

Client Alert

EPA's Anticipated Cumulative Risk Assessment Guidelines Will Guide EJ Enforcement

December 6, 2021

The U.S. Environmental Protection Agency (EPA) plans to release by the end of this year guidelines for analyzing cumulative risks that result from an aggregation of environmental hazards. EPA says the revisited and further developed cumulative risk assessment guidance will serve as an additional tool to guide EPA's regulatory decision-making and enforcement efforts, especially as it pertains to its environmental justice (EJ) goals.

Cumulative Risk Assessment was last defined by EPA as an analysis, characterization, and possible quantification of the combined risks to human health or the environment from multiple agents or stressors. However, since the George W. Bush administration, EPA has struggled to characterize and quantify socioeconomic and other non-chemical contributors to environmental and human health risks. But with the agency's attention on remedying disproportionate environmental burdens across all communities, a new cumulative risk assessment approach is necessary for the agency to achieve its ambitious environmental justice goals. The pending guidance will thus likely include new scientific methods on how to assess and mitigate environmental health risks to minority and low-income communities facing exposure to a complex combination of pollutants in addition to other non-chemical stressors.

For now, it is unclear how the guidance will transform from its original form in the 2003 Framework for Cumulative Risk Assessment. However, EPA Administrator Michael Regan clearly views cumulative impacts as a key part of his environmental justice agenda, and plans to expand consideration of cumulative impacts in agency permitting and enforcement decisions. Administrator Regan's recent request for a review of the legal authority to use cumulative risk or impact analyses to better account for the risks that poor and minority communities face illustrates his position. This request coincided with the EPA Inspector General's September 2021 announcement that the office is conducting an audit of cumulative impacts faced by disadvantaged communities near the 35th Avenue Superfund Site in Birmingham, Alabama. This audit will serve as a test-run of the administration's efforts to elevate environmental justice by assessing its ability to use such cumulative risk assessments – and the findings from those assessments – to mitigate adverse impacts.

Relatedly, EPA's Office of Civil Rights (OCR) External Civil Rights Compliance Office (ECRCO) is also developing complementary cumulative impacts guidance specifically for all recipients of federal funds disbursed by the agency. This action comes in response to a 2020 OIG report calling for the ECRCO to craft guidance for states on assessing cumulative pollution in permitting decisions as one way to prevent discrimination under the Civil Rights Act. The purpose of ECRCO's effort is to help ensure collective permitting and other actions across the agency's program, regional, and administrative offices do not disproportionately harm minority and poor communities.

A modernized Cumulative Risk Assessment Guidance aligns squarely with President Biden’s push to elevate environmental justice and racial equity throughout government decision-making. As a year that saw many pronouncements about environmental justice but few specific actions draws to a close, the guidance may help EPA better structure its approach to assessing risks and enforcing environmental justice in the future. EPA leaders may even draw inspiration from state environmental justice laws, like Connecticut for example, which requires that companies seeking a new or expanded certificate, permit, or other siting approval for facilities in environmental justice communities proactively communicate with community members and leaders during the application process and submit “meaningful public participation plans” that include an assessment of cumulative impacts affecting a community or by consulting with local officials to evaluate the need for a community environmental benefit agreement to alleviate any disproportionate environmental burdens. As such, companies seeking to be ahead of the curve may want to evaluate not only the impacts of their own operations but also those of their neighbors, and consider whether any proactive mitigation may be advisable to anticipate future regulatory action. Crowell’s Environmental Justice Working Group will continue to monitor these developments as they are published by the agency in order to best assist clients in need of support.

For more information, please contact the professional(s) listed below, or your regular Crowell & Moring contact.

Elliott P. Laws

Partner – Washington, D.C.

Phone: +1.202.624.2798

Email: elaws@crowell.com

Elizabeth B. Dawson

Partner – Washington, D.C.

Phone: +1.202.624.2508

Email: edawson@crowell.com

Eryn Howington

Associate – Washington, D.C.

Phone: +1.202.624.2571

Email: ehowington@crowell.com