

# EMBRACING ENVIRONMENTAL JUSTICE INITIATIVES TO ADVANCE CORPORATE OBJECTIVES



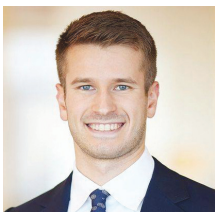
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is a recipient of the Chicago Audubon Society Award for Protection of the Environment, which recognizes those who have helped conserve, preserve, and enhance the habitats and open spaces of the greater Chicago region. His recognitions include Chambers, USA, Environment: Litigation (Illinois); Illinois Super Lawyers, Environmental; National Law Journal, Energy and Environmental Trailblazer; Legal 500 US, Industry Focus, Environment, Litigation; and Best Lawyers in America, Environmental Law.



**TATJANA "TANJA" VUJIC** is special counsel in the Washington, DC office of Jenner & Block. She focuses on issues related to climate and the energy transition and ESG, co-chairing the Transitions in Energy & Climate Solutions (TECS) and ESG practices. Formerly, she was president of WasteNot Strategies, the consulting business she established to assist clients with issues related to climate target setting and strategies to achieve climate as well as sustainability goals. Tanja holds special experience in renewable natural gas development and policy, natural climate solutions, agriculture, carbon offsetting, and other market-based mechanisms to reduce or zero out organizations'

greenhouse gas emissions. She is also active in ESG issues. Tanja played an essential role helping Duke University plan and execute its climate and energy transition strategy, including the launch of the Duke Carbon Offsets Initiative and the James E. Rogers Energy Access Project at Duke University. In 2019, Tanja was recognized as a Trailblazer by BioCycle Magazine for her efforts to establish and scale a renewable natural gas market from livestock methane, beginning with a partnership between Duke University, Duke Energy, and Google to build the first swine waste to energy system to yield carbon offsets and renewable energy certificates and meet stringent environmental performance standards. Tanja was appointed by former North Carolina Governor Beverly Perdue to chair the state's Energy Policy Council.



**ARIE FELTMAN-FRANK** focuses his practice in the Chicago office of Jenner & Block on environmental and workplace health and safety. Before joining Jenner & Block, Arie clerked for the US Environmental Protection Agency (EPA), Region 5 Office of Regional Counsel, the US Department of Justice, Environmental and Natural Resources Division, Environmental Defense Section, and EPA's Environmental Appeals Board. Arie's pre-law background is in environmental science, where he has had experience with renewable energy development and air pollution control.



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Earth Week 2023 brought with it two significant environmental justice developments.<sup>1</sup> 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.<sup>2</sup> 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.<sup>3</sup> These actions, and other significant developments, highlight the heightened emphasis on environmental justice at the federal and state levels.

The United States 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.”<sup>4</sup> With increased funding provided by the Inflation Reduction Act,<sup>5</sup> the Infrastructure Investment and Jobs Act,<sup>6</sup> and the American Rescue Plan Act,<sup>7</sup> 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 percent of the overall benefits of certain federal investments flow to “disadvantaged communities that have been historically marginalized and overburdened by pollution.”<sup>8</sup> The Climate and Economic Justice Screening Tool geospatially identifies such disadvantaged communities, which include federally recognized Tribes and Alaska Native villages.<sup>9</sup>

As companies face increased scrutiny all along the supply chain from regulators, customers, investors, and the public, failure to consider the environmental justice implications of their corporate activities can significantly hinder the advancement of corporate objectives. By way of example, in September 2022, a company's air permits to build a \$9.4 billion plastics manufacturing complex were revoked 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.<sup>10</sup>

The risks associated with failing to consider environmental justice issues are causing some companies to reevaluate corporate policies and develop business practices that embrace environmental justice and community stakeholder initiatives. This article explains how embracing environmental justice and community stakeholder concerns can advance corporate objectives.

## 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 effectuated its policy of prioritizing environmental justice initiatives by directing federal agencies to make achievement of environmental justice a part of their missions. 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.

### EPA

EPA published a May 2022 report,<sup>11</sup> followed by a January 2023 addendum,<sup>12</sup> 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, including programs under the Clean Air Act; the Visibility Protection Program; the Clean Water Act; the Safe Water Drinking Act; the Federal Food, Drug, and Cosmetic Act; the Resource Conservation and Recovery Act; and more. The EPA's

existing legal authority to advance and address these topics in decision making encompasses the full breadth of the agency's activities, including its oversight of state programs.

EPA 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.

EPA'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 EPA office, as well as authorize EPA's Office of Civil Rights to periodically conduct compliance reviews. If a recipient is found to be non-compliant, the recipient may elect to take corrective actions to mitigate the risk of losing financial assistance.

### **Permitting guidance**

EPA recently issued interim guidance<sup>13</sup> for addressing environmental justice and civil rights during permitting, as well as specific guidance<sup>14</sup> 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 to a predominantly Black and Hispanic neighborhood." After a two-year investigation, the US Department of Housing and Urban Development found the city's involvement in the relocation of the facility, approval of the new site, and broader institutional methods that resulted in the concentration of industrial pollution into Black and Hispanic neighborhoods violated the Civil Rights Act and the Housing and Community Development Act.<sup>15</sup>

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 EPA'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.<sup>16</sup> EPA 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.<sup>17</sup>

