

US Environmental Protection Agency
Office of Policy
1200 Pennsylvania Avenue, NW
Washington, DC 20460

January 30, 2024

RE: Revised Technical Guidance for Assessing Environmental Justice in Regulatory Analysis

We, the undersigned organizations and individuals, commend EPA on its recent efforts to implement Executive Order 14096, including this draft update to the 2016 Technical Guidance.

We strongly support EPA's efforts to strengthen the analysis and early integration of environmental justice (EJ) concerns in all activities, including rulemaking.

In this comment, we highlight seven ways EPA can strengthen the draft Technical Guidance:

1. **Applicability:** EPA should specify which regulatory actions are subject to the Guidance;
2. **Outcome-Driven:** the agency's EJ analysis should drive regulatory standards as permissible by law;
3. **Alternatives:** EPA must explain when and how to consider regulatory alternatives to minimize EJ concerns;
4. **Data Gaps:** there should be a clear plan when data needed for an EJ analysis are limited or unavailable;
5. **Risk-Based Decision-Making:** The Guidance should give recommendations on how to address the acknowledged limits of risk-based decision-making;
6. **Considering Cumulative Impacts:** The Guidance should account for recent developments in assessing cumulative impacts and non-chemical stressors, including climate change-related impacts; and
7. **Meaningful Engagement:** The Guidance's meaningful engagement requirements should reference and be consistent with EPA's Meaningful Involvement Policy.

Thank you for your consideration. For further clarification, contact Sofia Owen at sofia@ace-ej.org or Edward Quevedo at edward.quevedo@asu.edu.

1. EPA should clarify which regulatory actions are subject to the Technical Guidance

It is not clear from the draft technical guidance what triggers the use of the guidance. Will the guidance merely be an optional resource that offices may reference, or will it have defined applications where reliance on the guidance is mandatory?

EPA acknowledges that the guidance applies to "regulatory actions," which are defined in footnote 2 as "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." Elsewhere in the document however, EPA uses vague language such as "the

purpose of this document...is to outline analytic expectations and particular technical approaches and methods that *can* be used by Agency analysts...for regulatory actions.” To enable consistent application of the guidance and help protect *all* communities across *all* EPA Regions, EPA should more clearly state that the guidance document *should* be used early in the process for all regulatory actions. EPA should also clearly state that if an analyst chooses not to use the guidance, the analyst should specify exactly what methods they are using. Finally, the guidance should specify that EPA should conduct an EJ analysis even if the regulatory action would only bring benefits, not costs or harms, to communities with EJ concerns.

EPA’s Office of the Inspector General (OIG) has previously noted concerns regarding inconsistent use of these guidance documents. In 2015, after the Process Guidance was finalized but before the Technical Guidance was finalized, [the OIG reported](#) “the *EJ in Rulemaking Guide*’s impact is uneven across the agency due to its inconsistent use during the rulemaking process.” Further, the OIG noted “EPA does not currently have an agencywide process for assessing the extent to which the EJ in Rulemaking Guide is applied in the rulemaking process.” The OIG then recommended that the Associate Administrator for the Office of Policy “implement a process to measure the use of the EJ guides in the rulemaking process.”

For the revised Technical Guidance to have any real effect, its scope of applicability should be clearly defined, and the guidance should require consistent application, and provide for such application to be tracked and evaluated. These are the minimum conditions for transparency and accountability and to ensure equal treatment of communities around the country. EPA should also include a clear discussion of the Guidance’s use in conjunction with other relevant Agency guidance, at a minimum with regard to the “Process” or “Action Development Process (ADP)” guidance. Further, the Office of Policy should describe in the Technical Guidance how it is addressing the OIG’s recommendations regarding consistency and accountability in applying both the process and technical guidance.

2. *Where permitted by statute, the agency’s EJ analysis should drive substantive regulatory outcomes.*

Achieving environmental justice requires both procedural and substantive reforms. We commend EPA for its efforts to ensure robust analysis of EJ concerns in rulemaking activities, including advancing procedural justice through meaningful engagement with impacted communities (addressed below). However, the draft guidance fails to articulate when and how that analysis should drive substantive outcomes in the rulemaking itself.

