

Speaker 1 ([00:00](#)):

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Libby Stennes ([00:18](#)):

Welcome to Greenberg Traurig's E2 Law Podcast, where we discuss global topics related to environmental and energy law. In this episode of the 2022 Evolving Environmental Law Series, Libby Stennes and Maribel Nicholson-Choice will discuss environmental justice.

Libby Stennes ([00:38](#)):

I'm Libby Stennes, an environmental shareholder at Greenberg Traurig based in the Minneapolis office and I'm joined today by Maribel Nicholson-Choice, who's based in our Tallahassee office. We're going to talk today about environmental justice and to start us off, Maribel, why don't you give us the definition of what that term means?

Maribel Nicholson-Choice ([01:00](#)):

First I want to start off by saying that my name is Maribel Nicholson-Choice, and I've been practicing in the area of environmental law for about 30 years. And very early in my career, I dealt with environmental justice and environmental justice has been defined and discussed going back to Executive Order 12898 by President Bill Clinton, where he asked federal agencies to consider their decisions and how they impacted minority and low-income community.

Maribel Nicholson-Choice ([01:33](#)):

Since January 2021, President Biden signed Executive Order 14008 which prioritizes environmental justice at the federal level. He also created two White House councils to address environmental justice and signed legislation with \$1.9 trillion, which includes funding for environmental justice. Specifically back in the early 90s, the EPA defined the term of "environmental justice" within their regulatory program and they defined it 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."

Maribel Nicholson-Choice ([02:24](#)):

That became the regulatory definition of environmental justice from an environmental perspective. In Florida, we created a Florida Environmental Equity and Justice Study Commission in 1994 and I served on that commission. Today, I think that regulators, environmental groups, universities, and community activists use the term "environmental justice" to describe a combination of things, technical and policy criticisms ranging from risk-assessment methodology to government-citing decisions, cleanup decisions, enforcement decisions. You see also the term "environmental racism" being used, especially in the media, because it has a more explosive type of impact when the term "environmental racism" is used.

Maribel Nicholson-Choice ([03:20](#)):

I think that we see this now, the issue of environmental justice in development decisions. We see it in citing decisions. We see it in criticisms about disposal practices, for example. Any type of environmental regulatory decision that might have a perception of having a disproportionate impact on people of color

or poor people in general. We're seeing it now in terms of litigation, right Libby? Have you seen environmental racism or scenarios where your clients are dealing with such accusations in a litigation context?

Libby Stennes ([04:09](#)):

I have. Over the course of my career, I've seen a number of situations that involve accidents or long-term emissions, where my clients have been accused of wrongfully discharging chemical substances through air, through water, through solid waste disposal. In many of those high profile situations, there is a growing trend toward assessing whether the sites meet the criteria for environmental justice and piling on the accusation that there's some form of impact that basically is being alleged as environmental racism. For clients who are facing the challenge of litigation, that alone can be a struggle both at the board level, at the business leaders' level, assessing the questions of liability and how to resolve the litigation.

Libby Stennes ([05:22](#)):

But when you add to that, the additional allegations around environmental justice, it can have a very significant impact to market reputation to the employees at the site, both from questioning whether these allegations impact their day-to-day conduct and operations. It certainly can create a real hot-potato situation or a real crisis for a number of clients that are dealing with this. I know you, in the course of your practice, have put together some points that businesses should think about and maybe really should think about them before litigation strikes. What are some of those?

Maribel Nicholson-Choice ([06:16](#)):

Oh, absolutely. Before we address those, I wanted to pick up on something that you mentioned, you mentioned cumulative impact and that's a really interesting concept when it comes to environmental justice and how agencies analyze it. It's important to point out because you can have a company that has a permit and they're completely in compliance with their permit and they're located in a community with other companies that all each have permits and each are in compliance, and there can still be an environmental justice issue raised because of the cumulative impact of all the allowed permitted permits, whether it's air impacts, air pollution impacts or water discharges.

Maribel Nicholson-Choice ([07:03](#)):

It could really put a company in a litigation position that is otherwise legally in compliance with environmental laws and even an accident that normally would just require some remedial activity, a company can still find themselves accused of environmental racism. And that's when perception and reality conflict and it really doesn't matter to the public that your client has a permit, that they're in compliance, they can have a compliance history that's positive. They find themselves often companies in a situation where they trigger all of this scrutiny and accusation because the community is frustrated with the cumulative impact of all of the allowed discharges and sources within their community.

Maribel Nicholson-Choice ([07:59](#)):

That all turned to the question of, what are the techniques that a company needs to create and follow before they find themselves in that situation? I have advised clients, especially developer clients that are trying to develop in urban areas and low-income areas, to have a checklist within the company, within the development plan that allows them to prepare and be educated about environmental justice issues,

concerns, and complaints and how they might pop up with a development so that it could be handled in an effective, productive way with the community.

