedure Act's formal rulemaking procedures, and disburse taxpayer dollars, without ever requiring it to establish that an actual disproportionately high and adverse effect exists.

Second, the term "disproportionately high and adverse effects" is key to the applicability of the Proposed EJ Plan; however, the DOI never defines the term, allowing it to apply its environmental justice policy on an ad hoc and unpredictable basis. If this term is to be used with regard to the DOI's environmental justice efforts, we urge the DOI to define it so that the general public and the regulated community have a better understanding and heightened predictability with the use of an objective and provable standard of what triggers future initiatives and what actions may be taken under the umbrella of "environmental justice." In determining whether a program, policy, activity and/or impact of those programs results in a disproportionately high and adverse effect, it is imperative that the DOI consider inclusion of parameters for establishing whether an effect is actually disproportionate, such as the scope of the community reviewed and the benchmarks being used (e.g. income, race, ethnicity, etc.). And, in considering such parameters, it is imperative that the DOI include such a consideration in its final strategic plan.

**The Proposed EJ Plan encourages race-based decision making and is thus, ultra vires and invalid.**

SLF acknowledges that the DOI has an interest in ensuring that it does not fund programs or activities that discriminate on the basis of race, color, or national origin. However, the Proposed EJ Plan's focus on environmental "effects" on "minority, low-income, or tribal populations" is both narrower and broader than Title VI in that the latter involves disparate treatment rather than

disproportionate effects, protects all racial and ethnic groups rather than only “minority populations,” and says nothing about “low-income or tribal populations.”

Employing a “disparate impact” approach in the environmental context is problematic for several reasons. First, as a matter of statutory interpretation, Title VI itself bans only disparate treatment. Thus, the DOI’s ban on any action that has a disparate impact is ultra vires and invalid. Second, under the disparate impact approach set forth in the Proposed EJ Plan, discriminatory motive is irrelevant. It is enough to show that the program or policy (or in the environmental context siting decision or permit) results in a disproportion of some sort, even if the program or policy is nondiscriminatory by its terms, in its intent, and in its application. This will necessarily result in members of the regulatory community abandoning projects that could bring great economic benefits to particular communities to avoid potential expensive lawsuits.

Finally, transferring the disparate impact approach as it applies to employment law to the area of environmental law leads to nonsensical results where the very same conduct is legal in one city, but illegal in another – legality being based solely on the racial makeup of those cities. This approach provides no means to account for changes in the racial makeup of cities over time or to weigh the impacts on different racial minority groups.

**The Proposed EJ Plan runs the risk of violating federal anti-lobbying laws.**

Goal 4 of the Proposed EJ Plan provides that the DOI will increase its use of social outreach tools including Facebook, twitter, call centers, blogs and other platforms to share or exchange information with the public on environmental justice. The DOI’s use of social outreach tools runs the significant risk of violating federal anti-lobbying laws, such as the Financial Services and General Government Appropriations Act and the Department of Interior, Environment, and Related Agencies Appropriation Act. Those and other applicable federal laws prohibit the use of

the DOI's appropriations for indirect or grassroots lobbying in support of or opposition to pending legislation and for publicity or propaganda purposes. The prohibition on use of funds for prohibited lobbying arguably applies not only to funds spent directly by the DOI, but also to funds spent indirectly by grant recipients.

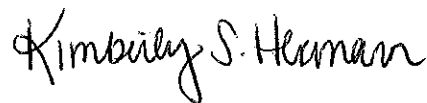
**The Proposed EJ Plan is constitutionally problematic.**

The Proposed EJ Plan provides that DOI will protect some racial and ethnic groups, but not others, denying the equal protection of laws. Specifically, under the Proposed EJ Plan, the DOI seeks to include particular groups in its decision-making process while ostensibly excluding other groups. The government's reliance on race as its primary consideration for protecting one group over another from alleged environmental harms is constitutionally problematic and subject to the strictest level of scrutiny.

**Conclusion**

SLF appreciates the opportunity to provide the DOI with its concerns and recommendations regarding the Proposed EJ Plan.

Sincerely,



Kimberly S. Hermann  
Senior Counsel