Recognizing that each regulatory activity is subject to unique statutory authorizations, we encourage EPA to require program offices to consider, as part of their EJ analysis, the relevant statutory authority or authorities that empower the Agency to advance EJ outcomes via regulatory requirements, e.g., setting stricter pollution standards or requiring more robust reporting to mitigate disproportionate and adverse public health and environmental impacts. Program offices can rely on the EPA Office of General Counsel’s May 2022 report: [EPA Legal Tools to Advance Environmental Justice](#) to quickly and efficiently identify such opportunities.

Further, EPA should clarify that the EJ analysis, including recognition of data and methodology gaps in assessing EJ concerns, will be used to inform any cost-benefit analysis (CBA) required as part of the rulemaking process. CBAs' limited scope typically results in a failure to adequately account for EJ-related benefits and harms when establishing a baseline, the design of options, and how those options are compared. Further, CBAs typically fail to consider distributional concerns by assessing non-disaggregated population averages. Finally, CBAs tend to assume full compliance, despite persistent evidence to the contrary for most environmental regulations. We specifically recommend that agencies expand their scope of assessment when conducting CBAs to include parameters and aspects which are applicable to EJ concerns.

3. EPA should clarify when and how program offices should analyze regulatory alternatives to address EJ concerns.

EPA must ensure that the consideration of regulatory options contains meaningfully distinct and substantively varied regulatory options to ensure that there is a proper consideration of alternatives. The draft guidance quotes Administrator Regan, stating that in order to accomplish the Agency's goals with regard to public health and environmental justice "in the context of rulemaking" the Agency should proceed by "considering regulatory options to maximize benefits to these communities." However, while the draft guidance makes several references to the assessment of regulatory options, it is silent on what kinds of options should be considered.

To adhere to the Administrator's commitment, the guidance must discuss in further detail the implications of the three core questions laid out in the guidance:

- 1. Baseline:** Are there existing (baseline) 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?

Specifically, if the answer to Question #2 is affirmative, then there must be consideration of options to meet the Administrator's priority of "maximizing benefits" to those overburdened communities. This is compelled not only by the several EJ-related Executive Orders, but by the analogous principle embedded in federal civil rights policy and guidance, that there be systematic consideration of "less discriminatory alternatives". In the context of this guidance, a meaningful regulatory evaluation with regard to environmental justice must, at a minimum, consider a full range of reasonable alternatives that can maximize the benefits to overburdened communities. The guidance should also specify that each regulatory option should include information on EJ impacts so they can be compared. This concept of "reasonable alternatives" runs throughout the Agency's guidance documents such as the Economic Analyses guidance listed in Appendix A of the draft Technical Guidance.

4. The Guidance should articulate a clear policy for how program offices should address and consider data gaps in its EJ analysis.

The Guidance should clearly articulate how agencies should respond to a lack of available data on EJ concerns. We commend the Biden administration's recognition of and [commitment to address data gaps in environmental justice-related science, data, and research](#). However, in the interim, it is essential to guide agencies on how to respond to existing data gaps in rulemaking activities. In the past, federal agencies have responded to a lack of data by either doing nothing or doing less.

We encourage EPA to adopt a precautionary approach when it encounters data gaps related to environmental justice concerns in rulemaking activities. Specifically, and consistent with applicable statutory authority, EPA should not permit uncertainty related to such data gaps as a basis for failing to take reasonable actions to protect members of structurally marginalized communities. Absence of proof of environmental inequities is not the proof of absence of environmental inequities. Any decisions of non-action should have to be justified with proof that there is an absence of environmental inequities. Further, the Guidance should require agency staff to identify at the outset of its EJ analysis any data or methodological gaps and other sources of uncertainty in the analysis, thereby enabling EPA to formulate a strategy for how to address those uncertainties in later steps of the decision-making process.

