

Lawyer Insights

What EPA Enviro Justice Guidance Means For Chemical Cos.

By Nancy Beck, Gregory Wall and Javaneh Tarter
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Environmental justice has become an increasing priority for the Biden administration — and an important consideration in the chemicals sector.

In May, the [U.S. Environmental Protection Agency](#) released a comprehensive expansion of "EPA Legal Tools to Advance Environmental Justice," its guidance document outlining the legal authorities the agency can use to achieve its goal of advancing environmental justice in its policies.

This road map should signal to the chemical sector that EJ will be a critical component to EPA decision making going forward.

According to the EPA, EJ is "the fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income, with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies."

It requires that every person enjoy the same degree of protection from environmental and health hazards and equal access to decision-making processes.

In the chemical industry, EJ directly affects the way the EPA assesses chemical risks and regulates the way chemicals are used in industrial facilities and consumer products that we use every day. EJ considerations are also gaining increasing importance in site cleanup actions, particularly under the Superfund program.

Chemical companies are increasingly evaluating how their businesses affect EJ. Some companies have released EJ policies, describing commitments to consider the potential impacts of their operations on low-income communities and communities of color.

In addition, retailers have implemented EJ policies that have implications for the chemical industry. Accordingly, it is important for companies in the chemical sector to be aware of where regulators, competitors and customers are headed in terms of EJ policies.

EJ in the Context of Assessing Chemical Risk Under the Toxic Substances Control Act

The Toxic Substances Control Act, or TSCA, was substantially updated in 2016 to strengthen the EPA's authority to evaluate the safety of chemicals, and to use a risk-based approach in doing so.

This update was in response to concerns expressed by industry, environmental groups and states that

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the existing law was insufficient in addressing chemical risks, and that the U.S. program was lagging far behind more robust chemical management programs in Europe.

Since 2016, the EPA has faced an enormous task: prioritizing chemicals for review, and undertaking comprehensive risk evaluations to determine if these chemistries warrant risk management to protect the public and the environment from unreasonable risks.

While EJ is not a consideration explicitly required by the TSCA, the statute does require that in the process of evaluating chemical safety, the EPA look at potentially exposed or susceptible subpopulations, or PESS.

PESS are defined by statute as individuals who may be at greater risk of adverse health effects, due to either greater susceptibility or greater exposure to chemicals. Examples of susceptible subpopulations include infants, children, pregnant women, workers and the elderly.

EJ and Fenceline Communities

The EPA has acknowledged that consideration of PESS includes fenceline communities — communities near industrial facilities, some of which can be, and often are, low-income or minority populations. The agency believes it must evaluate exposures to these communities to ensure it protects underserved communities from potential unreasonable risks.

Last summer, the EPA announced it was going to reassess certain chemicals — for example, 1,4-Dioxane — that were already evaluated during the Trump administration, because these evaluations did not cover certain potential exposure pathways to vulnerable subpopulations, including fenceline communities.

Accordingly, the agency plans to evaluate air, water and disposal exposures to fenceline communities, because they may be disproportionately exposed to chemicals over long periods of time.

Earlier this year, to begin reassessing chemical risks, the EPA released a draft screening approach for fenceline communities. The proposed screening level methodology uses available data and models to quantify environmental releases into the air and water, evaluate exposures to fenceline communities, and characterize risks associated with these exposures.

The EPA's Science Advisory on Chemicals recently released a peer review report on this screening approach, and found that the current approach lacked explicit consideration of race and economic disparities.

For industry, the EPA's incorporation of EJ concerns in its review of existing chemicals could result in more chemicals, or specific uses of chemicals, being restricted on that basis. For the next group of chemicals that the agency evaluates, it plans to expand its framework to include a method to address even broader EJ concerns, and cumulative or aggregate exposure to chemicals.

EJ and Risk Management of Chemicals Under the TSCA

Over the past few years, the EPA has held EJ consultations for its risk management rulemakings on methylene chloride, 1-bromopropane, HBCD, carbon tetrachloride, chrysotile asbestos, C.I. Pigment

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Violet 29, n-methylpyrrolidone, trichloroethylene and perchloroethylene. These consultations solicited input from stakeholders on whether the public had concerns related to EJ about the uses of these chemicals.

The EPA also addressed EJ directly in its most recent proposed rule to mitigate the risks of chrysotile asbestos. This rule includes a discussion of outreach the agency did to advocates of minority or low-income communities.

The EPA found some preexisting EJ concerns for this chemical, due to high levels of polluting industrial activities, and high proportions of minority residents in nearby communities.

