

CLIENT ALERT

EPA Update to Environmental Justice Legal Tools

June 3, 2022

On May 26, 2022, the U.S. Environmental Protection Agency's (EPA) Office of General Counsel released an updated survey of legal authorities that can be used to implement President Biden's environmental justice agenda and address the disproportionate impact of pollution on underserved communities.

EPA's *Legal Tools to Advance Environmental Justice (EJ Legal Tools)* is a 191-page document that builds on the original *Plan EJ 2014 Legal Tools* issued by EPA during the Obama administration, and reflects changes that have since been made to the environmental and civil rights statutes administered by EPA. The revised EJ Legal Tools details the many authorities EPA has to promote environmental justice, from civil rights law to the Safe Drinking Water Act (SDWA). The new document explains, for example, that water infrastructure amendments to the SDWA in 2016 and 2018 authorize EPA to provide drinking water grants to assist vulnerable, small, and disadvantaged communities. The new document also acknowledged for the first time that EPA may consider environmental justice concerns in setting annual renewable fuel standards under section 211(o) of the Clean Air Act.

Compared to the original document, the updated EJ Legal Tools places more emphasis on how EPA can use civil rights law, such as Title VI of the Civil Rights Act of 1964, to address environmental justice and ensure civil rights compliance by recipients of EPA funding. Notably, the latest update adds a new chapter on civil rights in federal assistance programs and underscores the need to consider community input during the investigation and resolution of complaints made under Title VI.

Additionally, EPA acknowledged the original document did not clarify how the agency's existing authorities can be used to consider and, in some cases, address cumulative impacts, or the effects of cumulative exposure to environmental stressors from multiple sources and pathways. In contrast to the prior version of EJ Legal Tools, the updated document details the explicit statutory and regulatory authorities for considering cumulative impacts such as section 4(b)(2)(A) of the Toxic Substances Control Act (TSCA) and 33 C.F.R. Part 320 concerning section 404 permits under the Clean Water Act. The updated document also includes a more robust discussion of factors that may be considered in a cumulative impact analysis, and provides EPA's current sample environmental justice evaluation criteria for competitive grant programs.

Finally, the updated document provides guidance on implementing Congress's 2016 reauthorization of TSCA, which streamlined EPA's review of new chemicals and strengthened the agency's testing authority. As explained in the revised EJ Legal Tools, the 2016 reauthorization broadened EPA's authority to consider environmental justice under TSCA section 5(a)(3)(C) by requiring the agency to consider risks to "potentially exposed or susceptible subpopulations" during the review process.

EPA committed to more frequent updates of the EJ Legal Tools, which signals that the agency will continue to incorporate and weigh environmental justice concerns in its standard setting, permitting, and siting decision-making. Accordingly, companies that currently operate under EPA permits, or intend to apply for EPA permits or grants, should identify and prepare to address the environmental justice impacts of their operations.

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