Further, while we appreciate EPA's mention of using traditional Indigenous knowledge in the context of gathering and using data, we believe the Guidance does not articulate processes that fully and meaningfully integrate traditional knowledge into agency decision-making. We encourage EPA to more fully develop guidance, in consultation with Indigenous communities, that explains when and how traditional Indigenous knowledge may be used. For example, traditional Indigenous knowledge is invaluable in situations where projects are proposed adjacent to or nearby Indigenous lands or in areas that are considered culturally important, but are no longer within Indigenous communities or nations because of conquest, colonization and land theft. Indigenous knowledge in those cases can inform decisions regarding hydrology, geology, archaeology and current cultural practices, among other issues.

We also encourage EPA to provide guidance on how the agency will work with Indigenous nations to both integrate their knowledge into decision-making and protect their knowledge from exploitation. Any final Guidance should clearly articulate how EPA intends to engage with Indigenous communities, including central tribal governments, the communities that would be most impacted by agency decisions and local tribal governments.

Finally, we appreciate the Technical Guidance's detailed discussion of research priorities to address key gaps in data and methodologies in Chapter 7. We agree that filling these gaps will be essential if environmental justice is to be effectively accounted for in EPA's regulatory analyses. We were struck, however, that the Technical Guidance did not mention the Agency's ongoing implementation efforts of the Foundations for Evidence-Based Policymaking Act of 2018 ("Evidence Act"). The implementation framework for this statute seems well-suited for pursuing the research priorities outlined in Chapter 7. Accordingly, we urge EPA to specifically

address how implementation of the Technical Guidance can be effectively integrated into its existing responsibilities under the Evidence Act.

5. *The Guidance should give recommendations on how to address the acknowledged limits of risk-based decision-making.*

The draft Technical Guidance correctly acknowledges the inherent limitations of risk assessments and risk-based decision-making. We agree that the “highly technical” nature of risk assessment often “lead[s] to a lack of transparency and accountability,” and that a narrow focus on quantifiable risk estimates fails to account for important considerations such as inequity in the distribution of environmental burdens (pp. 29-30, fn. 46). Prevailing risk assessment practices also understate chemical exposures and risks, resulting in underprotective regulations.

Given those acknowledged flaws in the risk assessment process, which can be reduced but never completely eliminated, a key step that agencies can take to advance environmental justice is to minimize their reliance on risk assessment and to make decisions based on chemical hazards, cumulative impact assessment, and other considerations wherever possible. We urge EPA to pursue non-risk decision-making in all circumstances where it is permitted to do so.

There are environmental laws that expressly require risk assessment or that require agency decisions to be predicated on a finding of unreasonable risk. In those circumstances, the Guidance should endorse a broader conception of risk that accounts for impacts that cannot be precisely quantified and that enables EPA to regulate substances that are known to be harmful without a multi-year, hyper-technical risk assessment.

The Guidance should also recommend risk assessment methodologies that reflect chemicals’ and pollutants’ real-world exposures and impacts, including the consideration of aggregate and cumulative risk (discussed below) and of spills, malfunctions, and other foreseeable but unplanned releases. Too often, EPA assumes compliance with facility permits and pesticide labels when evaluating the risks posed by chemicals and pesticides or adopts unrealistic assumptions about the effectiveness of remedial plans when evaluating post-remedial risks under CERCLA, despite evidence to the contrary.

Finally, we agree that a primary role of risk assessment is to inform regulatory decisions, and that EPA should “clearly articulat[e] the overall purpose of an assessment” as well as its plans for incorporating environmental justice concerns. But we also urge EPA not to narrowly define the “concise statement[] of risk management and analytical objectives” to exclude exposures and risks that may fall outside the jurisdiction of the agency or program office conducting the assessment. For instance, in order to fully assess the risks posed by a contaminant in drinking water the Safe Drinking Water Act requires EPA to account for other exposures to the contaminant as well, even though EPA’s Office of Water lacks the ability to regulate those sources. Similarly, to fully evaluate chemical risks under the Toxic Substances Control Act EPA must consider background exposures to the chemical in food packaging or personal care

products, even though those uses are regulated by the Food and Drug Administration. This is how the Agency should address cumulative impacts assessments.

