

# EPA Revises Guidance on Assessing Environmental Justice in Regulatory Analysis

DECEMBER 4, 2023

On November 15, 2023, the Environmental Protection Agency (EPA) released a draft revision of the *Technical Guidance for Assessing Environmental Justice in Regulatory Analysis* (Guidance). The draft Guidance updates EPA's original environmental justice (EJ) technical guidance published in 2016. The Guidance is an internal EPA policy that outlines and refines how EPA should evaluate EJ concerns in regulatory actions.<sup>1</sup> While it is an internal-facing document, the Guidance is the latest example of the Biden Administration's continued focus on advancing EJ.

## EPA DRAFT GUIDANCE OVERVIEW

The Guidance directs EPA to assess whether EJ concerns exist prior to the agency taking a regulatory action, such as notice of a rulemaking, and whether such concerns are likely to be exacerbated or mitigated by the regulatory action. According to EPA, the proposed revisions reflect the "state of the science; new peer-reviewed agency guidance; and new terminology, priorities, and direction."<sup>2</sup> EPA also incorporated [Executive Order 14096, Revitalizing Our Nation's Commitment to Environmental Justice for All](#), into the proposed Guidance. The revisions provide expanded or new discussion of numerous topics, including:<sup>3</sup>

- How meaningful involvement can inform regulatory analysis,
- Vulnerability as a function of intrinsic and extrinsic factors,
- Compliance and enforcement,
- Vulnerability to climate change,
- Considering the role of multiple stressors and cumulative effects,
- Hot spots as a function of existing conditions, and
- Investigating underlying heterogeneity.

The Guidance makes certain recommendations designed to ensure greater consistency across EPA assessments of EJ concerns for regulatory actions. The Guidance encourages analysts to conduct the highest-quality analysis feasible, recognizing that data limitations, time and resource constraints, and analytic challenges will vary. That said, the draft recommendations are not designed to be binding and do not mandate the use of a specific approach.

## CHAPTER SUMMARIES OF EPA DRAFT GUIDANCE

Key chapters and recommendations contained in the 130-page draft Guidance include:

Chapter 3 summarizes the questions that EPA analysts should aim to evaluate when analyzing EJ concerns, provides a framework for structuring the analysis, and offers best practice recommendations to enhance consistency across assessments. Pursuant to the Guidance, analysis of EJ concerns for regulatory actions should address three questions:<sup>4</sup>

1. Baseline: Are there existing EJ concerns associated with environmental stressors affected by the regulatory action for population groups of concern?
2. Regulatory options: Are there potential EJ concerns associated with environmental stressors that are affected by the regulatory action for population groups of concern for the regulatory option(s) under consideration?
3. Mitigation or exacerbation of impacts: For the regulatory option(s) under consideration, are EJ concerns exacerbated, mitigated, or unchanged compared to the baseline?

Chapter 5 provides guidance to EPA analysts on integrating EJ concerns into the planning of a human health risk assessment conducted to support a regulatory action, and explores how to evaluate intrinsic and extrinsic factors, including how both chemical and non-chemical stressors can impact risk.

Chapter 6 examines how to assess whether a regulatory action has EJ concerns using information generated from human health risk, exposure, or other assessments, and how to incorporate such information into regulatory analyses. EPA states that for many regulatory actions, it is impossible to rule out EJ concerns without some level of assessment.<sup>5</sup> The Guidance acknowledges that EPA generally prefers quantitative assessments that complement other types of quantitative regulatory analyses (e.g., benefit-cost analysis, risk assessment) conducted for regulatory actions. Even so, EPA states that where high quality and relevant quantitative data are unavailable, qualitative assessment is appropriate.

Chapter 7 discusses five primary data gaps and methodological gaps identified through focus groups with EPA program office management and staff who write or inform the development of regulatory actions. The chapter then presents research goals for addressing these five gaps and improving EPA EJ assessments.

### IMPORTANT DATES

EPA will be holding two informational webinars on the revisions. You can find the access and registration information for the webinars [here](#).

- Informational Webinar 1: December 6, 2023, 2:30 PM – 4 PM ET
- Informational Webinar 2: December 12, 2023, 3 PM – 4:30 PM ET

EPA is accepting comments on the draft revisions. The public comment period closes on January 15, 2024. Visit [federalregister.gov](https://www.federalregister.gov) to [read the draft Guidance and submit comments](#) to EPA.

### IMPACT OF THE GUIDANCE

Though the Guidance is internal-facing for EPA use, the Guidance is likely to impact the regulated community. First, there may be a delay in future EPA rulemakings or other regulatory actions as a result of EPA conducting more focused EJ analyses as contemplated by the Guidance. In addition, private actors should consider the methods EPA is promoting as appropriate for analyzing EJ concerns in the Guidance when conducting their own EJ analysis.

For further information or questions about the Guidance and its implications for your business, please contact your Winston & Strawn relationship attorney.

<sup>11</sup> Regulatory Actions is defined in the Guidance as “a subset of Agency actions conducted in direct support of a rulemaking; means any substantive action by an agency (normally published in the Federal Register) that promulgates or is expected to lead to the promulgation of a final rule or regulation, including notices of inquiry, advance notices of proposed rulemaking, and notices of proposed rulemaking.” EPA Draft Revision of Technical Guidance for Assessing Environmental Justice in Regulatory Analysis, page 89, available at: [https://www.epa.gov/system/files/documents/2023-11/eitg\\_revision\\_110823\\_508compliant\\_0.pdf](https://www.epa.gov/system/files/documents/2023-11/eitg_revision_110823_508compliant_0.pdf).

<sup>12</sup> *Id.* at iv.

<sup>13</sup> *Id.*

<sup>14</sup> *Id.* at 15.

<sup>15</sup> *Id.* at 48.

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