

EPA SIGNALS HEIGHTENED FOCUS ON ENVIRONMENTAL JUSTICE WITH SWEEPING GUIDANCE

June 2022

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The Biden-Harris administration recently affirmed its commitment to advancing environmental justice, issuing a sweeping guidance document on May 26, 2022. At first glance, the guidance from the US Environmental Protection Agency (EPA) merely reviews longstanding statutes and executive orders for environmental justice-oriented authority. But a closer reading reveals a subtle shift in EPA's decision-making.

Although more ambitious proposals would require notice-and-comment rulemaking, the guidance shows that EPA currently wields sufficient discretion to redirect permitting, funding, and enforcement actions to address environmental justice concerns. Industries operating in or near communities with environmental justice concerns should prepare to address community concerns in their own decision-making processes—or face a potentially tougher road to agency approval.

BACKGROUND

On May 26, 2022, EPA's Office of General Counsel published [*EPA Legal Tools to Advance Environmental Justice \(Legal Tools\)*](#), an update to its [2011 guidance on advancing environmental justice](#). The document combs through key executive orders and major federal statutes administered by EPA to identify existing authority that allows EPA to directly address environmental justice concerns.

EPA defines environmental justice as the fair treatment and meaningful involvement of all people in environmental decisions. The EPA guidelines target two main environmental justice goals: (1) minimizing cumulative impacts and (2) increasing community participation in environmental decision-making. For example, EPA likely would scrutinize siting a hazardous waste facility in a predominantly Spanish-speaking community if other facilities were already concentrated in the area, and likely would seek to ensure that translation services were provided during public proceedings.

Seemingly, not much has changed since EPA last published *Legal Tools* more than a decade ago. The statutes and executive orders forming the bulk of EPA's authority to address environmental justice are the same as they were in 2011. The only significant exception is the 2016 overhaul of the Toxic Substances Control Act.

Yet, two potentially significant changes were buried in EPA's 200-page updated guidance.¹

First, EPA hints that it could use its existing discretion to prioritize environmental justice concerns, either directly or through indirect pressures on state regulators.

Second, the 2022 update highlights EPA's affirmative obligation to comply with civil rights laws in a variety of contexts, including environmental assistance programs, signaling stricter procedural requirements for recipients of EPA funding.

¹ This discussion is not meant to be comprehensive; interested parties should review EPA's *Legal Tools* in total.

SHIFTING PRIORITIES

Air Programs

EPA has discretionary authority to pressure state and local governments into advancing environmental justice goals in the administration of air programs under the Clean Air Act (Act). The Act establishes a complex regulatory regime where EPA sets national standards and states administer and enforce those standards. If states fail to meet certain criteria, more extensive federal control is triggered, such as a federal implementation program for national ambient air quality standards (NAAQS).

However, EPA retains significant discretion to pressure states that are in compliance with federal standards but may be falling behind on environmental justice goals. For example, EPA can refuse to extend attainment deadlines for states and can issue sanctions for failure to meet those deadlines.

Thus, facing EPA pressure, states may try to avoid nonattainment consequences or sanctions by preemptively advancing environmental justice concerns. This could result in fewer siting approvals in hot spots or environmental justice communities. States may also try to increase community outreach through more public hearings and greater accessibility. The result for regulated industries would be greater procedural hurdles and higher compliance costs.

EPA could go even further and incorporate environmental justice concerns when setting or revising air pollution standards.

For example, revisions to the 2010 NAAQS for nitrogen dioxide, a source of particulate matter and a precursor to ozone, were informed by new pollution monitoring stations in communities with high asthma rates. EPA could likewise establish new NAAQS using monitoring in environmental justice community hot spots—areas with low-income and historically marginalized populations and multiple pollution sources. The result would likely be more stringent standards, and thus more restrictive state and local administration and enforcement programs.

EPA can also directly incorporate environmental justice concerns when states meet statutory requirements that trigger federal implementation of air quality standards. Similarly, EPA can directly require states to revise their implementation plans to incorporate environmental justice measures.