Maribel Nicholson-Choice ([08:43](#)):

One of the first things that I advise clients, Libby, is for them to understand the historic and the current definition of environmental justice. And we talked about that early on, there's a regulatory definition, and it can come up in a permitting scenario, for example, but then there's this not necessarily a regulatory definition, it's just a combination of criticisms and concerns that people can raise under the umbrella of environmental justice.

Maribel Nicholson-Choice ([09:15](#)):

Having the education of knowing, "Oh, this is an environmental justice issue that is being raised." I had an accident. I had a permit, my permit isn't compliant, but the accident it's in a "fenceline community." EPA is now a defending fence community most recently and there's mapping for it. But those are areas where the agency has determined that there are significant sources of air and water pollution, and that there is a high concentration of poor people and people of color and therefore an accident and those particular communities would create an environmental justice issue and review for environmental justice under the goal of trying to determine whether there's a disproportionate impact on these communities from an environmental perspective.

Maribel Nicholson-Choice ([10:13](#)):

Your homework as a company before litigation starts, before you even buy property, for example, for a new location, your due diligence these days should include a fenceline community environmental justice review, where you find your property on the EPA's mapping available online, it's all public so that means it's available to communities, too. And identify where your facility is located, who are your neighbors, what's the makeup of the community around your facility, and understand that environmental justice can come up as an issue because you're part of a cumulative impact because you're part of a community, you're part of an environmental community, as well as the people community. Understanding that new concept, that you're part of a community that impacts poor people and people of color just by virtue of your location is a new way to evaluate risk, environmental risk and potential damage to your brand in the event that you're sued.

Maribel Nicholson-Choice ([11:29](#)):

Understanding the historic and current definition of environmental justice is one of the first things I advise my clients to know. The second thing is, identify the stakeholders. I mean, you understand the what if you understand what environmental justice means. Now, you need to understand the who and the reason why you need to understand the who is because that's where you can build consensus and bridges so that you can communicate an effective way with the community and creating these avenues for communication is imperative because if you have a relationship foundation with the community where your facility is located, either through your employees or through your customers, then when you have to deal with a highly charged accusation and situation, you have some foundation upon which you can build some trust where you can transfer scientific data in a way that it might be more readily received by the community and trust and communication as we go through the checklist you're going to see the solution to a lot of the problem.

Libby Stennes ([12:43](#)):

I want to ask you something there, because we've both referenced EPA, and when we're referencing it today, we're talking about federal EPA. A lot of times when we're dealing with this impact to local communities, EPA may play a role, but may not be the first place for that trust building establishing in the local community. Could you talk a little bit more about who some of those trusted ally resources may be?

Maribel Nicholson-Choice ([13:15](#)):

Absolutely, Libby. I think you're spot on on this question. And environmental justice is normally arises as a local issue. You're looking to the local government to create those bridges between you and your client. When I say that, I mean, there are a lot of local governments, city and county commissions that have citizen advisory boards, for example, to review projects, to consider concerns of the community and environmental justice folds nicely into that context. It could be a public hearing. It could be a workshop that you requested to describe your project before it gets there and it creates an avenue where you can meet the players and the players vary from community to community and it varies from state to state. What I mean by that is that the people that make decisions on behalf of community, sometimes in the south are tied to the church.

Maribel Nicholson-Choice ([14:24](#)):

You can use your local government for example, if you're located in the southeast region of the United States, Alabama, Mississippi, even Florida, to reach out to communities through their church, through their Reverend, for example. Other ways that you can reach out to the community is through the teachers and providing information to children in school about your project or creating opportunities where you interact with the schools within your community to provide information or to sponsor projects that create scientific educational opportunities for kids where you give out handouts and papers that go home to the parents. The local government can help you in terms of the city and county attorneys, land use, the land development staff that create workshops, public workshops, that invite people to come and share their thoughts about, for example, on a development project, what type of development they think they would like to see in their community and it creates an opportunity for you to share concepts of your project.

Maribel Nicholson-Choice ([15:47](#)):

A specific example, I would have a client that might want to convert gas station that's abandoned and where there is uncontrolled contamination going on. As part of the project, my client was to put a pharmacy at that location. Instead of waiting to find out if there's opposition for his development or her development at the stage of approval where the newspaper would cover it in a negative way, my clients proactively are advised by me to reach out to the city and county attorney, the project managers that are reviewing their projects at the local level, ask for workshop, give notice of the proposed project and show concepts.

