

## ESG Essentials: What You Need To Know Now

### Episode 8 – Environmental Justice

**Colvin:** Welcome back to "ESG Essentials: What You Need to Know Now," a podcast from Fox Rothschild. I'm your host, [David Colvin](#), Co-Chair of the firm's [ESG Practice Group](#). For our new listeners out there, Fox's series of short bite-sized podcasts cover core ESG concepts and explore important issues for businesses that are concerned with developing and deploying an ESG profile; responding to increased scrutiny from regulators, investors or consumers regarding their environmental and social impact; and minimizing the potential legal, business and reputational risk associated with ESG.

In this episode, I am pleased to welcome from our Chester County (PA) office, [Adam Cutler](#). Adam is an environmental lawyer. He's a member of our ESG Practice Group and a member of the [Environmental Practice Group](#). He focuses his practice on environmental, regulatory and litigation matters. Adam is joining us today to talk about environmental justice. Welcome to the podcast.

**Cutler:** Thank you very much, David. I'm happy to be here and to work through some of these thorny environmental justice issues with you.

**Colvin:** I appreciate it very much.

Maybe just to level set for our listeners: What is environmental justice (EJ) and why should a business care about it in the ESG context?

**Cutler:** Environmental justice as a concept in the United States is, broadly speaking, the concept that the color of your skin and the zip code that you live in shouldn't determine your exposures to adverse environmental impacts. That also includes climate impacts.

Environmental justice is often defined by EPA and state governmental agencies as – and I'll quote some [language](#) here – “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.”

Now, within that broader definition, "fair treatment" generally means that no population bears a disproportionate share of negative environmental consequences resulting from industrial, municipal or commercial operations, from the execution of federal, state and local laws, or regulations or policies.

The "meaningful involvement" prong means that effective access is required to decision-makers for all – for everyone, regardless of where you come from or who you are – and the ability in those communities to make informed decisions and to take positive actions, to produce environmental justice for themselves. That is, that outcomes are thought of as just.

As a concept, EJ has been around for decades, going back to the sixties and seventies. Recently, the Biden administration and a number of states have taken a far more proactive approach through a

combination of executive orders, agency policies, and in some cases, in the states, through regulations and statutes. With that backdrop, EJ is relevant really in all three aspects of ESG for its connection to environmental decision-making, its relevance to social considerations, equity, inclusion and justice, and its relation to good governance.

EJ concepts are especially relevant in the climate context as well. Where people live is of great importance in assessing their risks of adverse climate impacts. In part because of climate justice concerns, corporate disclosures are increasingly including discussions of environmental justice and climate justice alongside human rights, indigenous rights and racial justice.

**Colvin:** Adam, a lot of our listeners are working at companies that are beginning to identify and develop an ESG profile. When we're thinking about environmental justice going hand in hand with ESG, who are the stakeholders that those companies should be thinking about from an environmental justice perspective?

**Cutler:** One place to start, and probably really the primary place to start, is with residents who are living in proximity to a company's manufacturing facilities, or facilities that are emitting or discharging pollutants, particularly when those communities are directly impacted by those emissions and discharges coming from multiple clustered facilities in the community.

As with sustainability or Global Health Data (GHD) metrics, a company might also look up and down its supply and customer chains. Where are they getting the energy that powers their facilities? Is it sourced from a fossil fuel-intensive generator that itself is located in an overburdened community? Are they looking to alternative sources of energy that are greener and cleaner and create fewer emissions?

Another thing to think about is where the facilities' solid waste is taken for disposal and what method of disposal is used. Are things being taken to incinerators, which themselves combust fuel, as well as trash? Are they taken to landfills, which can, over time, generate methane, a potent greenhouse gas (GHG)?

These are considerations to think about. Certainly also, businesses should be reaching out to local municipalities and states that have environmental justice policies or statutes or regulations. They should be looking at what requirements may be in place, as well as thinking about their reporting obligations.

**Colvin:** I want to get your advice to businesses that may just be getting started in identifying environmental justice issues. But before I do that, you referenced one of the considerations that the businesses should be thinking about: Whether they're sourcing fossil fuel and energy from companies and energy providers that may be in an overburdened community.

Is there a standard definition of what constitutes an overburdened community? How do businesses identify whether or not they're actually sourcing energy from the "overburdened community?"

**Cutler:** That's a good question, David. Right now, there's not a great deal of unanimity or consistency between the federal and state governments in terms of what constitutes an overburdened community.

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There are different metrics and different data points that EPA takes into consideration, a multi-input, multi-statistical assessment. They have various tools online, such as [EJScreen](#), where you can look at communities across the United States and identify what burdens they are facing.

States have a variety of different approaches as well. Pennsylvania, where I spend a lot of time looking at environmental justice policies, has focused on the percentage of racial and ethnic minorities in a particular census tract, as well as the poverty level in a particular census tract. They look at those two either individually or in combination. There is a move right now in Pennsylvania to look to a broader array of demographic and economic factors, as well as to look at where environmental sources are located. There are different approaches to it, and different agencies in different states and different sectors of the federal government look at it in different ways.

**Colvin:** As companies that may just be getting started in addressing environmental justice issues... many have already been well on their way to addressing, for example, climate impact. But in addition to the considerations you just identified, what's your advice to businesses that may just be hearing about environmental justice and wanting to do something about it? What should they be focusing on as they begin to address those issues?

**Cutler:** It's not unlike some of the things that companies are already looking at across the ESG spectrum. It's thinking about the environmental impacts of your operations. Where are your emissions and discharges going? What communities are affected by them? What does truck traffic look like in and out of your facilities? Where are those truck routes? What communities do those trucks travel through? Where does your waste go for disposal?

