

Time For Cos. To Walk The Walk On Environmental Justice

By Alan Dial, Douglas Henderson and Robert Benson

Law360 (January 22, 2021, 6:06 PM EST) - Companies now regularly report on a wide range of environmental, social and governance, or ESG, issues — including climate change, board member diversity and renewables use, to name a few. For many companies, ESG concerns now drive or influence many business decisions: what is sold, what is bought, how facilities operate, who is hired and what groups are supported.

Yet the environmental justice dimension of ESG — whether an entity's operations, practices and decisions disproportionately affect communities based on race, income, age, status or culture — largely remains unaddressed in most day-to-day business decisions.

Typically, environmental justice is neither mentioned by name in most ESG or sustainability reports, nor part of merger and acquisition due diligence or the deal itself, from either the seller's or purchaser's perspective. But like climate change, environmental justice is here to stay, and it will affect all things big and small in business.

The Biden administration's pledge to consider environmental justice across all agencies and in all federal decisions will only increase enforcement, disclosure and litigation involving environmental justice.[1] For companies embracing the importance of ESG, it is now important to make sure their audio matches their video.

Are statements concerning social justice, racial equality and fair treatment synched up with actual data on the environmental justice impacts of their businesses? Today, all lawyers — and not just environmental lawyers — need to understand environmental justice as a legal and business issue, how it is assessed and how disparate impacts can be addressed.

Defining Environmental Justice

A topic of discussion for more than 40 years, environmental justice is both a regulatory framework and a social movement concerned with minimizing the impacts of climate change and environmental effects on diverse communities.



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At its core, the concept of environmental justice raises two questions: (1) whether the actions of a government or businesses disproportionately affect different races, the poor and other cultures; and (2) whether governments or businesses involve affected local communities in decisions about actions that affect their lives.

For example, does a new distribution center, solar farm or electric vehicle manufacturer, located in a rural area or in an industrial area with adjacent residential neighborhoods, affect poor or minorities disproportionately? And, if so, how can the impacts be addressed?

For the U.S. Environmental Protection Agency, environmental justice is defined as:

[T]he 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.[2]

For the EPA, "fair treatment" means no group of people should bear a disproportionate share of the negative environmental consequences resulting from industrial, governmental and commercial operations or policies. As for the second element, the EPA considers "meaningful involvement" to occur when:

- People have an opportunity to participate in decisions about activities that may affect their environment and/or health;
- The public's contribution can influence the regulatory agency's decision;
- Community concerns will be considered in the decision-making process; and
- Decision makers will seek out and facilitate the involvement of those potentially affected.

From the EPA's definition, environmental justice is more than race — it includes consideration of income, age, culture and other dimensions of community.

Limited Business Experience With Environmental Justice to Date

If a business has any direct experience with environmental justice at all, it likely occurred in one of two ways.

First, companies involved with projects that trigger federal permitting or other federal review — such as developing a natural gas pipeline — will have completed environmental justice assessments in the permitting process, or confronted claims by opponents that environmental justice assessments were wrongly conducted.

Under former President Bill Clinton's Executive Order No. 12898, federal agencies were required to consider environmental justice effects under the National Environmental Policy Act, which requires environmental impact assessments for significant federal actions affecting the natural environment.[3]

Although federal agencies regularly complete environmental justice assessments, NEPA does not contain bright-line numeric standards to establish disparate impact.[4] Historically, federal agencies have not stopped projects, or significantly modified them, based on environmental justice, nor have they frequently concluded that a project disparately impacts one community over another.

Second, companies operating or developing projects in states with their own environmental justice laws and regulations recognize that environmental justice assessments can be required for new facilities, permit issuances or permit renewals. In California, for example, which has an extensive framework of laws, regulations and guidance addressing environmental justice,[5] the construction of a new warehouse may require a detailed environmental justice assessment.[6]

In North Carolina and in Massachusetts, state laws similarly require environmental justice impact assessments for certain new and ongoing permits, site remediations, projects affecting climate change, and other actions and projects identified by the state.[7] Recently, the state of New Jersey enacted new environmental justice legislation that implements stringent assessment requirements for many projects.[8]

Some companies have faced environmental justice concerns while developing or attempting to develop properties in certain local communities with environmental justice ordinances. The city of Chicago, for instance, has banned certain developments involving crude oil, coke and coal bulk materials uses, and operations involving manganese handling — many of which trigger environmental justice issues.[9] Fulton County, Georgia, a major county in the Atlanta area, requires certain limited environmental justice reviews during the zoning process.