The economic analysis for the proposed rule includes a detailed section on EJ impacts, consistent with the EPA's "Technical Guidance for Assessing Environmental Justice in Regulatory Analysis" guidance, released in March. The economic analysis details the fence-line communities potentially affected from chlor-alkali plants, gasket manufacturing facilities and chemical manufacturing facilities.

The EPA analyzed the socioeconomic and demographic characteristics of these communities and concluded that, given the combination of high poverty, concentration of minority populations and elevated cancer risks, EJ concerns exist in the communities surrounding facilities.

Another recent example of the EPA considering EJ in risk management involves its planned revisions to five persistent, bioaccumulative and toxic chemical rules that were released in 2021. The agency has announced that it will revise these rules in a future rulemaking that will assess how EJ could be promoted through further exposure reductions for these chemicals.

Potential EJ Considerations for Every Action Taken by the EPA Under the TSCA

The EPA recently released "EPA Legal Tools to Advance Environmental Justice," outlining the range of legal authorities, including the TSCA, that the agency can use to pursue EJ. This guidance sets the stage by pointing to Section 2(c) of the TSCA, in which Congress authorized the EPA to consider environmental, economic and social impacts of any action taken under the TSCA.

The report demonstrates that each component of the TSCA — including new chemical reviews, existing chemical evaluations, data gathering, fees and even citizen petitions — present opportunities to incorporate EJ considerations.

For example, the EPA has broad authority to regulate chemicals and gather information on chemicals. The agency must also use the best available science to make scientific decisions. It has the discretion to advance EJ when implementing this requirement. And it can obtain data on chemicals through resources like EJScreen, its environmental justice screening and mapping tool.

Under Sections 5 and 6 of the TSCA, the agency can incorporate relevant EJ work as part of its screening-level analysis when it prioritizes, reviews and regulates conditions of use of chemicals, and when it considers new chemicals, that pose an unreasonable risk to human health and the environment — as it already is doing with its current risk management rules for existing chemicals.

This legal tools guidance could have an impact on all TSCA regulatory actions going forward.

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EJ Considerations for Companies

In the context of the TSCA, the EPA's consideration of fence-line community exposures and other EJ concerns in future evaluations could result in more chemicals or specific uses of chemicals being restricted or regulated.

For the next group of chemicals EPA evaluates, it plans to expand its fence-line screening approach framework, to include a method to address even broader potential EJ concerns and cumulative or aggregate exposures to chemicals.

EJ in the Context of Site Cleanup Under Superfund

For decades, EJ advocates have raised concerns about the EPA's response to hazardous waste contamination and the health effects it causes communities that live next to contaminated property. In fact, while the exact start of the EJ movement is not clear, some of the impetus for the movement came from the EPA's Superfund program.

The Comprehensive Environmental Response, Compensation, and Liability Act, or CERCLA — commonly known as Superfund — allows the EPA to clean up hazardous waste sites and force responsible parties to perform cleanups, or reimburse the government for cleanups done by the agency. Studies conducted decades ago found that EJ communities are disproportionately located in proximity to uncontrolled hazardous waste sites.

Advocates have been critical of the EPA in the past for being slow to respond to contaminated sites in EJ communities, and for not allowing these communities to participate in the decision-making process. Under the Biden administration, Superfund sites located in or affecting EJ communities are getting priority attention.

First, Biden's 2023 fiscal budget sets aside \$1.2 billion for the Superfund program specifically to advance EJ. Second, the EPA's draft EJ action plan incorporates recommendations from the National Environmental Justice Advisory Council for the Superfund program.

Finally, the EPA's strategic plan for fiscal years 2022 to 2026 also details strategies for cleanup of contaminated sites in EJ communities.

EJ and Superfund Enforcement

On July 1, the EPA's enforcement office issued a memorandum titled "Strengthening Environmental Justice Through Cleanup Enforcement Actions." The memorandum discusses how the agency is prioritizing early action and enforcement at sites that most affect overburdened communities. An underlying theme of the memo is that sites in EJ communities are likely to become enforcement targets.

In addition to these high-level policy initiatives, Superfund actions have also affected sites located in EJ communities. In March, the EPA announced that it will add 12 sites, and proposes to add another five sites, to the Superfund National Priorities List.

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According to EPA Administrator Michael Regan, nearly two-thirds of these sites are located in overburdened or underserved communities. The agency is promoting the future cleanup of these new National Priorities List sites to support EJ community revitalization.