Maribel Nicholson-Choice ([16:36](#)):

You don't show permit application approvals and then ask people to provide input because that's not meaningful input. Meaningful input means that they have an opportunity maybe to change the project, improve it in some way and when I say that, I mean, we show up with a conceptual plan and we might have a plan for an anchor project, let's say a strip mall. And then the community shows up and they have some concerns about how they can benefit from the development and we set aside an area for kiosks for local art and kiosks where individual community members might be able to display and sell

their projects where you are providing economic justice as a part of your development. And now you're building positive support for the project at the local level. That's an example of let's say a brownfields redevelopment where you're cleaning and then redeveloping properties.

Maribel Nicholson-Choice ([17:37](#)):

Let's say after the fact there's an incident or an accident related to environmental contamination or discovery that portion of the project site wasn't cleaned properly. You have a foundation at this stage, through the local government and through the work you've done to incorporate some of the vision of the community into your development, where you're not in a scenario where it's David against Goliath, because nobody's going to root for Goliath. You're in a scenario now where you're a member of a community and there's a problem. There's a problem in the family because some of the people that benefit from your development are some of the people in the community.

Maribel Nicholson-Choice ([18:19](#)):

Now, the dynamics of the discussion can significantly dissipate from and the small community against this giant David and Goliath scenario to more of a dispute or disagreement between family members or community members. You're not going to get away from being the company with the deep pocket, that's inherent in the process, I think inherent in just who you are, but you can significantly increase the probability of being able to communicate effectively with some of the community members because you have a mutual economic benefit and a trust relationship that has been previously built.

Maribel Nicholson-Choice ([19:06](#)):

Libby, I'm for sure that local governments are the key to that, and where there is not a local government advisory board, you, as a company can create a workshop, just like a single workshop or a series of workshops where you're able to talk about your plans and where you're able to listen.

Maribel Nicholson-Choice ([19:28](#)):

The key, I think, when you get ready to deal with authorities that have to make decisions about whether or not your accident or your development plan is fair, is that you, as a company, can say that you sat down with the community and you listened. That doesn't mean that you changed your entire a project and you made it financially infeasible. That doesn't mean that you admitted to any intentional acts of environmental racism, it means that you listened and if you can incorporate one or two things within your project or within your practices that improve the project from a community perspective and it creates some kind of community benefit, then you have some goodwill that you can use to mitigate the accusations of environmental justice, because you met and you listened.

Maribel Nicholson-Choice ([20:32](#)):

If you think about that principle of meeting with someone that you might impact by a decision or by an accident that occurred at your facility, and you listen, it's not farfetched idea if you think about the 14th Amendment of the constitution, giving people notice and an opportunity to be heard. It just provides so much goodwill on your part, that from the perspective of the community, that the company is trying to be fair.

Libby Stennes ([21:00](#)):

For many clients thinking about this in the scenario, when civil litigation is underway, it may sound like an impossible or a daunting task to put yourself out there in the community, and to basically be on the front lines with that public type of a hearing or a discussion or an interaction of ideas. I will add from my perspective that it is possible to do it. It is something that, yes, it does require preparation and some thought ahead of time, because you do have to keep your eye on the liability side of things with an ongoing parallel lawsuit. You're definitely in a more challenging set of circumstances, but just as businesses don't shut down once a lawsuit is filed, the role that businesses play in the community and the intent of the business to be an extension of that community and to do the right thing has to continue.

Libby Stennes ([22:12](#)):

There are ways to go through these public processes and these interactions that mitigate some of the impact in pending lawsuits, but are absolutely essential to be done and can present create of ways to resolve at least portions of the lawsuit, as well.

Maribel Nicholson-Choice ([22:35](#)):

I agree with you, Libby, and I've heard some of some litigators say, "Well, we don't want to make any promises that will come back and bite us in court." And here's what I have to say about that, as a company in these days and before now, but especially now, you have to have some internal reflection already completed before you quote, "Get out there." You have to have some core principles that you have already agreed upon. And I'll give you an example, for environmental justice and negotiations for a legislation in Florida on environmental justice. And I remember when I sat down with my client, we had manufacturers, gas station owners, hotel owners, and a bill had all already been filed to evaluate environmental justice in Florida.

Maribel Nicholson-Choice ([23:36](#)):

I remember, sitting and trying to build a consensus about at least three principles related to environmental justice that everybody felt comfortable saying, "I agree with that." "I'll say that." If you do your core principle work as a company so that you know what your values are, then when you get out there, you have a clear understanding of where you're going to stand in terms of environmental justice issues. And I think ignoring them and, and saying, "Well, we're just not going to say anything and we're just going to litigate", is not going to be the right scenario, or it's not going to be the most financially successful scenario. And it also might be the most damaging to the brand because it allows no control, it allows you to have no control about what people perceive the company to be. If the end game is always to be in charge of your brand and always be the one that defines your brand, then you need to get ahead of the idea of someone accusing the company of environmental racism by having principles related to that, values.

