

EPA Cumulative Impact Guidance Is Just A First Step

By **Juan Carlos Rodriguez**

Law360 (January 13, 2023, 8:43 PM EST) -- The U.S. Environmental Protection Agency's new legal guidance regarding its authority to consider the cumulative impacts of pollution exposure on vulnerable populations in its actions is the clearest articulation yet of the agency's powers, but it stops well short of any concrete requirements and is best seen as an incremental step on the issue.

Low-income communities and communities of color are disproportionately affected by health and environmental risks that stem from proximity to different sources and types of pollution, according to the EPA. But those cumulative impacts are not often a make-or-break consideration when a facility is applying for a new permit or to modify an existing one because the primary consideration is whether its main emissions or discharges meet the relevant state and federal standards, not whether they contribute to a more complicated backdrop of pollution.

But the EPA does have some power to consider cumulative impacts under several statutes, including the Clean Air Act, the Clean Water Act, the Toxic Substances Control Act and the Federal Insecticide, Fungicide and Rodenticide Act, as the guidance, issued Wednesday, illustrates.

It's clear that the Biden administration is seizing this moment to respond to communities that have clamored for generations for a more comprehensive analysis of their surroundings when regulators are considering whether to add new pollution to their air, water or land, said Patrice Simms, vice president of litigation for the Healthy Communities Program at Earthjustice.

Simms called the EPA's new legal guidance "critical" to helping relieve communities that experience disproportionate health and environmental impacts from pollution.

"There is virtually no more important issue to grapple with than the persistent challenges in many communities that have been left behind by our environmental laws," Simms said. "We have communities who are continuing to lose people unnecessarily from pollution-related illness on a daily basis. This is one of the most important structural problems with our environmental regulatory system, and we've got to solve it."

Still, he said there's not a lot of brand new legal interpretation in the guidance and sees it more of a first step toward getting more meaningful progress on the issue.

Byron Brown, senior counsel at Crowell & Moring LLP, said the guidance is notable for compiling

interpretations of statutory authority, but also for repeatedly emphasizing the agency's limits.

"There are a lot of disclaimers in the document about the need to consult with the Office of General Counsel or regional attorneys," Brown said. "And there are a lot of uses of discretionary language, saying that the agency could do this or it could do that. But then it's followed by caveats that make it clear that a lot of the agency's new analyses or recommendations haven't been tested in the courts yet. So it remains to be seen how durable some of these recommendations will end up being over the long term."

Cumulative impact considerations are most likely to arise in rulemaking that implements federal law and one-off permit processes in which state regulators review a potential project's application under federally approved guidelines.

Regulations are known for setting numerical standards for pollutants, such as carbon monoxide or lead, and those are easy for regulators to implement in their permitting processes. But there aren't any hard regulatory standards for cumulative impacts, and the EPA's new guidance doesn't offer any.

Instead, it offers legal support to states or communities that may want to use cumulative impact analyses in decisions that involve them, which can still have a direct impact on proceedings, said Stacey Sublett Halliday, a principal at Beveridge & Diamond PC.

"There's a level of messaging there, saying, 'Here's what we have authority to do to make things very unpleasant, and we can use this with discretion,'" Halliday said. "A lot of the companies that are subject to the permitting decisions of state or local authorities deal with the reputational costs that are associated with that scrutiny. So they don't want reports written or EPA public letters."

Simms said EPA rule writers could also draw on it as they craft regulations for specific air, water or other types of programs.

"There are many places where the agency is called upon to interpret what a statute requires and to make decisions about what kind of discretion it's going to exercise when drafting regulations that can include provisions that would go directly at cumulative impacts," he said.

For example, he said the EPA could build those kinds of obligations into rules requiring states, regulated industry or both to gather data about the nature of cumulative impacts.

Conrad Bolston, counsel at Vinson & Elkins LLP, said the EPA's guidance could also serve as a building block to spread awareness about cumulative impacts to other agencies it works with.

"I'm really interested in EPA's next steps in terms of coordinating with other agencies, and how it's going to exercise its regulatory authority under Title VI [of the Civil Rights Act] to conduct health impact assessments and other cumulative-impact-type assessments to supplement its regulatory authority under the environmental statutes," Bolston said.

But Simms said the Biden administration faces a challenge making significant progress with just two years left in its term.

"The agency has a limited time to get things done, and they're trying to do a lot," he said. "I think that

the leadership at the agency genuinely recognizes this issue and wants to deal with it. I think it's a matter of recognizing the degree of priority."

--Editing by Robert Rudinger.

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