



## The EPA's "Guidance on Considering Environmental Justice During the Development of Regulatory Actions" and the Potential Effect on the Regulated Community

On May 29, 2015, the U.S. Environmental Protection Agency (EPA) recently released its "**Guidance on Considering Environmental Justice During the Development of Regulatory Actions.**"<sup>1</sup> This new guide is a companion document to the EPA's "Draft Technical Guidance for Assessing Environmental Justice in Regulatory Analysis" released in 2013. Both guidance documents support the EPA's *Plan EJ 2014*, which reaffirmed and refocused the agency's commitment to understand, integrate, and implement environmental justice (EJ) initiatives under Executive Order 128898, *Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations*.<sup>2</sup> Although the intended audience of this new guidance document is EPA rule-writers and decision makers, the regulated community should take note of how EJ issues and concerns may affect and guide The EPA's development of regulatory actions. For example, EJ concerns played a significant role in a large company in Jackson County, Mississippi, recently filing for bankruptcy. After the company experienced numerous permit violations, local community activists insisted that the state agency increase regulation of the facility in order to address EJ concerns prevalent in communities near the facility. In order to meet these new requirements, the company decreased production, and eventually filed for bankruptcy.

### The EPA's Mission and Direction to Rule-Writers and Decision Makers

Environmental justice is now considered an integral part of the EPA's mission. The EPA defines EJ as "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." "Fair treatment" means that no group should bear a disproportionate burden of environmental harms and risks, including those resulting from the negative environmental consequences of industrial, governmental, and commercial operations or programs and policies. The concept of fair treatment has been expanded by the EPA to include "not only consideration of how burdens are distributed across populations, but the distribution of benefits as well." "Meaningful involvement" means that potentially affected populations have an appropriate opportunity to participate in the decisions about a proposed activity and can influence decisions made by the agency.

Under the new guidance document, the EPA's rule-writers and decision makers are directed that "where feasible, regulatory actions should prevent or address and mitigate potential EJ concerns." A regulatory action may involve a potential EJ concern if one of the following may occur as a result of the action:

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<sup>1</sup><http://www.epa.gov/environmentaljustice/resources/policy/considering-ej-in-rulemaking-guide-final.pdf>.

<sup>2</sup> 59 FR 7629 (Feb. 16, 1994).

- Creates new disproportionate impacts on minority populations, low-income populations, and/or indigenous peoples;
- Exacerbates existing disproportionate impacts on minority populations, low-income populations, and/or indigenous peoples; or
- Presents opportunities to address existing disproportionate impacts on minority populations, low-income populations, and/or indigenous peoples through the action under development.

Additionally, in the development of any regulatory action, the EPA must address the following three core EJ questions during key stages of the process:

1. How will (or did) the public participation process provide transparency and meaningful participation for minority populations, low-income populations, tribes, and indigenous peoples?
2. How will (or did) the rule-writers identify and address existing and/or new disproportionate environmental and public health impacts on minority populations, low-income populations, and/or indigenous peoples during the rulemaking process?
3. How did the actions taken under #1 and #2 impact the outcome or final decision?

#### **The Public May Monitor EJ Initiatives with the EPA’s Action Development Process Tracker**

The EPA has developed best practices and recommendations regarding EJ considerations. For example, in any regulatory action, a form is completed in the EPA’s Action Development Process Tracker, which provides basic information about the action being initiated. The Tracker prompts the rule-writer or decision maker with the following question: Does this action involve a topic that is likely to be of particular interest to or have particular impact upon minority populations, low-income populations, indigenous populations, or tribes? (“EJ Question”). If the EJ Question is answered in the affirmative, one or more of the following options are identified by the rule-writer or decision maker:

- The action is likely to impact the health of these populations;
- The action is likely to impact the environmental conditions of these populations;
- The action is likely to present an opportunity to address an existing disproportionate impact on these populations;
- The action is likely to result in the collection of information or data that could be used to assess potential impacts on the health or environmental conditions of these populations or tribes;
- The action is likely to affect the availability of information to these populations or tribes; or
- Other reason (provide an explanation).

An affirmative answer to the EJ Question signals that potential EJ concerns are likely to be involved in the regulatory action.

## Importance of the EPA's Action Development Process Tracker to the Regulated Community

Notably, the EJ Question in the Tracker can be altered by EPA staff at any time. The current status of the EPA's position regarding potential EJ concerns for any particular regulatory action may be accessed by the public at <http://yosemite.epa.gov/oepi/RuleGate.nsf/>. The fact that this information is readily available to the public is an important consideration for the regulated community because any regulatory initiative may be redirected or become more restrictive based on any public comments received by the agency. Consequently, it is imperative that the regulated community monitor any updates on the Tracker in order to stay ahead of any EJ initiatives that may potentially impact business decisions, including growth and future development.

### Tips to Address EJ Concerns:

- Monitor EPA updates on [the Tracker](#).
- Monitor local community and environmental activists' interests near your facility.
- Educate your employees and the local community about your company's objectives to protect human health and the environment.
- Communicate and coordinate with federal and state agencies to address any EJ concerns that may arise.

For more information regarding EJ and the potential impact on your industry, please contact [Susan Floyd King](#) or [Michael A. Chernekoff](#).

*Remember that these legal principles may change and vary widely in their application to specific factual circumstances. You should consult with counsel about your individual circumstances. For further information regarding these issues, contact:*

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