

ESG Essentials: What You Need To Know Now

Episode 14 – Environmental Justice: Federal and State Trends

Colvin: Welcome to the latest episode of "ESG Essentials: What You Need to Know Now." I'm your host, David Colvin, co-chair of Fox Rothschild's ESG Practice Group. And as our returning listeners know well, Fox's series of topical and timely podcasts cover core ESG concepts, and explore really important issues for businesses that are concerned with developing and deploying an ESG profile; with responding to increased scrutiny from regulators, investors or consumers regarding their environmental and social impact; and really minimizing the potential legal, business and reputational risks that can be associated with ESG.

In today's episode, we'll be returning to a prior topic that we covered last year, that topic being environmental justice. And for that conversation, I'm pleased to welcome back my colleague Adam Cutler who is resident in the firm's Chester County office and a member of the firm's Environmental Department.

Welcome back to the podcast, Adam.

Cutler: Thank you, David. It's good to be back and glad to be here for the latest update on what are some fairly important recent developments in the field of environmental justice.

Colvin: Excellent. Maybe then level set for listeners who may not have listened to the prior podcast on environmental justice or who are not familiar with the concept at all. Can you just talk a little bit about what environmental justice is and why our business clients should be thinking about it in the ESG context?

Cutler: Absolutely. The idea of environmental justice is really a concept that has been building in importance and relevance on the federal level since the 1970s and 80s. But it really stems from the civil rights struggle that, in its greatest impact, was felt in the 50s and 60s. And the concept is really a fairly simple one: It's that communities, no matter where they are located, should not bear a disproportionate burden of environmental and public health impacts simply by virtue of the -- typically -- racial component or socio-economic component of the residents of that community. Where there are disproportionate burdens of environmental harms that are visited upon communities that are primarily communities of color, those are environmental justice concerns.

And historically, those types of concerns have closely followed, or have closely been linked to, past structural impacts, such as redlining, that have created some of the zoning and mapping issues that we see now where communities are kind of shoulder to shoulder with industrial facilities.

Colvin: And so when we think about ESG as a concept and we think about how companies can mitigate risk in the ESG context, how does the concept of environmental justice really fit into that?

Cutler: It's really relevant across all the axes. It addresses environmental risk in the sense of permitting risk. If a facility needs a permit to undertake activities, whether they're new or continuing activities in the sense of a renewal, in a particular community and their environmental impacts on that community might tend to cause some disproportionate level of harm, it does create a risk in the permitting process and in the PR context for the permit holder or the permit seeker.

Because typically, what's going to happen in most overburdened communities that are dealing with environmental justice concerns is that there's going to be a significant amount of public participation and public engagement fostered by, whether it's the federal agency, EPA, or state and local agencies that are attuned to environmental justice concerns. There's going to be press and media attention, and there's going to be a focus in the community, and perhaps among the company's shareholders, on what exactly those impacts are going to be that the permit may cause in the surrounding community.

It really gets to the heart of environmental and reputational risk. And it also brings in the social component of ESG: what are the company's policies in relation to the communities in which they operate?

Colvin: Yep. Yeah. Really environmental justice issues are really prevalent both at the federal and at the state level.

Why don't you talk to us a little bit about -- I know there have been some developments on the federal side and the state side. We'll cover both. But why don't we start with the federal side and tell us a little bit about what's new there that clients and businesses should be aware of on environmental justice issues.

Cutler: Absolutely. Recently, President Biden issued Executive Order 14096. And this builds on executive orders that the Biden administration has issued going back to its earliest days as well as in connection with some major legislation, the Infrastructure Investment and Jobs Act and the Inflation Reduction Act. And it also builds on the original environmental justice executive order, which was issued by President Clinton in 1994.

And what the new Biden executive order has done is adopt a more proactive, whole government approach to advancing environmental justice that's applicable to a broad set of federal agency actions and cuts across all federal agencies.

So, among other things, this is going to involve requiring every federal agency to develop and publish for public review, an environmental justice strategic plan that's to be updated every four years. And, midway through that four-year cycle, these agencies will be required to make a public assessment of the effectiveness of that strategic plan.

So, trying to build in some aspects of measurability and accountability as far as what each federal agency is doing to advance environmental justice. It also sets up and formalizes a number of federal positions and offices that will be charged with undertaking these efforts.