Only a handful of companies have ever defended environmental justice lawsuits. Lawsuits seeking to establish discrimination under Title VI of the Civil Rights Act of 1964 are rare, given the difficulties of establishing intentional discrimination under Title VI.[10]

Similarly, while federal agency regulations prohibit disparate impacts associated with environmental exposures, in 2001, the U.S. Supreme Court in *Alexander v. Sandoval*[11] found no private right of action to enforce disparate impact regulations under Title VI. For all these reasons, most businesses have not yet had to deal with environmental justice in their ordinary operations.

Growing Importance of Environmental Justice

For the Biden administration, environmental justice represents a fundamental bedrock of environmental and social policy. The Biden environmental justice plan, aimed at addressing the disproportionate impact from climate change and other environmental effects on communities of color and low-income communities, seeks to increase regulatory enforcement addressing underlying conditions contributing to disproportionate rates of illness, hospitalization and death.

Not only does the plan propose increased focus on what it calls "frontline and fence line" communities, it specifically recommends increased air quality monitoring for criteria pollutants and toxics to provide accurate and publicly available real-time data.[12] The plan also proposes additional requirements mandating community involvement in environmental justice assessments.

Even before the Biden plan was announced, several key environmental justice bills were pending in Congress. Then-Sen. Kamala Harris, D-Calif., and Sen. Cory Booker, D-N.J., along with several members of the U.S. House of Representatives, proposed the Environmental Justice for All Act, a

comprehensive environmental justice law to achieve health equity and climate justice for all — particularly underserved communities and communities of color. Among other things, the Environmental Justice for All Act would:

- Amend and strengthen the Civil Rights Act of 1964 to prohibit environmental discrimination based on disparate environmental impacts;
- Overturn *Alexander v. Sandoval*, which prohibits individuals from bringing claims to enforce disparate impact claims in administrative proceedings;
- Require permitting decisions under the Clean Water Act, Clean Air Act and other statutes to consider the cumulative impacts involving environmental justice;
- Codify Executive Order No. 12898; and
- Reinforce the environmental justice analysis under NEPA to require early and meaningful public involvement in actions impacting communities and tribes.

The Climate Equity Act of 2020, supported by Harris, Rep. Alexandria Ocasio-Cortez, D-N.Y., and others, would establish an Office of Climate and Environmental Justice Accountability within the White House Office of Management and Budget, and create a director of climate and environmental justice within 20 agencies. Among other requirements, this act would require quantitative and qualitative analysis of impacts to frontline communities.

Environmental justice also surfaces — conceptually, at least — in many sustainability and ESG key performance indicators now gaining traction for shareholders, rating agencies, equity investors, many lenders and even governments — although it is not mentioned by name in most of these indicators.

One of the major sustainability performance indicators, the Sustainability Accounting Standards Board, or SASB, standard for the chemical industry, does include environmental justice under its discussion of community relations. SASB RT-CH-210a.1, titled "Discussion of engagement processes to manage risks and opportunities associated with community interests," provides that:

The entity may describe its efforts to address environmental justice concerns in communities in areas where the entity operates as well as potential operating impacts from regulatory or community action to address environmental justice.[13]

That SASB standard specifically incorporates the EPA's definition of environmental justice. So for companies adopting the SASB standards, environmental justice is already on the boardroom table, and it likely will soon appear by name in other sustainability key performance indicators.

Environmental Justice in Corporate Transactions

The limited applicability of environmental justice as a legal and regulatory concept largely explains the lack of attention given to it in most business settings. In typical M&A environmental, health and safety due diligence, the main issues are soil and groundwater contamination and environmental compliance, because they may expand or accentuate liability for a purchaser or for a seller.

In M&A and commercial real estate transactions, environmental, health and safety liabilities are managed through representations and warranties, indemnifications, representation and warranty

insurance, brownfields programs, and other approaches. Environmental justice is typically not included in due diligence checklists for most deals.

Historically, the workhorse of environmental due diligence in M&A and real estate transactions has been the Phase I environmental site assessment, a report that identifies recognized environmental conditions and other specific environmental issues.[14]

Prospective purchasers complete Phase I reports so they can establish the innocent purchaser defense under the Comprehensive, Environmental Response, Compensation and Liability Act, or CERCLA — also known as the Superfund law — along with the added benefit of identifying environmental issues. But the focus of a Phase I report is on the properties being purchased, not the effect of past or present operations on neighborhoods, communities or diverse populations.

Not only does environmental justice potentially change how environmental, health and safety due diligence might be conducted, it likely will change how deals are marketed, structured and documented.