6. The Guidance should account for recent developments in assessing cumulative impacts and non-chemical stressors, including climate change-related impacts.

There are numerous cumulative risk assessment methods that agencies have used for decades,¹ and other means of addressing cumulative risks that cannot be precisely quantified, including the use of additional uncertainty factors. Rather than inaccurately characterize such assessments as “nascent” or “rare,” which will encourage the continued use of a flawed chemical-by-chemical risk evaluation approach, the Technical Guidance should provide examples and resources to agency program offices on how to conduct such assessments. Below we provide several models – while we do not endorse everything in these documents, they illustrate the type of resources EPA should provide to facilitate implementation of the current draft guidance.

- EPA’s February 2023 [Draft Proposed Approach for Cumulative Risk Assessment of High-Priority Phthalates under the Toxic Substances Control Act \(TSCA\)](#), including a detailed discussion of different cumulative risk assessment methodologies;
- EPA’s June 2023 draft [Guidelines for Cumulative Risk Assessment Planning and Problem Formulation](#);
- The Organization for Economic Cooperation and Development’s (OECD) [Considerations for Assessing the Risks of Combined Exposure to Multiple Chemicals](#), included in EPA’s 2008 report on [Concepts, Methods, and Data Sources for Cumulative Health Risk Assessment of Multiple Chemicals, Exposures and Effects](#).

Furthermore, the Technical Guidance’s provisions addressing human health risk assessments (HHRAs) should explicitly require consideration of climate change-related harms. For example, EPA’s current protocols in developing HHRAs find that risk is mitigated with the use of personal protective equipment (PPE), yet in extreme heat, the use of PPE can further exacerbate health risks for workers—particularly for workers who already work in confined spaces, such as nurseries, and workers who are in direct contact with toxic chemicals, such as pesticide applicators and handlers. Furthermore, the Guidance, for example, should specify how risk assessments will integrate the varying impacts of pesticides on agricultural workers, above and beyond exacerbations caused by extreme heat, and consider the social, economic, genetic, and cultural unquities for different categories of agricultural workers. For models, EPA should look at risk assessments of pesticides in California, including discussions of related epidemiological impacts at <https://oehha.ca.gov/>.

¹ See, e.g., *Framework for Cumulative Risk Assessment*, EPA (May 2003), https://www.epa.gov/sites/default/files/2014-11/documents/frmwrk_cum_risk_assmnt.pdf; *Risk Assessment Guidance for Superfund Volume I, Human Health Evaluation Manual (Part A)*, EPA (Dec. 1989), https://www.epa.gov/sites/default/files/2015-09/documents/rags_a.pdf (recommending the use of a hazard index to address cumulative risk at multi-contaminant Superfund sites).

7. The Guidance's meaningful engagement requirements should reference and be consistent with EPA's Meaningful Involvement Policy.

We note that [EPA is currently revising its Meaningful Involvement Policy](#). We were struck, however, that the Technical Guidance does not specifically refer to that policy, even though meaningful involvement is an important element of it. We therefore urge EPA to consider how these two documents can be better integrated to ensure that they are implemented in a manner that is both consistent and mutually reinforcing. On that same note, EPA should also specifically refer to and integrate the Agency's revised [EPA Policy on Consultation with Indian Tribes](#) and the companion [Guidance for Discussing Tribal Treaty or Similar Rights](#). Similarly, we urge EPA to integrate the United States' international human rights obligations with respect to Indigenous Peoples into its Guidance. Those obligations include the principle of free, prior and informed consent for projects within Indigenous Nations and in areas that are no longer within Indigenous nations, but that continue to have cultural significance.

Finally, it is noteworthy that this current comment opportunity is inconsistent with ensuring meaningful involvement of interested communities. We recommend the following for future comment opportunities:

- Where a comment opportunity addresses EJ concerns, EPA should extend the comment periods to 90 days, particularly where the comment period includes federal holidays. To increase the accessibility of technical concerns, increasing the comment period would provide more adequate time for communities to understand and thoughtfully respond.
- EPA should announce an upcoming comment opportunity in advance to give organizations time to prepare.

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