



## Embracing Environmental Justice Initiatives to Advance Corporate Objectives

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**Editor's note:** Tatjana Vujic is Special Counsel, and Arie T. Feltman-Frank and Daniel L. Robertson are Associates at Jenner & Block LLP. This post is based on a Jenner & Block memorandum by Ms. Vujic, Mr. Feltman-Frank, Mr. Robertson, and Steven Siros. Related research from the Program on Corporate Governance includes [The Illusory Promise of Stakeholder Governance](#) (discussed on the Forum [here](#)) by Lucian A. Bebchuk and Roberto Tallarita; [For Whom Corporate Leaders Bargain](#) (discussed on the Forum [here](#)) and [Stakeholder Capitalism in the Time of COVID](#) (discussed on the Forum [here](#)) both by Lucian Bebchuk, Kobi Kastiel, Roberto Tallarita; and [Restoration: The Role Stakeholder Governance Must Play in Recreating a Fair and Sustainable American Economy—A Reply to Professor Rock](#) (discussed on the Forum [here](#)) by Leo E. Strine, Jr.

Earth Week 2023 brought with it two significant environmental justice developments. The week began with New Jersey Governor Phil Murphy [announcing](#) the adoption of regulations aimed at reducing pollution in historically overburdened communities and those disproportionately impacted by health and environmental stressors. President Biden then capped the week off by issuing an Executive Order on Revitalizing Our Nation's Commitment to Environmental Justice for All which further embeds environmental justice initiatives throughout the federal government (read our analysis of that order [here](#)). These actions display the heightened emphasis on environmental justice that has led to these and other significant developments at the federal and state levels.

The United States Environmental Protection Agency (USEPA) [defines](#) environmental justice 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.” With increased funding provided by the Inflation Reduction Act, the Infrastructure Investment and Jobs Act, and the American Rescue Plan Act, federal agencies are investing at unprecedented levels to advance environmental justice.

The Biden administration also developed the [Justice40 Initiative](#), with a goal of ensuring that 40% of the overall benefits of certain federal investments flow to “disadvantaged communities that are marginalized, underserved, and overburdened by pollution.” The [Climate and Economic Justice Screening Tool](#) geospatially identifies such disadvantaged communities, which include federally recognized Tribes and Alaska Native villages.

As companies face increased scrutiny all along the supply chain, including from regulators, customers, investors, and the public, one thing is clear: failure to consider environmental justice implications of corporate activities can significantly hinder the advancement of corporate objectives, including the achievement of climate targets, the effects of which are quite significant. By way of example, in September 2022, a company's air permits to build a \$9.4 billion plastics manufacturing complex were [vacated](#) in part because the state Department of Environmental

Quality's environmental justice analysis was found to be arbitrary and capricious, and therefore failed to uphold the "public trust doctrine" of Louisiana's constitution.

The increased scrutiny and risks associated with failing to consider environmental justice issues is causing some companies to reevaluate corporate policies and develop business practices that embrace environmental justice and community stakeholder initiatives. In this client alert, our team explains how embracing environmental justice and community stakeholder concerns can advance corporate objectives.

## A Recent History of Environmental Justice Developments

While the concept of environmental justice has long had its roots in American civil rights history, President Biden brought the topic to the forefront of federal governance as part of the administration's "whole-of-government" approach to addressing health and environmental impacts on disproportionately affected communities. Through various executive orders, the Biden administration has put its policy of prioritizing environmental justice initiatives and directing federal agencies to make achieving environmental justice a part of their missions into practice. Federal developments thus far have taken the form of plans, new offices and positions, grant programs, mapping tools, reviews of existing legal authority, permitting guidance, and enforcement policies.

Federal, state, and local developments that are particularly relevant to the regulated community are reviewed below.

## USEPA's Legal Authorities to Advance Environmental Justice

USEPA published a [May 2022 report](#), followed by a [January 2023 addendum](#), that reviewed the agency's legal authority to advance environmental justice and take steps to mitigate the cumulative impacts of federal actions taken under its various programs. The takeaway is that USEPA has existing legal authority to advance and address these topics in decision-making. This authority encompasses the full breadth of the agency's activities, including its oversight of state programs.