Water Programs

EPA similarly has discretion to disapprove or directly promulgate water quality standards in states and tribal areas based on environmental justice concerns.

For example, for designated fishable or swimmable water quality areas, EPA could require standards to account for fishing and fish consumption in environmental justice communities. EPA could similarly tighten pollution standards to account for swimming and other recreational activities in urban areas, limiting effluent discharge permits in upstream industrial areas.

EPA could also disapprove a state's new or revised water quality standard for failing to comply with the public hearing requirement from an environmental justice perspective. To avoid disapproval, states will have to research affected communities, distribute notices of public hearings, and ensure all materials are appropriately translated. While these burdens will fall largely on agencies, greater community involvement may result in tighter pollution controls or procedural delays for regulated industries.

Similarly, EPA and states have broad discretion in setting maximum discharges of water pollutants from point sources like power plants. EPA and state environmental agencies could use that discretion to limit

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discharges in overburdened environmental justice communities. Currently, neither EPA nor states are required to consider environmental justice concerns in the allocation process. However, the guidelines note that EPA has statutory authority to promulgate regulations requiring environmental justice considerations.

For drinking water, EPA can exercise its discretion to promote environmental justice in two ways.

First, EPA can expand public participation in permitting processes. Second, EPA can impose permit conditions necessary to protect environmental justice communities, so long as those conditions target the protection of drinking water, not other types of impacts like diminution of property values. Separately, *Legal Tools* references considering environmental justice impacts if EPA decides to promulgate new regulations for lead pipes.

Hazardous Waste Disposal

EPA controls hazardous waste disposal under the Resource Conservation and Recovery Act (RCRA). Environmental justice advocates frequently criticize the concentration of hazardous waste facilities in low-income communities of color. The extent of EPA's authority to influence public participation and reject RCRA permits on environmental justice grounds was delineated in the 1995 Environmental Appeals Board decision *Chemical Waste Management*.

In *Chemical Waste Management*, the administrative judge held that EPA can provide opportunities for public involvement beyond RCRA regulations. Thus, EPA has considerable discretion to include affected environmental justice community members in the permit process. EPA's discretion to approve or deny permits on environmental justice grounds is more constrained. EPA cannot solely base the decision on "alleged social or economic impacts upon the community."

However, *Legal Tools* notes that EPA can reject a permit on the grounds of disproportionate cumulative impacts. In other words, if there is already a toxics hot spot in the area, EPA has grounds to reject the permit, thereby advancing (perhaps indirectly) environmental justice concerns.

Superfund

The Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA or Superfund) empowers EPA to take those measures "necessary to protect the public health or welfare or the environment," which EPA emphasizes includes ensuring communities with environmental justice concerns can meaningfully participate.

Further, EPA may prioritize environmental justice communities for Superfund cleanups. The agency can already do this without rulemaking for smaller non-National Priorities List sites. However, sites on the National Priorities List must go through a rigorous quantifying and ranking scheme.

Still, EPA could favor environmental justice communities by quantifying environmental justice issues and cumulative impacts for use under the hazard ranking system. EPA could also incorporate environmental justice concerns in assessing remedial alternatives for Superfund cleanups—thus influencing the final remedy selection decision.

Environmental Review

EPA has discretion to consider indirect and cumulative impacts on environmental justice communities during National Environmental Policy Act (NEPA) reviews. As part of these reviews, EPA examines potential environmental effects of major federal actions in the context of demographics and socioeconomic factors. For example, a NEPA analysis would weigh community impacts differently for the

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same pollution source in a poor community of color versus a wealthy white community, all else being equal. EPA can also use NEPA analyses to foster discussion about environmental justice issues through NEPA's requirement of meaningful public review and comment.

A heightened emphasis on environmental justice concerns likely will increase delays and costs for major federal actions in environmental justice communities. EPA also has discretion to undertake voluntary environmental review where NEPA does not apply, and EPA notes that its environmental justice analysis could inform whether to undertake that review—a potential delay for smaller proposed actions in environmental justice communities. However, EPA may be less likely to take this approach given the agency's resource constraints and NEPA's resource-intensive procedures.