Maribel Nicholson-Choice ([24:46](#)):

Here are a couple of values that I remember we brainstorm and all these companies trying to say, "Let's come up with three things that when you go to the capital, we stand behind that." Here's one, "We all agree as stakeholders that discrimination and environmental policies and laws on the basis of race, national origin, or economic status is illegal and unjust." That principle is that they are against the idea that any agency or anyone is making decisions intentionally based on discrimination. Everyone can agree to that because that is illegal. All they're saying in that core principle is that we stand behind the fact

that you should not discriminate in environmental policies based on race. Everybody was able to get behind that.

Maribel Nicholson-Choice ([25:44](#)):

The second principle was that the stakeholders agree that government should promote and ensure meaningful participation by all stakeholders in government decisions, implementing environmental laws and policies. Under the basis of that is the 14th Amendment. We agree that the 14th Amendment should apply, that means that every, businesses and communities should get notice of a project and have an opportunity to come to a public hearing and say what they're going to say, and then allow the decision makers to decide. Everybody was able to get around that idea, because that was just the 14th Amendment. It's a core principle.

Maribel Nicholson-Choice ([26:26](#)):

Then the last one, stakeholders agreed the at risk and health effects from exposure to environmental pollutants should be communicated to communities in a responsible and understandable manner. I represented companies that said they agreed that if you're going to give an environmental report to a community, it should be understandable, it should be legible, they shouldn't have to hire a scientist to translate it. Now, if there's a gap because you do have a science report and they can't read it, I know EPA has come up with ways to give grant money to hire consultants to translate the environmental reports to communities. But in this core principle, what they were saying is that they agree that if you're going to provide any writing with the company logo on it, that it should be easily understood, not highly technical information, easily understandable. That was the three principles and if you think about it, it was about noticing the opportunity heard as the 14th Amendment, enforcing existing laws, regardless of race and sharing information about health effects using scientific data that's in an understandable format.

Maribel Nicholson-Choice ([27:53](#)):

Again, you're going to have to deal these days as a company with what you're doing to be responsible for the impacts you're making the environment. You're going to be responsible to explain what you're doing or what you're not doing. As a core principle, you should already have an understanding within your company what your values are in terms of your impact, your footprint on the environment, and that includes environmental justice impact to poor people and people of color.

Maribel Nicholson-Choice ([28:26](#)):

I think that you're right, Libby, that you can't get in a silo and say, "Well, I'm just not going to speak on the subject", because that allows other people to define your brand. That allows other people to say what your values are and they're not going to say it in a positive light. In most cases, in litigation is going to be loud. It's going to be accusatory, and it's going to be damaging from a public perception perspective, whether it's true or not, that's the key. It's going to be negative and impact your brand whether the accusations of environmental racism are true or not if you don't speak on it, or if you don't do your homework ahead of time to already define what your values are, as opposed to making promises. And I think if you take the time to develop those core principles and it's part of the culture of the company, then when environmental racism and shows up, you automatically know that's not us, there's a misunderstanding here, let's talk.

Maribel Nicholson-Choice ([29:31](#)):

Now you separate the brand from an accident. Accidents happen to everyone. Now you humanize your company and you're saying, "We had an accident. It was caused by these things, these mistakes, or these issues without legal admissions. But there's an accident and it's counter to our guidelines, and this is the way we're going to address it. This is how we're remediate it. We're following the steps that we've created when there is a mistake." And mistakes happen to everyone. Now that doesn't look like there's an intentional culture and disregard for the environmental impacts on people of color. The idea of intentional racism is significantly dissipated and now you're looking at an accident by a business member of the community, and they're trying to be responsive to it in a responsible way under existing laws.

Maribel Nicholson-Choice ([30:35](#)):

I think it's a totally different discussion that you're having if you do your homework ahead of time and you understand and have some core principles and are ready to get to the building consensus and get to the table so that you can reach possibly a settlement of the litigation or significant portion of the litigation.

Libby Stennes ([30:59](#)):

Maribel, this has been a great conversation today. We hope that our listeners now understand a little better the definitions of environmental justice, and that we've given you some things to consider when you think about what environmental justice means to you and how it may impact your operations. We also hope that what you take away from today is there are some active steps you can take now to plan and get started to build that trust to understand the impact to your operations and to really be better prepared and hopefully you won't have the situation of accidents or lawsuits, but if you do that foundation will be very important to help to mitigate that impact.

Maribel Nicholson-Choice ([31:52](#)):

I think that this was really interesting to hear about how, from a litigation perspective, clients can show up highly charged. And these techniques that we talked about have been around for many years, even though environmental issues and social impact seems to be new, it's not, it's been around many years and environmental justice and how to handle those type of issues has been around a long time.

Libby Stennes ([32:20](#)):

Thank you all for listening today and we hope you will tune in to the next episode in our ongoing series.

Maribel Nicholson-Choice ([32:27](#)):

Thank you all so much.