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ESG and Environmental Justice

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What buzzwords define the environmental space in the past two years? Both “ESG” and “environmental justice” (EJ) are strong contenders. This post outlines how these concepts relate and provides guidance as to how companies can stake out appropriate positions on EJ in ESG reporting.

“ESG” — referring to environmental, social, and governance factors that influence decision making — has moved quickly from the fringes of policy to the center of corporate decision making, with the US Securities and Exchange Commission (SEC), the Federal Trade Commission (FTC), and other governmental entities regularly weighing in on what businesses need to report and what they can say advertising in this area. While “E” in ESG stands for “environmental,” “S” stands for “social,” meaning how businesses interact with their employees and — more particularly — the communities in which they operate.

“Environmental justice” sits at the interplay between “environmental” and “social” factors which can be evaluated under the ESG umbrella. The US Environmental Protection Agency (EPA) 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.”

Below, we will unpack what EJ is, how it relates to ESG, and outline steps businesses can use to evaluate ESG risks and opportunities relative to EJ concerns.

The Rise of Environmental Justice

While “environmental justice” as a concept dates to the Civil Rights era, consciousness of the effects of social status – including race – on public health date back far longer.

Though past decades have seen significant progress in the environmental space, it has not been uniformly distributed. There is broad acceptance that the benefits of environmental progress, and the burdens of environmentally intensive industries, are not uniformly dispersed among Americans. The Biden Administration’s EPA has made addressing EJ concerns a primary focus by integrating EJ concerns into ESG initiatives at the federal level, including working to increase equity in the environmental space through programming and funding, requiring equitable considerations while advancing the clean energy transition, and inching toward more substantive changes to how federal and state regulators administer and enforce federal environmental laws such as the Clean Air Act and the Clean Water Act.

Key steps EPA has taken to promote equity in the environmental space include:

- Actively working to build capacity of local organizations to engage in the environmental space. (See Actions 2 & 4 in EPA's Equity Action Plan, discussed in greater detail here.)
- Increasing environmental compliance inspections in "environmentally overburdened" communities to the point that more than 50% of all inspections will occur in such communities. (For more on this, see here.)
- Allocating significant funding for community lead projects, most recently, $100 million in January 2023 (See our discussion here.)
- Redoubling EPA's focus on civil rights issues in terms of program administration (see here for a discussion of how this plays out in practice).

In terms of substantive changes, the primary substantive changes stem from increased prominence of civil rights issues and assessment of "cumulative impact" in the environmental space.

- *Civil Rights Issues.* For most projects, state or federal regulators have focused narrowly on individual projects. Which projects can be and are permitted may depend on shifting regulatory perspectives that determine whether a project meets regulatory limits and, in combination with planned or pre-existing factors, has the potential negatively affect a community. The past year has seen EPA repeatedly evaluate civil rights issues in connection with projects fairly far along in the permitting process, The two foremost examples are its actions related to the relocation of a recycling facility in Chicago and a petrochemical plant in Louisiana.
- *"Cumulative Impacts."* Environmental laws in the United States have focused on permitting and process. In general, regulators are narrowly focused on a project's effects versus pre-existing regulatory limits. We have previously examined this issue as applied in regard to the Ninth Circuit's decision in Center for Community Action v. FAA; and more generally in the context of federal and state efforts to formalize assessment of "cumulative impacts."

EJ and ESG

EJ falls at the intersection of the 'E' and 'S' of ESG, and good governance is required to manage exposure to EJ risks. Assessment of ESG issues frequently involves conducting a quantitative and qualitative assessment of environmental, social, and governance issues. As we have discussed, this has often involved assessments of both environmental and social concerns when addressing issues like plans to reduce carbon emissions.

EJ is similar some other environmental issues in that quantitative metrics are — to some degree — available. For instance, federal environmental permits often require extensive data collection and reporting. (See here, for an example.) In terms of understanding how corporate operations interplay with "environmentally overburdened" communities, various databases exist which track whether communities fall into this category. EJSCREEN, EPA's primary tool, is discussed in greater detail here. Corporations are also engaging with the communities in which they operate by holding community meetings and reaching out to local organizations.

Well-positioned Companies Understand Corporate Exposure on EJ Issues

Knowing whether business operations are in "environmentally overburdened" communities is a good starting point. When businesses operate in such communities, ensuring consistent community engagement is the first step in minimizing exposure. Additional steps:

- **Consistent community engagement**. Consistent community engagement is a keystone to managing EJ issues. If community leaders are only in contact with a business when the business has a need to report an environmental issue, tensions are likely to be higher and community leaders may reach out to regulators as a first step to raise concerns, instead of relying on pre-existing relationships with at the business. As EPA has stated that it intends to redouble efforts to engage in EJ communities and to use tools like increased monitoring to better assess and address community concerns in real time, having resilient relationships to begin with is a must.

- **Making sure consciousness of EJ-associated risks is factored into the corporation's governance strategy and overall risk profile.** To state the obvious, every business's risk profile is different. As we have indicated in a recent post, energy intensive businesses currently face a heightened risk of litigation in the ESG space, whereas a software or marketing company might have no meaningful exposure in the EJ space. Of relevance here, businesses seeking to relocate or re-permit operations in EJ communities may need to be strategic about what EJ-related disclosures are made and when. Some of the "asks" EPA has recently made, such as asking a petrochemical company to relocate a school as a potential solution to resolve concerns related to facility expansion, can pose significant challenges in terms of ESG reporting. And EPA's "asks" in this space can come tied – as they did in Louisiana –to America's long history of racial discrimination, a topic with which every business would want to avoid any association.

- **Clarity in EJ-related sustainability disclosures or corporate reports**. Businesses need to evaluate where and when EJ-related ESG disclosures are made in the context of prior disclosures. As we discussed above, EJ disclosures both have an "environmental" and a "social" aspect to them and would be made in a context where the underlying law is rapidly evolving. As with other business disclosures, corporate ESG disclosures or sustainability reports in the EJ space need to rely on verifiable data and strike an appropriate balance between aspiration and reality. Broad disclosures like "the Company intends to comply with the letter and the spirit of all environmental laws" may not be appropriate given the underlying legal uncertainty.

In an upcoming post, we will provide greater detail on how environmental justice issues have the potential to lead to litigation in the ESG space.

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