One of them, and probably the most significant of them, is a White House Office of Environmental Justice, which is going to be housed within the White House's Council on Environmental Quality. And the

Office of Environmental Justice is going to be charged with advancing EJ -- environmental justice -- initiatives within the federal government as well as in collaboration and coordination with state, tribal and local governments.

In addition, the executive order is establishing an Environmental Justice Subcommittee on the National Science and Technology Council. The idea here is to coordinate, or begin to coordinate, a federal strategy to identify and address gaps in the science, gaps in the data and gaps in the research related to environmental justice and adverse health and environmental impacts in overburdened communities. The focus there is going to be on trying to fill in some of those missing links that right now exist in the science and the data.

Colvin: So, appreciating that the structure, and I would say really expanding in a significant way on prior executive orders to set up, as you said, the sort of whole government approach on environmental justice across all federal agencies. Can you talk a little bit about any directives that are in the executive order? What's the meat of the order in terms of what directives the administration is giving on environmental justice issues?

Cutler: Sure. I think the primary concept that the President in this executive order is trying to move the ball forward on is the concept of cumulative impacts. And right there in the definition of environmental justice, in the executive order, it lays out a focus on protecting people from the cumulative impacts of environmental and other burdens, risks and hazards related to climate change, as well as what's referred to as "legacy of racism and other structural and systemic barriers" in the U.S. historically. The concept of cumulative impacts is, one facility may well be perfectly capable of meeting its permit limitations, whether that's in terms of its air emissions or its wastewater emissions, pollutants, submitting wastewater, whatever it's permitting obligations may be. One facility may meet all of those obligations and not individually be subject to any sort of enforcement.

The problem that arises in communities dealing with environmental justice concerns is, you have a clustering of facilities. So you might have, instead of merely one manufacturing facility, you might have a handful of manufacturing facilities, as well as a handful of waste processing facilities, as well as a fossil fuel energy generation station. All of these things have a cumulative effect on the health and environmental well-being of the surrounding community.

And so, the science has long been complex around cumulative impact analysis. The executive order now, for the first time in, I think, very assertive language, includes a directive that agencies, when they carry out reviews under the National Environmental Policy Act, must analyze not only direct and not only indirect impacts, but also cumulative impacts on the communities that have EJ concerns. And then consider what the best available science and information says about any disparate health impacts that may be arising from this cumulative exposure to pollutants and other environmental hazards.

Colvin: So, in terms of a business that might have a facility, a manufacturing facility, say, that's either in existence or one that's planned to be built ... what do you see as the likely impact on that business of this new federal executive order from the Biden administration?

Cutler: So, overall, as I kind of alluded to before, this executive order is taking a much more proactive approach. Prior executive orders really were framed in terms of avoiding adverse impacts, and it was a

little more aspirational. And this, you know, is going to have a clear impact. This executive order and its directives will have a clear impact on projects that implicate review under NEPA, the National Environmental Policy Act. Typically, that will include most projects that involve federal funding and some level of federal permitting or other federal regulatory action.

You know, if you want to build a new power generating facility, if you want to build a new manufacturing facility, and you're going to be relying in part on federal dollars by way of grants or loans, if you're going to be acquiring federal land, things like that will implicate NEPA review.

And there is now going to be this new focus on the cumulative impacts such that, if your proposed activity is going to add to or exacerbate the cumulative impacts already being felt in an overburdened community or just a community with environmental justice concerns, you're going to definitely, it seems, under this executive order, be facing something of a tougher gauntlet to satisfy the federal concerns.

If we look into the crystal ball a little bit and project out, it's also possible that this concept of filling data gaps through the Environmental Justice Subcommittee that's been added to the National Science and Technology Council, those efforts could support future prospective federal efforts to bring cumulative impact analysis into permitting in a more concrete way, such as through specific regulations in the areas of wastewater, discharge or air emissions. Currently, there is broad language in those governing statutes and governing regulations that EPA has -- depending on which administration we're in -- taken the position that those statutes and regulations already provide the tools to allow for inclusion in the permanent process.

That has been, kind of, an ephemeral and somewhat undeveloped area of regulatory law. But, if more data and more data gaps are closed and more of the science of cumulative impacts is understood, you certainly could see an EPA, under certain administrations, taking an aggressive regulatory approach and saying, now, look, we have this information, now we have the data to support it. We're going to now include regulations that will require cumulative impact analysis in all permitting. Whether we get there or not will depend on how those data gaps get filled.