For a seller, if a prospective deal involves the sale of its manufacturing plant, should it conduct an environmental justice assessment before marketing companies or assets for sale? Or, would it be better to address environmental justice issues in the context of other environmental, health and safety issues, if or when they arise? How do a company's suppliers, toll manufacturers, or distributors stack up against an environmental justice assessment? Answers to these questions will depend on the parties, deal, structure, price and strategy.

Often, ESG reports review programs and goals for climate change, sustainability, renewable resources and employee diversity, and a few include pledges to support social justice and end racism.[15] But few ESG reports actually mention environmental justice by name.

In one of the few that do, Waste Management Inc. uses the EPA's Environmental Justice Screening and Mapping, or EJSCREEN, tool to evaluate the environmental justice implications of its operations.[16] Still others acknowledge the environmental justice implications of their projects.[17]

Prospective Corporate Environmental Justice Assessments

If a company is purchasing a specialty chemicals plant, considering expanding an existing manufacturing plant, or developing new energy sources, the current or future environmental justice implications cannot be understood unless, just like financial, HR or pricing issues, environmental justice data are collected and assessed. But just how should a company complete a voluntary environmental justice assessment?

Taking a cue from the regulatory process, the first step is to understand and define the business decisions or operations with actual or potential environmental justice impacts. Some activities will trigger environmental justice assessments almost by definition.

The development of a new chemical plant at a new greenfields site, for instance, is one activity warranting an environmental justice assessment. But other activities are less clear.

Should an environmental justice assessment be completed for the development of a new product, a change in suppliers or the shutdown of a distribution center? A host of factors, from legal and regulatory

compliance to corporate culture to corporate strategy, will drive the decision if — or when — to conduct a voluntary environmental justice assessment.

A followup step is to define the community affected by the potential business decision or operation. Defining the affected community is one of the most important methodological challenges in completing environmental justice assessments.

Early on in environmental justice history, agencies used census tracts, county boundaries or other readily available, easily defined boundaries to define affected communities. But the unit of measurement raises significant issues in completing an environmental justice analysis.

If an affected community is defined by county lines, it may not validly represent the actual community with the most significant impacts, which may be limited to three streets near a plant. After the environmental effects of the business decision on the affected community — e.g., noise, discharges, etc. — are identified, the next step is to evaluate those impacts against relevant benchmarks, such as state averages for the various dimensions of environmental justice, to gauge disparate impacts.

Various tools are available to help complete environmental justice assessments. The most frequently used is the EPA's EJSCREEN tool, a program that, for any location in the U.S., computes certain environmental justice indicators based on certain publicly available environmental and socioeconomic data.

EJSCREEN includes a set of six demographic indicators such as percent low income, percent minority, linguistic isolation and three other measures along with 11 environmental justice indices, including particulate matter, wastewater discharges and other indices. As a screening instrument, EJSCREEN does not determine if emissions, discharges or conditions create a disproportionate impact, nor does it set thresholds of harm or thresholds of disparate impact that equate to regulatory violations.

Many other states have developed their own environmental justice assessment programs. California has its CalEnviroScreen 3.0,[18] and New York developed its NY EJMapper.[19] These tools can provide a good first step in developing an overall environmental justice perspective, but none of them are perfect.

In determining whether human health and environmental effects are disproportionately high and adverse for diverse communities, agencies typically consider at least three factors:

- Whether the effects, which might be measured as risks and rates, are significant or above generally accepted norms;
- Whether the risk or rate of hazard exposure of a minority population, low-income population or tribe to an environmental hazard is significant and appreciably exceeds or is likely to appreciably exceed the risk or rate to the general population or other appropriate comparison group; and
- Whether effects occur in a minority population, low-income population or tribe affected by cumulative or multiple adverse exposures from environmental hazards.[20]

For many, these factors provide little meaning, considering the subjective reference standards for evaluating environmental justice disparate impacts. In practice, an environmental justice assessment, much like a financial assessment, will need to consider a wide range of data under a broad range of assumptions, with the results considered against the larger context of the business and community.

Considering Alternatives and Mitigation

If an environmental justice assessment shows potential disparate impact to an affected community, that does not automatically mean a deal should die, or that a board should close a plant or end long-standing operational practices, because those moves could end up adversely affecting the community even further.

Rather, the real-world question is whether the identified disproportionate impacts can be resolved or mitigated appropriately, considering a wide range of issues and perspectives. For instance, if certain solid waste management staging activities occur early in the morning, and that time period could affect certain low-income residents more, it may be possible to change the time of operation. Or if industrial noise affects residents closer to a plant, installation of a sound and vibration mitigation wall may reduce adverse sound impacts.