USEPA also has the authority to advance environmental justice through civil rights laws. Title VI of the Civil Rights Act of 1964, for instance, prohibits recipients of federal financial assistance from intentionally discriminating on the basis of race, color, or national origin (including limited English proficiency) in their programs or activities.

USEPA's implementing regulations also prohibit recipients of federal financial assistance from taking actions that have a discriminatory effect. The regulations offer a mechanism for a person who believes they have been discriminated against to file a complaint with any USEPA office, as well as authorize USEPA's Office of Civil Rights to periodically conduct compliance reviews. If a recipient is found to be noncompliant, the recipient may elect to take corrective actions to mitigate the risk of losing financial assistance.

## Permitting Guidance

USEPA recently issued [interim guidance](#) for addressing environmental justice and civil rights during permitting, as well as specific [guidance](#) for addressing environmental justice concerns specific to air permitting. The guidance emphasizes that compliance with federal environmental laws does not necessarily provide a shield against allegations of non-compliance with federal civil rights laws.

For example, in Chicago, the city allegedly agreed to permit a scrap metal recycling facility's relocation from a predominantly White neighborhood into a predominantly Black and Hispanic neighborhood. After a two year investigation, the US Department of Housing and Urban Development **found the city** in violation of the Civil Rights Act and the Housing and Community Development Act, stating that the city's involvement in the relocation of the facility, approval of the new site, and methods used to achieve these objectives were shaped by the race and national origin of the residents of each neighborhood.

Therefore, even beyond what is legally required by the applicable permitting statute and regulations, companies should consider taking steps throughout the permitting process to ensure that environmental justice and civil rights concerns are being sufficiently analyzed and adequately addressed, as well as ensuring sufficient community engagement.

## Enforcement Policies

As outlined in USEPA's **Fiscal Year 2022-2026 Strategic Plan**, new environmental justice-focused enforcement policies emphasize increased inspections in communities with environmental justice concerns, prioritizing enforcement in overburdened communities, and identifying remedies for noncompliance that offer tangible benefits to those communities. USEPA also emphasized acting through emergency orders to secure early relief where possible. Enforcement remedies include increased or additional fence-line monitoring, public availability of monitoring data, and encouraging supplemental environmental projects that are tied to addressing adverse environmental impacts on local communities.

## State and Local Developments

In addition to various states that have enacted or are in the process of enacting environmental justice-related legislation, New York recently joined Montana and Pennsylvania by explicitly including a "right to clean air and water, and a healthy environment" in the New York Bill of Rights. Several other states have proposed ballot initiatives to incorporate environmental rights into their constitutions.

At the local level, the focus on environmental justice has propelled some municipalities to address the topic in similar as well as different ways. As a 2019 **report** prepared by the Tishman Environment and Design Center indicates, municipalities have addressed environmental injustice through various land use measures, including bans on polluting facilities; policies that incorporate environmental justice goals and considerations into municipal activities; environmental review processes; and proactive planning, zoning, and public health codes.

For example, in 2020, Washington, DC amended its comprehensive plan to incorporate environmental justice objectives. Among other things, the plan states that environmental justice principles should inform public policy decisions on the siting of municipal and industrial facilities.

## Embracing Environmental Justice as Part of a Company's Corporate Culture

Considering the heightened focus on environmental justice outcomes, companies would be well served to ensure that their environmental, health, and safety programs adequately consider potential environmental justice issues and concerns and are designed in ways that strengthen community and stakeholder relationships, such as by incorporating environmental justice commitments into a company's environmental, social, and governance (ESG) goals. Below, we outline some recommendations and best practices.

## Keep Abreast of Environmental Justice Developments that May Affect Your Operations

**Track environmental justice issues.** Not all environmental justice issues will apply to a specific business. However, being aware of national and local developments will allow a company to minimize regulatory, permitting, and community concerns and challenges that may otherwise catch it off-guard, including potential risks of objections to permits and litigation.