EJ communities are likely to continue to receive heightened attention from EPA leadership in the Superfund program and enforcement offices. One way EPA leadership can do this is by instituting internal consultations and approvals before the agency's regional offices can take certain actions.

These could include decisions related to remedy selection, settlements and enforcement actions at Superfund sites involving EJ communities. These types of internal measures allow EPA leadership to exert more control over the regions and further the EJ policy agenda.

Outreach to EJ Communities

The EPA is expected to continue taking efforts to provide EJ communities with a greater voice on Superfund decisions affecting their neighborhoods. Unlike some regulatory programs, Superfund has community involvement built into its decision-making process.

However, it is also expected that the EPA will seek to go beyond the community involvement engagement provisions under the National Contingency Plan for sites in EJ communities. The June 2020 community involvement plans at the Del Amo and Montrose Superfund sites in California are an example of the approach the agency may seek to follow at other sites.

At these two sites, the EPA took a much more active outreach role to provide opportunities for low-income and minority communities to become involved in the Superfund cleanups. For example, the site team at these locations did not just hold public meetings at one spot, but rather held meetings at homes, schools, neighborhood centers and churches that were familiar environments for the community.

The EPA also used TV, radio, social media and other community networks to share information, including a mobile information van that visited communities at times when members would be home from work. In addition, fact sheets about these sites were translated into multiple languages based on the ethnic makeup of the neighborhoods.

Using and building on these models, the EPA is likely to engage in this type of community involvement at EJ sites in the future.

EJ Considerations for Companies

Companies interested in taking a proactive approach may want to consider how they can help and partner with the EPA to engage with EJ communities at sites where they are involved. Early and regular community engagement may be crucial to understand community concerns.

As highlighted by the Del Amo and Montrose sites, effective community engagement activities in EJ communities may require tailored approaches to equalize access to resources and information. All of these efforts may help strengthen companies' relationships with EJ communities, the EPA, and applicable state or tribal regulators.

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EJ in the Context of Chemical Release Reporting Under the EPCRA

In December 2021, the EPA for the first time ever exercised its discretionary authority to require Toxic Release Inventory reporting by facilities that are not normally subject to such reporting, due to EJ concerns. The TRI program was established under Section 313 of the Emergency Planning and Community Right-to-Know Act, or EPCRA.

TRI reporting requires facilities in certain industry sectors to report to the EPA certain toxic chemical substances that they release into the environment, if above certain threshold quantities. This information is compiled in the publicly available TRI database, and includes information on what facilities are doing to reduce their exposures.

The data collected by the EPA is made public, and provides a valuable tool to track the trends of toxic releases in communities, and whether the releases are in the air, soil or water. This program provides the public with information about releases of toxic chemicals within their own communities, and is intended to incentivize companies to work toward reducing chemical exposures.

In December 2021, the EPA issued a decision to extend TRI reporting to facilities that release ethylene oxide and ethylene glycol. Because the agency considers ethylene oxide to be a carcinogen when inhaled by humans, it decided to require reporting for these facilities, given its concerns about the harmful effects of ethylene oxide on historically underserved communities located adjacent to these facilities.

In this decision, the EPA explicitly acknowledged that it used its discretion to require reporting of exposures because of its concern about communities with potential EJ concerns. This regulatory action is significant because it shows that the agency can, in the future, target companies for increased TRI reporting requirements because of EJ concerns.

Companies that are not used to TRI reporting could be subject to these requirements if the EPA uses its discretionary authority in this manner. Because the data is public, companies will be accountable to the public as they report on chemical releases. TRI reporting will also provide plaintiffs with data to support toxic tort lawsuits, because this is data reported from the company itself about the chemicals it releases to certain communities.

TRI data is part of the fundamental backbone of the EPA's EJScreen tool with regard to air toxics and wastewater discharge data. Thus, it will be important to monitor what the agency does in the future if stakeholders who represent EJ communities identify particular chemicals — or even specific facilities — that they suspect may pose a health risk to these communities.

The Potential Role of EJ in PFAS Litigation

In general, regardless of whether the concern is site cleanup or toxic tort exposure, many of these EJ initiatives undertaken by the EPA will lead to additional data being generated about facilities. Consequently, if per- and polyfluoroalkyl substances are listed as a hazardous substance under CERCLA in the future, that could generate more data about PFAS — particularly with respect to PFAS exposures in EJ communities.

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Because many of these programs are focused on generating data that will be publicly available — including to plaintiffs attorneys — this could lead to an increase in PFAS litigation, especially once the EPA takes more firm regulatory action against PFAS.

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