ESG Litigation Update: Environmental Justice Claims

Article By:

J. Michael Showalter

A new set of environmental policies embraced by the Biden Administration ? environmental justice (EJ) ? may soon spur litigation in the environmental, social, and governance (ESG) space.

Below, we discuss why EJ issues are likely to bleed into ESG litigation and outline steps companies can do to protect themselves before claims arise.

We began writing this series with the view that “ESG Litigation” tends to be about other social policies. Prior posts discuss carbon-related ESG claims; circular-economy related “greenwashing” claims; and how regulatory EJ reforms tie into the ESG efforts. (For those seeking background on either EJ or ESG, the last post provides a brief primer.)

EJ and ESG

“ESG” is given different meanings by different actors. Some of these meanings bear the hallmarks of investment professionals, while others are more closely tied to policy advocates. A working paper by Elizabeth Pollman, University of Pennsylvania Law School Professor of Law and Institute for Law & Economics co-director, entitled “The Making and Meaning of ESG” ? providing four usages — provides a jumping-off point for this discussion. ESG can mean:

- Factors used by investors for managing risk and identifying opportunities;
- Broad principles which can be themselves implemented as risk-management tools or used to create opportunities;
- A description of factors relating to corporate social responsibility or corporate sustainability; and
- A concept which incorporates a policy preference (at least somewhat removed from risk management) or taste guiding investment decisions.

Some of these meanings are inherently unobjectionable. For instance, our real estate colleagues, writing to benefit the commercial real estate industry, recently highlighted funding available for energy efficiency improvements; that vendors now sell energy “as a service,” which allows for off-thebalance-sheet financing for energy improvements; green bonds as a finance tool for projects; and the availability of Inflation Reduction Act (IRA) funding to alleviate costs and in turn make assets more profitable.

At the other end of the spectrum, ESG has become a cudgel which businesses or politicians wield to advocate for beliefs ranging from support of fossil fuel interests to opposition to equity and diversity initiatives. (See here and here.) This cudgel comes in the form of using the word "woke" as an epithet. A recent article in the Harvard Business Review by Daniel Crowley and Robert Eccles decries this politization, which flows in – in their view – from tensions in the ESG community itself "about whether to extend ESG measurements to include not just the risks a company faces from ESG issues, but also account for the impact the company has on society and a wider world."

EJ has migrated at a fast clip from the advocacy community to becoming a force in policymaking in its own right. (For background on this, see here and here.) The rapid rise of EJ in the policy space has created a fair amount of uncertainty. Some degree of backlash is appearing as US House Republicans indicated their intent to target $60 billion in IRA funding targeted to EJ communities and an additional $27 billion in IRA funding intended to reduce or alleviate greenhouse gas emissions in economically disadvantaged communities. (We summarized IRA-related EJ funding here.) In this, EJ may serve with ESG as convenient political footballs.

EJ-Related ESG Litigation Risks

To this point, the Biden Administration's efforts to address EJ issues have resulted in increased uncertainty for businesses in two major areas:

- **Increased Enforcement.** The Biden Administration has deployed various tools to address environmental concerns in EJ communities. These range from redoubling efforts to listen to community concerns to increasing facility inspections to imposing more stringent monitoring requirements as part of the permitting process. Each of these actions increases the potential for enforcement activities for regulated businesses.

- **Increased Uncertainty Affecting Business Operations.** Perhaps the bigger business risk EJ reforms entail relates to the re-examination of "old" activities. At sites throughout the country, the Biden Administration has weighed in to oppose construction of new plants and relocation of others on EJ grounds. Consideration of "cumulative impacts" opens the door to one broad set of standards for non-EJ communities while regulators could consider location-specific issues in EJ communities. In certain instances, the US Environmental Protection Agency (EPA) has wielded powers derived from federal civil rights laws to request consideration of permit conditions which would otherwise be outside of its statutory mandate.

Our prior posts have explored how "ESG" is likely to be used by policy advocates to push reforms which they have been unable to secure from the political branches. (See here.) In posts focused on climate and carbon issues, and then on circular economy "sustainability" issues, we have explored how claims which facially relate to securities- or product-marketing appear to be frequently motivated by policy outcomes.

We expect that EJ issues may move to the ESG Litigation realm for three reasons:

- **EJ Represents a Fundamental Shift in Emphasis in Environmental Law.** Not only has

EPA recently proposed to address EJ concerns in every one of its National Enforcement and Compliance Initiatives for fiscal years 2024-2027, we expect the shift to result in unprecedented litigation. Re-centering environmental policy around EJ issues represents a fundamental change to how environmental policy has historically been made. For example, without EJ, regulators considering whether a facility should be permitted looked only at the facility itself. If the facility was capable of meeting standard emissions limits and permit conditions, it could be permitted regardless of whether it could exacerbate community conditions around where it was located. In this, the non-EJ evaluation was heavily focused on property rights and administrative law. An EJ-inclusive evaluation, like the ones which occurred in Louisiana (see here and here), could factor in the history, demographics, and health of a community in ways which could change permit outcomes.

- **EJ Efforts Are Likely to Be Politicized**. As was stated above, EJ reforms are likely to be politicized. Environmental health issues often track race, long a third rail in US politics. Racial issues – most specifically, segregation – correlate with environmental health in a profound way as do the primary language and income of a given community. As EPA has ramped up its EJ efforts, cases evaluating whether race can be used as a factor in decision-making are currently on the US Supreme Court docket. (See here and here.) These cases may heighten tensions related to EJ issues and accordingly increase business risks associated with EPA's related focus on civil rights issues.

- **EJ Issues Can Grab Headlines and Represent "Material" Risks to Business Operations.** Federal securities laws require the disclosure of "material" risks and the US Securities and Exchange Commission is currently engaged in evaluating how climate-related risks should be reported. (See discussion here.) While it is possible that many EJ-related risks will fall below the "materiality" threshold for public companies, the combination of a shift in permitting emphasis, EPA's willingness to weigh in to derail projects nearing completion on EJ grounds, and the risk of reputational spillover all provide ample reasons why litigation in this space may increase over time.

Our prior posts in our ESG Litigation series have (here, here, and here) outlined a series of practical steps companies can take to manage risks associated with ESG litigation. These include:

- Ensuring that data, including digital advertising, used to attract customers properly expresses corporate policies, data and intentions.

- Becoming – and remaining – consistently engaged in communities where business operations occur.

- Clearly communicating related EJ issues in any sustainability disclosures and corporate reports; and finally

- Remaining abreast of EJ-related regulatory changes and factoring them into the corporation's overall governance strategy.

National Law Review, Volume XIII, Number 52