Colvin: So, the headline, it seems to me, the headline out of the executive order -- beyond the establishment of the White House Office of Environmental Justice, which is novel. It sounds to me like the headline here is that companies and businesses that are looking, for example, to expand or establish new operations that will involve some level of federal funding or some level of federal permitting need to be thinking about the cumulative impact and environmental justice as part of their overall approach. Is that a fair way of summing it up?

Cutler: Absolutely. I think that getting out in front of it and doing the work upfront to understand it themselves will help those companies when it comes time to get those federal approvals.

Colvin: And so, let's talk a little bit about enforcement when it comes to environmental justice.

Are there any updates you can share with the audience regarding what the EPA or the Department of Justice are up to when it comes to enforcement actions related to environmental justice?

Cutler: Yes, there's certainly been a number of actions on that front. The headline here is that there is a focus right now in EPA and at the Department of Justice on prioritizing enforcement in communities with environmental justice concerns.

What do we mean by that? That means they're stepping up the number of facility inspections in those communities. In the civil regulatory enforcement area, they're really pushing on violators in those communities to resolve their non-compliance through remedies that will have tangible benefits in the community that specifically and tangibly address public health and environmental issues. And they're focusing on facilities in those communities for criminal enforcement where appropriate, and in terms of cleanup projects under Superfund or the Resource Conservation Recovery Act.

There was one recent agreement reached that was notable because the DOJ is calling it the first environmental justice settlement that they have secured under the nation's civil rights laws. And so, this was an action that started with an investigation in Lowndes County, Alabama. And there was an issue involving actions at the county and state level that were essentially putting low-income residents, who were mostly in communities of color, into this unending spiral of financial penalties and property seizures for the residents' efforts in attempting to solve, through a home remedy called "straight piping," persistent governmental failures to provide adequate sewage infrastructure to their homes.

Essentially, people were having to try to pipe their own sewage out of their homes, away from their homes, and into appropriate conveyances. Which as you can imagine, when people are trying to do this on their own, wasn't working too well. And it was creating a real public health issue. And people were getting fined and the fines were piling up and those fines were resulting in essentially, kind of, civil forfeiture property seizure. People were losing their homes, et cetera.

And the Department of Justice and Department of Health and Human Services entered a settlement agreement with the Alabama Department of Public Health. Basically saying, this has to end. The county and the state need to start providing appropriate services to these communities, and they have to stop fining people for doing the best they can to try to resolve a problem that the state is creating.

All of this was founded, or grounded, upon Title VI of the Civil Rights Act, which basically says that if you as a state government accept, in this context, accept federal funding for your activities, you can't discriminate on the basis of race and that discrimination can't be intentional. There are some elements of disparate impact analysis, too, but this was considered to be a pretty egregious example of disproportionate impact in communities of color that directly implicated Title VI of the Civil Rights Act. So, that settlement agreement just went into place.

DOJ is also currently investigating governmental agencies in Houston, Texas, for policies that are alleged to allow discriminatory and unequal responses to reports of illegal dumping in communities of color as compared to predominantly white neighborhoods of Houston. So again, you see DOJ looking to prioritize and resolve definitively these issues in overburdened communities, in communities of color where environmental justice concerns are implicated, because those impacts are being visited disproportionately upon those communities. Or, in the case of these two examples, in Alabama and in Houston, are really being directed at communities of color.

Colvin: So, I think that the headline there is, for clients and businesses to be aware of, is simply that, the Department of Justice, the EPA and other federal agencies, not surprisingly with everything that's going on in the Biden administration on these issues, is stepping up their enforcement actions and taking a closer look at where companies may be engaged in activity that's perceived to be disproportionately or is in fact disproportionately affecting underrepresented communities. So, that's important obviously for businesses and clients to know.

Let's switch gears for a minute, and we've talked a lot about environmental justice at the federal level. I know there's an update out of New Jersey at the state level that you wanted to talk about. So, why don't you tell us what's going on in the Garden State?

Cutler: Sure. So, New Jersey enacted an environmental justice law in 2020. And now, as of April 17, 2023, has issued the final regulations that implement that law. So, they've been working through policy to try to make sure that the principles of the law are upheld in the interim, but now they have final binding regulations. And what the New Jersey Environmental Justice Rules require is somewhat unique at the state level.

