The legal Basis for EPA’s

After 40 years in the making, the U.S. Environmental Protection Agency (EPA) has reasserted its commitment to environmental justice through its recently-announced Plan EJ 2014. The strength of the commitment, however, is limited by EPA’s legal authority to implement and enforce the initiatives behind that commitment. This article explores the legal basis for EPA’s environmental justice program, highlighting the Office of General Counsel’s Plan EJ 2014 Legal Tools, in which EPA asserts wide-ranging authority under existing laws to pursue its goals.

Title VI and EPA

The legal foundation for EPA’s environmental justice program originates with the U.S. Civil Rights Act of 1964. Title VI of the Act states: “No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance.” While Title VI itself prohibits only intentional discrimination, the U.S. Supreme Court has ruled that Title VI authorizes federal agencies to adopt implementing regulations that prohibit discriminatory effects as well as intentional discrimination.

EPA adopted regulations implementing Title VI in 1973. Those rules require that all recipients of EPA financial assistance, including state environmental...
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agencies receiving federal funding, ensure they implement their environmental programs in a manner that does not have a discriminatory effect.\(^4\) The EPA regulations include a mechanism for individuals to pursue administrative complaints alleging discrimination in violation of the regulations.\(^5\) EPA's Office of Civil Rights (OCR) External Compliance and Complaints Program is responsible for that complaint process.\(^6\)

In 1994, President Clinton targeted Title VI protections under environmental laws with the issuance of Executive Order No. 12898 “Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations.”\(^7\) The order directed EPA and other specified agencies to “make achieving environmental justice part of its mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minority populations and low-income populations.”\(^8\) The Executive Order did not create any new law or legal remedies. Instead, it directed federal agencies to implement environmental justice policies under existing laws.

As President Clinton explained in a memo accompanying the order, “Environmental and civil rights statutes provide many opportunities to address environmental hazards in minority communities and low-income communities. Application of these existing statutory provisions is an important part of this Administration’s [environmental justice] efforts.”\(^9\) Following the mandate, EPA’s Office of General Counsel (OGC) issued a memorandum in December 1, 2000, identifying several existing legal provisions available to support the implementation of environmental justice goals in EPA permitting actions.\(^10\)

Plan EJ 2014 Legal Tools

OGC significantly expanded the December 1, 2000, effort pursuant to Plan EJ 2014, Administrator Lisa Jackson’s comprehensive framework for advancing EPA’s environmental justice priorities. The Office of General Counsel’s Plan EJ 2014 Legal Tools (Legal Tools),\(^11\) issued in December 2011, expands on the permitting authority discussed in the previous memorandum. It also addresses EPAs legal authority to pursue environmental justice goals through standard-setting (e.g., establishing National Ambient Air Quality Standards and Water Quality standards), information gathering, public involvement in environmental decision-making, grants and procurement, and protecting the environment on tribal lands.

The 108-page Legal Tools identifies and analyzes legal authorities across all the major program areas—air, water, solid waste and emergency response, pesticides and toxics, tribal programs, environmental review programs (NEPA and CAA Section 309), grants and procurement programs, and implementation of the Freedom of Information Act. The identified legal authorities address long-standing EPA practices, as well as approaches OGC acknowledges are innovative and would require changes in existing policy and regulation.

As EPA states in the report, “While some of the legal authorities are clear, others may involve interpretive issues or legal risk that call for further analysis.” Ultimately, the report provides important insight into the legal opportunities EPA has identified to support existing and, more important, future environmental justice goals. Recommending that the document be reviewed in its entirety, the following touches on some of the opportunities OGC discusses in Legal Tools: under the U.S. Clean Air Act, the Resource Conservation and Recovery Act (RCRA), and the Safe Drinking Water Act’s Underground Injection Control (UIC) program.

Clean Air Act

In the air permitting context, EPAs Environmental Appeals Board (EAB) has long held that EPA must consider environmental justice in issuing a federal Prevention of Significant Deterioration (PSD) permit.\(^12\) The EAB has also recognized that EPA has authority under PSD program regulations to incorporate conditions into permits based on environmental justice considerations.\(^13\) In addition, OGC sees opportunities under existing laws to increase public participation in the air permitting process—both informally and in the formal permit consideration process.

“[O]ur environmental laws provide no reason for not responding to environmental justice concerns; rather they are replete with opportunities to ensure the fair treatment and meaningful involvement of all people with respect to the development and implementation of environmental requirements and programs.”