**Understand your geographical area.** By taking steps to better understand the communities in the areas where a company operates or may operate, a company can evaluate risks and make better informed business decisions. For example, companies can take advantage of resources such as USEPA's [EJScreen Mapping Tool](#), which provides demographic, socioeconomic, and environmental information for chosen geographic areas. Other mapping tools, such as the Council on Environmental Quality's [Climate and Economic Justice Screening Tool](#) and state-specific tools are also available.

Companies with current or future operations in areas with higher percentiles of socioeconomic or environmental quality factors should prepare for the potential legal risks this may pose, including increased government and public scrutiny, and consider how to mitigate potential issues ahead of time. The tools can also be used to aid a company in analyzing health, social, and economic effects of a specific project.

## Build a Proactive Environmental Plan

**Create an environmental policy or revise an existing one.** The rise of corporate accountability has resulted in companies revising their business plans to incorporate ESG criteria into their decision-making. A way to ensure that environmental justice is included in a company's ESG plan is to make environmental justice part of a company's social objectives.

In particular, as we discussed in a prior [client alert](#), a company may wish to organize its social criteria objectives so that environmental justice commitments are treated as under the company's direct control, much like scope 1 greenhouse gas emissions are under the direct control of the company. Companies should also consider developing a public involvement plan as part of their social criteria. Environmental justice can be measured by the amount and quality of direct community engagement and community service. In this way, companies that develop robust engagement plans that further environmental justice objectives of the local community can fold those plans into the social criteria aspects of a greater ESG policy.

Perhaps the most important takeaway is that companies should be cognizant of the interconnectedness of their environmental goals to environmental justice and social/stakeholder concerns. A good environmental justice policy means a good social policy which means a more robust and effective environmental policy and greater chance of meeting environmental objectives.

**Develop a robust compliance plan.** Enforcement and litigation risk will be higher for companies with operations in communities with environmental justice concerns. Therefore, it is especially important that these companies have robust compliance programs in place. As we previously discussed [here](#), companies can benefit from consistently monitoring their operations and considering the availability of advanced monitoring technologies and methodologies (such as monitoring by aircraft and satellite) that may catch violations and prevent ongoing ones.

Companies should also strictly comply with all applicable monitoring, recordkeeping, and reporting requirements, and consider voluntary disclosure policies. [USEPA's Audit](#)

**Policy** provides several major incentives, including reduction of 100% of gravity-based penalties, for regulated entities to voluntarily discover and fix federal environmental violations. Moreover, the US Department of Justice, Environmental Crimes Section's **Voluntary Self-Disclosure Policy** offers beneficial treatment to companies that disclose potentially criminal environmental violations.

**Review suppliers and other entities with which the company contracts.** In a prior **client alert**, and as mentioned above, we discussed how a company can define the social aspect of its ESG plan to assist in developing a baseline standard against which a company can measure itself. This includes a company taking steps to establish a standard by which it expects those with which it contracts to behave, reviewing its supply chains to identify any potential areas of inequity against such a standard, and subsequently holding suppliers and other entities with which it transacts accountable, while being particularly mindful of actions that could be tied back to the company.

## Use Existing Tools and Resources to Assist in Siting and Permitting Decisions

**Be aware of evolving siting and permitting requirements.** As discussed above, companies making siting or permitting decisions should consider that projects in or near communities disproportionately burdened by pollution will receive scrutinized attention. Therefore, companies should ensure that environmental justice and civil rights concerns are being proactively evaluated and sufficiently addressed under environmental, civil rights, and environmental justice laws and seek out any available guidance to rectify such concerns. Failure to do so may result in unforeseen project hurdles, wasted resources, and an eventual siting or permit denial. We previously **discussed** how USEPA incorporates these concerns into the permitting process. Considering recent USEPA guidance on this topic, companies should develop their own best practices for permitting oversight, which should include the following:

- Use available screening tools to assess the existence of environmental justice or civil rights concerns early in the permitting process.
- Perform an appropriately scoped environmental justice analysis or disparate impact analysis (which should consider cumulative impacts) where concerns exist.
- Know what questions to ask, such as who is being affected by the action? How, and by how much? Compared to whom? Can we mitigate the effects and, if so, how?
- Develop a public involvement plan and engage communities and tribes to ensure that their views are accounted for (discussed further below).

