

Corporate Enviro Planning In The Black Lives Matter Era

By **Simone Jones and Nicole Noelliste**

Environmental groups have long complained that incidents at major industrial facilities, such as spills, releases, explosions, fires and leaks, as well as the siting of major assets bearing the risk of negative health effects, disproportionately impact communities of color. These concerns, however, have largely failed to gain traction.

Given the increasing attention paid to systemic racism endured by people of color, owing in large part to the Black Lives Matter movement, concerns that minority communities bear a disproportionate share of adverse consequences resulting from environmental incidents and asset siting likely will be magnified, and scrutiny of those claims is expected to increase significantly.

The regulated community should therefore consider the implications of the movement for incident response and asset siting, and tailor its approach to reflect current times — the era of Black Lives Matter.

The Significant Risk to Companies From Environmental Incidents

Major facilities take comprehensive measures, often sparing no expense, to prevent explosions, fires and other releases. This is done for good reason — with potential consequences of these environmental incidents including loss of life or injury to employees or community members, and damage to property both on and offsite. These incidents also have the potential to necessitate inconvenient and costly community evacuations and shelter-in-place orders.

Depending on their magnitude, environmental incidents may spawn investigations by an array of state and federal agencies, including state environmental agencies, the U.S. Chemical Safety and Hazard Investigation Board, the National Transportation Safety Board, the U.S. Environmental Protection Agency and the Occupational Safety and Health Administration (and its OSHA-approved state counterparts).

It is not uncommon for the U.S. Department of Justice to initiate civil, and even criminal, investigations. And companies that experience these incidents are also at significant risk of tort litigation brought by community members and other affected parties, and of being tried and found liable in the court of public opinion due to unfavorable media coverage — a fate sometimes just as damaging to businesses, if not more so, as a judgment issued by a court of law.

An important — but often unanticipated, and not easily quantifiable — issue resulting from an environmental incident may be the impact on a company's social license to operate: The



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public, particularly the community in which the facility is located, injured, upset and already leery of the company's presence, may question the company's contribution to the community, notwithstanding the high-paying jobs that the business provides and its overall community engagement.

The Substantial Outlays Involved in Asset Siting

Companies do not approach major asset siting lightly. Determining the most suitable location for a facility requires a business to balance a number of considerations, including the company's desire to be a good environmental steward, and its need to accomplish its operational goals.

The varied considerations, which must be approached strategically, include geography, development logistics, and the length and complexity of permitting processes. Major asset siting can last years, and involve many internal resources, developers and consultants, all at the cost of tens of millions of dollars — if not more.

Because failed, delayed or otherwise problematic siting can have cascading effects throughout a company, potentially affecting its balance sheet and reporting obligations, companies strive to get it right the first time.

Demands for Equality and Environmental Justice

Environmental groups and members of affected communities have for years demanded equality and environmental justice, claiming that negative environmental consequences resulting from the operation of certain existing facilities and planned major assets disproportionately impact communities of color.

Recently, the U.S. Court of Appeals for the Fourth Circuit vacated a permit for the construction and operation of a compressor station intended to facilitate the transmission of natural gas through a pipeline in a historic, predominantly African American community.^[1] The court declared that "environmental justice is not merely a box to be checked."

This ruling came as concern is increasing about environmental justice generally, both by the environmental movement and communities at large. There also are pending environmental justice challenges to an array of regulations, including process safety, siting and other issues.

Environmental justice lawsuits are being filed in increasing numbers across the country. And in the wake of the Black Lives Matter movement gaining traction, the need to proactively consider and address the problem of disproportionate adverse impacts of environmental incidents and asset siting on communities of color will only intensify.

The Increasing (and Express) Recognition That Black Lives Matter

Black Lives Matter, founded in 2013, was catapulted into the mainstream earlier this year. The murder of George Floyd — perhaps owing to the captive audience created by the COVID-19 global pandemic, its proximity in time to the killing of Ahmaud Arbery, or its sheer brutality — captured attention around the world, and galvanized demands for racial justice and equality.

Although corporate America had largely distanced itself from the movement prior to this time, many large corporations have now joined — and in some cases are leading — the

efforts to finally put an end to systemic and structural racism. These efforts not only include financial contributions to organizations combating racial injustice, such as the NAACP Legal Defense Fund, but also partnerships with the Black community.

A natural outgrowth of corporations' recognition of the inequities faced by the Black community is increased attention to claims that the corporations are contributing to those disparities — including through their existing and planned facilities. Companies can expect that long-standing concerns about environmental incident response and asset siting, and their effects on communities of color, will be greatly magnified, regardless of validity. Careful planning around these and other scenarios is therefore a must.

Meaningful Engagement in the Era of Black Lives Matter

The current landscape is fluid, and still evolving. However, we include below some meaningful ways that companies should consider engaging with communities of color when responding to environmental incidents and planning asset siting.

Be transparent.

There is always a tension between transparency and the threat of investigations and litigation. However, being open and getting out in front of issues builds trust with communities, and can often be accomplished without adverse impacts for subsequent investigations and litigation.

There also is a significant risk that damaging information may ultimately be disclosed in any event by the press or on social media, possibly destroying a company's credibility in the affected community and beyond, even internationally. Companies should therefore be transparent with communities at all stages, including in responses, audits and planning.

Involve the community.

Members of local communities have vested interests in protecting the area in which they live. So companies should seek engagement from community stakeholders, including traditional participants, such as community leaders, but also nontraditional collaborators, like church pastors.

Companies should also consider utilizing the services of members of the community, including minority-owned businesses, in their environmental responses and site planning, to the extent feasible. Company involvement signals a corporation's true investment in the community.

Be visible.

Corporations often contribute financially in myriad ways to the communities in which they are located. It is important for companies to be visible in those communities, not only when responding to environmental incidents and planning asset siting, but also generally.

Being visible demonstrates concern for the community, and can engender a belief that the companies are sincere, concerned members of the community.

Empathize.

Second only to appearing credible is the need to demonstrate to the community that the

company cares. Although there may come a time when a company will have to balance being empathetic with mounting its best defenses in investigations or litigation, the importance of showing genuine concern in the first instance should not be discounted.

Be nimble.

Like the current environment, the circumstances of incident responses and asset siting are rapidly changing. It is important to adopt a fluid approach, built on certain foundational principles, to respond to changing circumstances. Constant monitoring to ensure effectiveness of chosen methods is critical.

Communicate.

It is imperative that companies regularly communicate with the communities in which they are located at set cadences, and using various forms of media designed to reach the intended demographics, in hopes of touching as many stakeholders as possible, whether or not there is an environmental incident response or planned siting.

At a societal level, the current moment is one that is long overdue, to be sure. Although much about the future remains uncertain, it is clear that the status quo that existed before Black Lives Matter went mainstream is no longer acceptable.

It also is certain that calls for racial and environmental justice will only grow louder, with the backing of many more voices. The time is therefore ripe for the regulated community to consider the impact of the movement on its environmental incident response and asset siting plans and strategies.

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[1] *Friends of Buckingham v. State Air Pollution Control Board*, No. 19-1152 (4th Cir. 2020).