> U.S. EPA General Counsel Scott Fulton, February 23, 2012
Earlier this year, EPA issued a “Notice of Availability of Proposed Regional Actions to Promote Public Participation in the Permitting Process and Draft Best Practices for Permit Applicants Seeking EPA-Issued Permits; Request for Comments,” soliciting public comment on ways that EPA and permit applicants can improve community representation in the permitting process and on draft best practices for permit applicants to promote community outreach. Notably, EPA has received comments seeking clarification that the guidance does not impose requirements in permit applications that could be used as the basis to deny permits.

Outside the air permitting context, OGC identifies authority to promote environmental justice goals under the Clean Air Act through the setting of air standards, including (1) New Source Performance Standards pursuant to Section 111 of the Act (interpreting that section to provide EPA discretion to evaluate potential impacts of certain stationary sources on environmental justice communities); (2) standards for siting of solid waste incinerators (interpreting Section 129(a)(3) to include review of environmental justice considerations in setting standards for the siting of solid waste incinerator); (3) Hazardous Air Pollutant standards under Section 112; and (4) National Ambient Air Quality Standards under Section 109.

**RCRA**

In the RCRA permitting context, OGC points to previous EAB decisions holding that EPA has authority to address environmental justice issues in RCRA permitting of hazardous waste treatment, storage, and disposal facilities. In *In re Chemical Waste Management of Indiana, Inc.*, the EAB found that EPA had discretion to implement the environmental justice mandates of Executive Order 12898 through public participation requirements and EPA’s “omnibus” authority under RCRA Section 3005(c)(3). The EAB concluded, “if the operation of a facility would have an adverse impact on the health or environment of the surrounding community, the Agency would be required to include permit terms or conditions that would ensure that such impacts do not occur.” The EAB also held that if EPA could not develop permit terms that would protect such populations, the agency would have the authority to deny the permit.17

OGC also finds support in the RCRA rulemaking context, under EPA’s authority to adopt regulations “as may be necessary to protect human health and the environment.” OGC references the Chemical Waste Management decision for support that this regulatory standard allows EPA to ensure RCRA regulations don’t adversely impact low-income or minority populations. In its recent proposed revisions to the definition of solid waste, EPA included an expanded environmental justice analysis that incorporates an evaluation of the potential for disproportionate impacts to minority and low-income populations and protections to those populations.19

**UIC Program**

Where EPA is the agency issuing the UIC permit, OGC points to EPA’s authority to include permit conditions under 40 C.F.R. § 144.52 when it finds that injection activity may result in drinking water contamination that could adversely affect environmental justice communities.20 OGC also identifies EPA authority to consider the implications for environmental justice communities in determining whether an aquifer meets the criteria for exempted aquifers in 40 C.F.R. § 146.4. Additionally, it discusses EPAs authority to pursue environmental justice goals through revision of current regulations and guidance to ensure consideration of environmental justice concerns for all types of UIC wells.

Related to that discussion, on May 4, 2012, EPA issued for comment *Underground Injection Control (UIC) Program Permitting Guidance for Oil and Gas Hydraulic Fracturing Activities Using Diesel Fuels, UIC Program Guidance #84 – Draft.* The draft guidance describes how environmental justice considerations could be incorporated into the UIC review process for hydraulic fracturing using diesel fuels, noting that permit writers and owners or operators should make a special effort to consider those issues.

**Conclusion**

Administrator Jackson has reasserted EPA’s commitment to environmental justice. OGC has
determined that the legal authority is in place to support that commitment, as set out in the comprehensive Office of General Counsel’s Plan EJ 2014 Legal Tools. While most of the authorities OGC identifies in Legal Tools are untested in the environmental justice context, the document offers important insight into EPA’s pursuit of its environmental justice goals. em

References
5. Id. at § 7.120.
12. See, e.g., In re Knauf Fiber Glass, GmbH, 8 E.A.D. 121 (EAB 1999) (PSD permit remanded for failure to provide EPA’s environmental justice analysis in the administrative record).
13. See In re AES Puerto Rico, L.P., 8 A.E.D. 253 (EAB 1995) (“Because of concerns raised during the public comment period, this permit contains additional conditions [post-construction monitoring requirements] that are not mandated by the PSD regulations but are within the Region’s discretion to require.”).
15. In re Chemical Waste Management of Indiana, Inc. (6 E.A.D. 66 (EAB 1995)).
16. Id. at 74.
17. Id (The EAB cautioned, however, that “there is no legal basis for rejecting a RCRA permit application based solely upon alleged social or economic impacts of a community”).
18. See RCRA sections 3002(a), 3003(a), and 3004(a).
20. See In re Envirotech, L.P., 6 E.A.D. 260, 278-82 (EAB 1996) (EPA has authority to impose permit conditions to prevent the migration of fluids in order to protect underground sources of drinking water relied upon by minority or low-income communities).