Other examples of environmental justice mitigation could include widening buffers to affected communities, adding additional environmental controls, increasing testing, holding more frequent meetings with community groups and changing transportation routes.

Regardless of mitigation options, some identified disproportionate impacts may be significant enough to restructure a deal, change a corporate strategy or even kill a deal completely — again, depending on the facts and nature of the parties involved.

Community Environmental Justice Involvement

For regulatory environmental justice assessments under NEPA and other statutes, a bedrock element is community involvement and transparent communication. A regulatory environmental justice assessment without community involvement is an incomplete assessment — even if a mitigation approach might resolve disproportionate impacts quickly.

For businesses considering a voluntary environmental justice assessment, they should consider how community involvement will be integrated into the effort. At one extreme, a company could adopt the NEPA environmental justice approach in full, identify key community groups and work with those groups to evaluate potential environmental justice impacts. Practically, however, that approach would not work for discrete voluntary environmental justice assessments, because the process likely would take too long and raise more out-of-scope than in-scope issues.

Another company — possibly in the context of a quick acquisition, assessing third-party complaints or confronting adverse media coverage — may elect to complete an initial environmental justice assessment. Under that approach, and depending on the results, the company might afterward approach the affected community to discuss the assessment and develop and implement workable mitigation measures.

Still other companies — perhaps facing litigation or governmental investigations — may elect to conduct a detailed environmental justice assessment under the direction of counsel to protect privilege.

For NEPA or state-required environmental justice assessments, the community involvement requirements are clear. But for voluntary environmental justice assessments, the goals of the assessment and the nature of the business will determine how and when communities are involved in the process itself.

Conclusion

Going forward, businesses need to understand what their environmental justice impacts actually are, not what the company hopes, not what a neighborhood believes or what opponents might claim.

The results of a voluntary environmental justice assessment may confirm smart financial decisions, strong community relations and solid investor relations. But they may also reveal deep-seated community mistrust, highlight long-term liabilities and prompt fundamental changes to well-established products, operations and procedures.

In evaluating financial performance, if a company has not collected and analyzed its actual data, it cannot appreciate where it has been and where it should go — a truism that applies equally to environmental justice.

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[1] Biden Plan to Secure Environmental Justice and Equitable Economic Opportunity in a Clean Energy Future, <https://joebiden.com/environmental-justice/>.

[2] <https://www.epa.gov/environmentaljustice/learn-about-environmental-justice>.

[3] Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations, 59 Fed. Reg. 7629 (Feb. 16, 1994).

See <https://www.epa.gov/environmentaljustice/national-environmental-policy-act-nepaej-resource-compendium>.

[4] Council of Environmental Quality, Update to the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act, 85 Fed. Reg. 43,304 (July 16, 2020).

[5] <https://calepa.ca.gov/envjustice/resources/>. See <http://graham.umich.edu/media/pubs/California-Environmental-Justice-Resources-45817.pdf>.

[6] <https://oag.ca.gov/environment/ceqa/letters>.

[7] For North Carolina, see <https://deq.nc.gov/outreach-education/environmental-justice/environmental-justice-reports>. For Massachusetts, see <https://www.mass.gov/service-details/environmental-justice-policy>.

[8] See <https://www.nj.gov/governor/news/news/562020/20200918a.shtml>.

[9] New School, Tishman Center and NRDC, Local Policies for Environmental Justice: A National Scan,

February 2019. See <https://www.nrdc.org/sites/default/files/local-policies-environmental-justice-national-scan-tishman-201902.pdf>.

[10] 42 U.S.C. § 2000d et seq.

[11] *Alexander v. Sandoval*, 532 U.S. 275 (2001).

[12] See Biden Plan to Secure Environmental Justice and Equitable Economic Opportunity in a Clean Energy Future, <https://joebiden.com/environmental-justice/>.

[13] See https://www.sasb.org/wp-content/uploads/2018/11/Chemicals_Standard_2018.pdf.

[14] ASTM E1527-13, Standard Practice for Environmental Site Assessments: Phase I Environmental Site Assessment Process.

[15] See https://www.corporate.carrier.com/Images/Carrier-2020-ESG-Report_tcm558-84190.pdf.

[16] See <https://sustainability.wm.com/esg-hub/social/environmental-justice>.

[17] <https://sustainability.dominionenergy.com/engaging-communities/environmental-justice/>.

[18] <https://oehha.ca.gov/calenviroscreen/report/calenviroscreen-30>.

[19] <https://www.dec.ny.gov/public/911.html#Potential>.

[20] https://www.epa.gov/sites/production/files/2015-02/documents/ej_guidance_nepa_ceq1297.pdf.