Covered facilities under the rules that seek certain permits are going to have to undertake a multi-step environmental justice impact statement process that involves an analysis of the environmental and public health stressors in adjacent or in the overburdened communities in which they are located, and the ways in which the facility is potentially contributing to those stressors.

The facility has to demonstrate that it's either going to avoid causing disproportionate impacts by adding environmental or public health stressors, or that it will mitigate any disproportionate impacts that are unavoidable.

And finally, there are extensive public participation requirements that are part of this process, including a required public hearing, a public comment period of at least 60 days. And the permit seeker has to make a response to those public comments. All of this has to happen -- the analysis, the public participation elements -- all of this has to happen before the New Jersey Department of Environmental Protection will review the merits of the permit application. Primarily what this is going to mean is that there is going to be a significant increase in the time and the cost attendant to new permit applications, certain renewal applications, particularly for Title V Operating Permits in the air context for affected facilities that are that going to be subject to these rules.

Colvin: So, that summarizes what's going on in New Jersey with respect to the final implementing regulations that are now in effect. What, if anything, Adam, are you seeing in other states that may be following New Jersey's lead when it comes to environmental justice and regulations or regulatory action?

Cutler: So, close on the heels of New Jersey, New York state has passed and has enacted the Cumulative Impact Bill, which is very much patterned after New Jersey's Environmental Justice Law and Rules. So, that law is set to go into effect in late June 2023. And like in New Jersey, it will similarly require what they're calling New York Environmental Impact Statements and an assessment of the existing pollution burdens in a community as part of the permitting process for facilities under certain circumstances.

Similar to New Jersey where the focus is on covered facilities in “overburdened communities,” in New York the focus is going to be on covered facilities in “disadvantaged communities.” And similar to New Jersey law, in both of these cases the state agency will have the power to deny permits that would impose disproportionate cumulative impacts on disadvantaged, or in New Jersey's case, overburdened communities. Those are defined terms in the statute, and mapping has been done to notify the regulated community where those specific census block groups are that are considered, in New Jersey, "overburdened," in New York are considered "disadvantaged" communities in which these rules will apply.

Colvin: So Adam, in light of the new regulations in New Jersey and New York, and other states that inevitably may follow in their footsteps, what should businesses and companies located in those states do to prepare themselves to address these regulations and so that they can successfully comply with them?

Cutler: I think the first thing is, they have to plan for much more time and much more expense when it comes to the permit application process. But aside from that, what they can do is proactively consider and invest in ways to reach out to the affected communities around their facilities. Early outreach to local residents, particularly in the way that New Jersey has framed this, is going to be critical. Not only in terms of explaining the facility's permitting needs but also to gain an understanding in advance of what issues and concerns are important to the community. After all, the facility plans to be in that community for a long while.

So that kind of outreach at the front end, done right, not only will help the facility avoid surprise at the public comment stage, but it starts to build a relationship, hopefully one of trust, with the surrounding community. And then, to the extent that the facility, the regulated entity, can build ways to address those community concerns into the development of its permit application package, it's going to be able to help that environmental justice analysis process and the public comment process go much more smoothly.

And it will also, in my view, likely help negotiations with the agency over any additional conditions in the permit go much more smoothly, because the company will have more proactively thought about what it can do and what it's willing to do on the front end.

Colvin: I think one area we can revisit on a future podcast, in addition to perhaps providing some further updates with respect to states that are planning or have adopted similar regulations or legislation, would be to really also talk about what are the options for a business or a company with operations in these states to readdress, or address, an adverse finding in the permitting process with respect to a determination that they believe was improperly reached with respect to their impact or cumulative impact on disadvantaged communities. And what clients can do also in the context of the entire preparation and permitting process to avoid a potentially adverse outcome. I think that's really important and will be meaningful for companies that have operations in those states. But I think that's all the time we have today.

So Adam, let me thank you for taking the time to bring these important issues to the attention of our listeners. Super informative as always. And I look forward to talking with you again soon.

Cutler: Thanks a lot. Looking forward to it as well.

Colvin: And so for all of our listeners out there, thank you for taking the time to join us. And please stay tuned for our next podcast. Until then stay safe, and we'll talk to you soon. Thanks.

Copyright © 2023. Fox Rothschild LLP. All Rights Reserved.

All content of this podcast is the property and copyright of Fox Rothschild LLP and may not be reproduced in any format without prior express permission. Contact marketing@foxrothschild.com for more information or to seek permission to reproduce content.