You also want to assess the communities where your operations are located. If you are in an industry where your operations are regulated and your emissions and discharges are permitted, you're going to want to look at what your permit limitations are. You're going to want to look at whether those localities are imposing new environmental justice considerations when they review your permits for renewal.

Generally speaking, as noted before, often you can think of this – in terms of what the state and federal governments are interested in – the demographics of those communities. Are they places where there are significant populations of racial or ethnic minorities? Are they places where poverty levels are high? Are they places where people have other disadvantages, whether it's level of schooling or language access? Things like that.

Particularly, think about places where multiple environmental emitting facilities are clustered together. Those are places where you might expect to find environmental justice-related risks. From a climate justice perspective, that assessment's going to be similar, but of course, more broadly focused on where the impacts from the GHG emissions, the carbon intensity of those operations, is focused.

**Colvin:** One issue that comes to mind, and you mentioned this, Adam, is where your waste goes for disposal. That's a very important issue. What do you say in terms of advice to companies about how they should be looking at that issue? In terms of where their waste is going, and how they can reduce the environmental justice risk associated with waste disposal, as an example?

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**Cutler:** Certainly, one thing you can look at is waste diversion practices and reducing the amount of waste in that stream, so that you don't have to consider sending things off into communities where they may be feeling significant impacts of those waste disposal facilities. Reducing the waste that you send out in that way can limit some of those risks.

There are obviously recycling incentives in various places. There are waste diversion incentives. That would be, I think, the place to look first. How can I cut down the waste that our company is sending out? Is it something that can be reused on-site in another process? Is it something that can be diverted in another way or managed in another way, so that it's not being sent off to a waste disposal facility that might have significant climate or environmental justice impacts?

**Colvin:** Very helpful. We talked a little bit about companies that may be new to the concept of environmental justice and the advice that you give them about how they can get started in identifying the issues and addressing them. But certainly, some of our listeners, I would expect, already have familiarity with environmental justice issues and considerations.

You mentioned earlier that the Biden administration and a number of states are taking a far more proactive approach than we've seen in the past when it comes to these issues. What can companies that are already doing something on environmental justice, what can they do now to get ready for what legal and regulatory action may be down the pike?

**Cutler:** Certainly, we're seeing it in a growing number of states – California, Washington state, most notably New Jersey – where legislation either has been passed, or is in the process of being passed, including EJ considerations in permitting decisions.

Tying back to something that we've talked about already, we're looking at, for example, the cumulative impacts on a community of a clustering of emitting facilities in one general location. Each facility might itself be meeting permitting limits, but the combination of those facilities may have more significant environmental and health impacts on the members of the community. Some states are legislating this into the permitting process. Other states are looking at it more as a matter of agency policy or through the regulatory process. It's important, even if you are familiar with environmental justice issues, just as a matter of risk identification, for companies to be aware of the statutes and regulations that may impact them, whether it's their future permit renewals or permitting for new operations.

In addition, there's the enforcement angle. Both the federal government and many of the same states are consciously focusing more compliance and enforcement resources in the environmental area on facilities that are located in communities that are overburdened under whatever state or federal definition may apply. The risk of enforcement against facilities in those locations really could be heightened as a result of this new wave of environmental justice policies.

That's something for all companies, particularly those that have some familiarity with EJ, to really be prepared for.

**Colvin:** One thing that obviously comes to mind when we think about what potential regulations and other action may lie ahead, is the SEC's recently proposed rule for climate-related disclosures.

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Fox's ESG group has spent a lot of time talking about that proposed rule and writing a lot about it. But I'm curious to get your input in terms of how you see that rule, in whatever form it may ultimately take when approved, and how that rule really ties in to the environmental justice issues that we've been talking about today.

Do you have any thoughts on that?

**Cutler:** Yes, there is certainly the potential for some entities that would be covered by the rule to have some direct Scope 1 emissions risks that connect with environmental justice concerns. Direct GHG emissions from on-site sources, depending on what industry they may be involved in, certainly in the oil and gas industry other industries that rely on combustion in their processes.

Then there are the Scope 2 issues. We touched on it earlier, the idea that the source of your energy, whether it is fossil fuel generated energy or alternative energy, may tie into these environmental justice concerns. Where are you purchasing that energy from and who is the generation of that energy impacting?

Then of course, we've got the Scope 3 issues when we're talking about looking up and down the supply chain. Again, the primary example of that is the waste stream. Are you sending waste off to waste disposal facilities that will be generating methane that isn't controlled? That could be a down chain emissions scenario to consider. There are ways that it ties in, although not directly mentioned in the current language of the proposed rule. There are ways that these considerations tie into the Scope 1, Scope 2 and Scope 3 considerations under the rule.

**Colvin:** Yes. For our listening audience, the SEC just extended the comment period for public comment on the proposed rule. The deadline is now June 17. To the extent our listeners want to join the conversation and be involved and participate in the rulemaking process, we encourage you to do so. We also encourage you to reach out to Fox and its ESG practice group to the extent that we can be of service on that.

Adam, I really appreciate your time today with respect to the issues we've been talking about. I think that oftentimes when we talk about the environment and we talk about climate, we don't talk enough about the impact on communities and people and the overburdening of certain segments of society. So, I appreciate you bringing those issues to light for our discussion today.

**Cutler:** Thank you, David. I appreciate it.

**Colvin:** That will conclude this episode of the ESG podcast. I ask that y'all check in and stay tuned for the next episode, which will be coming to you soon. Take care.

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