Civil Rights

EPA provides substantial financial assistance to state governments, local government agencies, and private corporations and organizations, and this assistance comes with an obligation to comply with federal civil rights laws. Even without promulgating any new regulations, EPA can enforce civil rights laws against recipients under threat of annulling, terminating, or refusing to award this funding. Through this channel, EPA could also affect decision-making at the state and local levels, where many of the biggest environmental programs are administered.

At its most extreme, EPA can cut funding for actions that disproportionately impact environmental justice communities, regardless of intent. EPA can also deny applications to site facilities in environmental justice communities due to cumulative impacts. At minimum, EPA can require a recipient seeking siting approval in an environmental justice community to justify the decision and explain why alternate sites would not be as effective.

EPA can also directly enforce civil rights complaints against recipients. [Title VI of the Civil Rights Act of 1964](#) prohibits discrimination on the basis of protected characteristics—including race, color, and national origin—by recipients of federal assistance. Employees and community members who feel they have been discriminated against by EPA recipients can file a complaint under Title VI with any EPA office. EPA's administrative complaint process often offers the only forum for relief because federal courts can decide Title VI cases of intentional discrimination only.

EPA could also exercise a lighter touch through information or data requests. The agency's External Civil Rights Compliance Office (ECRCO) has broad discretion to issue information or data requests for funding applicants and recipients. ECRCO can also conduct periodic Title VI compliance reviews of any recipient's programs or activities, even absent any Title VI complaints. With an environmental justice focus, ECRCO's requests may include additional pollution monitoring or proof of sufficient procedural safeguards in environmental justice communities.

IMPLICATIONS

Although the extent of EPA action will be limited by agency resources and political directives, *Legal Tools* highlights key pressure points that environmental and civil rights groups can leverage to force agency action, such as the Title VI complaint process. If EPA fully exercises its existing discretion, then regulated industries will need to incorporate environmental justice concerns into their decision-making process or risk agency action.

Regulated industries should review their own compliance with all relevant civil rights statutes in the broader context of unintentional discrimination. This includes a thorough review of cumulative impacts on affected communities.

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Regulated industries can also avoid EPA action by communicating with impacted communities and increasing public outreach efforts, with a particular focus on accessibility. For example, failing to provide translation services risks violating Title VI, as it could qualify as discrimination on the basis of national origin. Regulated industries can avoid this charge by surveying the demographics of impacted communities, translating outreach materials accordingly, and providing translation services at public meetings.

Regulated industries should also consider enhanced pollution monitoring and data collection. EPA's increased focus on cumulative impacts means that one facility's emissions cannot properly inform decision-making without the context of background pollution from surrounding sources. Identifying and avoiding pollution hot spots can save regulated industries significant regulatory hurdles. However, if a hot spot still proves the most economical choice for a siting decision, then the business should have documentation on hand to justify that decision, including an alternatives analysis.

In the future, EPA could make even greater efforts to support environmental justice by promulgating new regulations that maximize the agency's full statutory authority. Regulated entities should, of course, closely monitor EPA notices of proposed rulemaking for such developments.

The release of a robust guidance document just before the Memorial Day holiday weekend is curious, suggesting that EPA might be seeking to avoid scrutiny of its revamped guidance. Such scrutiny is inevitable, however, as the agency seeks to advance environmental justice as a key priority of the Biden-Harris administration.

SUPERFUND, RCRA, AND CONTAMINATED SITES

As companies seek to navigate Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA or Superfund) regulations; Resource Conservation and Recovery Act (RCRA) corrective action; and other contaminated site remediation and ensuing litigation, Morgan Lewis lawyers who represent clients in this complex area of environmental law offer their analyses and thinking while providing access to primary source materials and related events. View our [Superfund, RCRA and Contaminated Sites resource page](#) for related information.

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