For example, in 2020, Washington, DC amended its comprehensive plan to incorporate environmental justice objectives.<sup>18</sup> 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 EPA's EJScreen Mapping Tool, which provides demographic, socioeconomic, and environmental information for chosen geographic areas.<sup>19</sup> Other mapping tools, such as the Council on Environmental Quality's Climate and Economic Justice Screening Tool<sup>20</sup> 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 potential legal risks and challenges, 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, 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. 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. EPA's Audit Policy provides several major incentives, including reduction of 100 percent of gravity-based penalties, for regulated entities to voluntarily discover and fix federal environmental violations.<sup>21</sup> 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.<sup>22</sup>

## **Review suppliers and other entities with which the company contracts**

As mentioned above, 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 and reviewing its supply chains to identify any potential areas of inequity against such a standard. The company must then subsequently hold 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. Considering recent EPA 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?; and
- 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 EPA 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.<sup>23</sup> 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.<sup>24</sup>

More stringent requirements of which companies should be mindful may include: (i) additional monitoring, recordkeeping, and reporting requirements; (ii) additional pollution controls and/or more stringent limits; and (iii) 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 their bonds 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. 📌

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### Notes

- 1 An earlier version of this article first appeared on the Harvard Law School Forum on Corporate Governance.
- 2 Press Release, State of N.J., Governor Murphy Announces Nation's First Environmental Justice Rules to Reduce Pollution in Vulnerable Communities, Apr. 17, 2023, available at <https://www.nj.gov/governor/news/news/562023/approved/20230417a.shtml>.
- 3 Exec. Order No. 14,096: Revitalizing Our Nation's Commitment to Environmental Justice for All, 88 Fed. Reg. 25,251 (Apr. 21, 2023).
- 4 U.S. Env't Prot. Agency, Learn About Environmental Justice, Sept. 6, 2022, available at <https://www.epa.gov/environmentaljustice/learn-about-environmental-justice>.
- 5 Pub. L. 117-169 (2022), available at <https://www.govinfo.gov/content/pkg/PLAW-117publ169/pdf/PLAW-117publ169.pdf>.
- 6 Pub. L. No. 117-58 (2021), <https://www.govinfo.gov/app/details/PLAW-117publ58>.
- 7 Pub. L. No. 117-2 (2021), available at <https://www.govinfo.gov/app/details/PLAW-117publ2>.
- 8 Exec. Order No. 14,008, Tackling the Climate Crisis at Home and Abroad at Sec. 223, 86 Fed. Reg. 7,619 (Jan. 27, 2021).
- 9 Climate and Econ. Just. Screening Tool, Council of Env. Quality, Nov. 22, 2022, available at <https://screeningtool.geoplatform.gov/en/#3/33.47/-97.5>.
- 10 St. James v. La. Dep't of Env't Quality, Docket No. 694029 (La. Dist. Ct. Sept. 12, 2022).
- 11 Off. of Gen. Counsel U.S. Env't Prot. Agency, EPA Legal Tools to Advance Environmental Justice (2022), available at <https://www.epa.gov/system/files/documents/2022-05/EJ%20Legal%20Tools%20May%202022%20FINAL.pdf>.
- 12 Off. of Gen. Counsel U.S. Env't Prot. Agency, EPA Legal Tools to Advance Environmental Justice: Cumulative Impacts Addendum (2023), available at <https://www.epa.gov/system/files/documents/2022-12/bh508-Cumulative%20Impacts%20Addendum%20Final%202022-11-28.pdf>.
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- 14 Off. of Air and Radiation, EJ in Air Permitting Principles for Addressing Environmental Justice Concerns in Air Permitting (2022), available at <https://www.epa.gov/system/files/documents/2022-12/Attachment%20-%20EJ%20in%20Air%20Permitting%20Principles%20.pdf>.
- 15 U.S. Dep't of Hous. and Urban Dev., Letter of Findings of Noncompliance with Title VI and Section 109, Southeast Environmental Task Force, et al. v. City of Chicago (Jul. 19, 2022).
- 16 U.S. Env't Prot. Agency, FY 2022-2026 EPA Strategic Plan (Mar. 2022), available at <https://www.epa.gov/system/files/documents/2022-03/fy-2022-2026-epa-strategic-plan.pdf>.
- 17 The New School Tishman Env't and Design Ctr. Local Policies For Environmental Justice: A National Scan (Feb. 2019), available at <https://www.nrdc.org/sites/default/files/local-policies-environmental-justice-national-scan-tishman-201902.pdf>.
- 18 The Comprehensive Plan for the National Capital: District Elements, Environmental Protection Element, DC Law 24-20 (Aug. 21, 2021), available at [https://planning.dc.gov/sites/default/files/dc/sites/op/publication/attachments/06\\_EP\\_small.pdf](https://planning.dc.gov/sites/default/files/dc/sites/op/publication/attachments/06_EP_small.pdf).

- 19 U.S. Env't. Prot. Agency, EJSscreen: EPA's Environmental Justice Screening and Mapping Tool, available at <https://ejsscreen.epa.gov/mapper/>.
- 20 Climate and Econ. Just. Screening Tool, *supra* note 9.
- 21 U.S. Env't. Prot. Agency, Final Policy Statement: Incentives for Self-Policing: Discovery, Disclosure, Correction and Prevention of Violations, 65 Fed. Reg. 19,618 (Apr. 11, 2000).
- 22 U.S. Dep't of Just. Environmental Crimes Section, Voluntary Self-Disclosure Policy (Mar. 2023), available at <https://www.justice.gov/file/1571071/download>.
- 23 Am. Compl., Air Products Blue Energy, LLC v. Livingston Parish Government, 3:2022cv00809 (M.D. La. Nov. 22, 2022).
- 24 N.J. Dep't of Env. Protection, Env. Just. Law, available at <https://dep.nj.gov/ej/law/>.