Failure to take these measures as part of the project scoping process may result in significant hurdles to project development. This includes the possibility of pressure being exerted on state and local regulators to change their course of action with respect to a proposed project. In the Chicago example discussed earlier, the city denied a scrap metal recycling facility's permit to begin operating an \$80 million facility after USEPA issued a letter raising health impact concerns in the surrounding community. The city's decision, which is currently the subject of a lengthy and ongoing appeal, followed an alleged agreement between the facility operator and city that would have allowed the operator to move to the site.

This also includes active opposition to a project, which may turn into litigation. For example, developer Air Products recently **sued** Livingston Parish after the parish attempted to restrict the company's proposed hydrogen/carbon capture and storage project through a moratorium. Ultimately, the parties came to a resolution, whereby the parish agreed that the moratorium was invalid and unenforceable, and the parties agreed that each would bear its own fees and costs related to the litigation.

**Review existing permit conditions.** Companies with existing facilities that will be applying for permit renewals should be prepared for the possibility of new and more stringent permit obligations being imposed by regulators at the time of their permit renewal. The recently enacted New Jersey environmental justice regulations, for example, set forth a **step-by-step process** for reviewing future permit applications, including specifically stating that existing permit holders may be subject to additional permit conditions to reduce health and environmental impacts.

More stringent requirements of which companies should be mindful may include, among other obligations: additional monitoring, recordkeeping, and reporting requirements; additional pollution controls and/or more stringent limits; and the inclusion of enforceable work practices, operating plans, and/or best practices for minimizing emissions and/or discharges.

Companies should address environmental justice-related concerns sooner than later, by taking advantage of the existing tools discussed above, to avoid unforeseen complications arising during the permit renewal process. For example, if particulate emissions are a specific concern in your area (e.g., EJScreen shows a particularly high EJ Index percentile for particulate matter 2.5), taking proactive measures to mitigate any increased particulate emissions may streamline the permit renewal process.

## Engage the Local Community

**Be proactive in engaging the community.** Governmental environmental justice policies typically entail expectations of robust engagement with the local community and opportunities for community actors to provide input into company decisions that will affect their communities. Companies may want to similarly engage with the local community prior to taking steps to expand or modify existing operations. This is particularly true for the permitting process; however, companies are well served by engaging with communities and local tribes as a vehicle for making more informed business decisions generally.

This can include learning from a community about a company's impact, creating strategic partnerships within the community, and collaborating with the community to advance shared goals and establish outcomes that will benefit the community overall. For example, a company can help communities finance environmental justice initiatives or help eligible applicants apply for available grants and help formulate how these community-driven initiatives will take shape.

Being proactive will better prepare a company for what issues, if any, a governmental agency may uncover during its own public engagement process. Ultimately, by strengthening its bond with the local community, companies are better situated to identify community concerns early and take appropriate action that will satisfy both company and community needs while building trust into the future.

**Review existing community relationships.** The community engagement discussed above should include a review of existing community relationships, specifically where potential environmental justice concerns may not have previously been addressed. To stay on track with such engagement and to ensure the maintenance of strong relationships, making periodic reviews and assessments of existing community relationships could be incorporated into a company's ESG criteria.

**Engage internal stakeholders.** Community engagement goes beyond external forces at a specific facility. A company should also cultivate internal discussions with workers, unions, and other stakeholders affected by the company's actions. Initiatives to consider include informational meetings, listening sessions, and trainings. Environmental health and safety managers should also engage upper management to ensure leadership buy-in for environmental justice initiatives. This guarantees that all levels of the company are aware of and striving towards the same goals.

## Conclusion

By embracing environmental justice, companies minimize environmental oversight risks, are likely to achieve environmental goals more quickly, build community relationships, help reduce inequity and ultimately, create a solid foundation for long-term strength, all of which are accretive to an improved bottom line. As federal, state, and local governments continue embedding environmental justice and related initiatives in their regulations, policies, and programs, companies would be well served to do the same.