

DEVELOPING NEWS



[Sean M. Sherlock](#)

Partner | Orange County
714.427.7036

ssherlock@swlaw.com

My [LinkedIn](#) Profile

Your Due Diligence Checklist Just Got Longer—Environmental Justice

Environmental justice has been around for the last 40 years. It reflects the concern that poor and minority communities bear the brunt of pollution and other hazards resulting from industrial development and operations. But environmental justice has been mostly in the background for these last four decades. Numerous councils, committees, and working groups have been formed to study the issue, talk about it, and issue memoranda and guidelines for government agencies. But to this point few laws exist to put any teeth into environmental justice. That is about to change.

At the federal level President Biden has made environmental justice one of his two top priorities. He issued an Executive Order outlining his environmental justice strategies, and multiple environmental justice bills have been introduced in Congress. In California a 2016 environmental justice law will soon be implemented by our counties and cities, and new environmental justice laws and regulations are in the works.

These measures will inevitably make it more difficult and expensive to develop projects and operate facilities in and around what the federal government calls “underserved communities,” and what California calls “disadvantaged communities.” Soon environmental justice may pervade nearly every aspect of the environmental profession, from entitlements and permits to site investigation and cleanup, to rulemaking and enforcement. Fortunately, the federal and California laws provide a framework and tools that can be used to anticipate and avoid or mitigate environmental justice concerns.

Federal Environmental Justice Laws

While some federal laws might arguably come under the umbrella of environmental justice, no existing federal laws directly implement environmental justice. In Executive Order No. 14008 President Biden outlined his five environmental justice priorities. They are: (1) developing an environmental justice screening tool; (2) strengthening EPA enforcement of environmental regulations in underserved communities; (3) creating a community notification program to monitor and provide real-time data on pollution; (4) creation by the Attorney General of a comprehensive environmental justice enforcement strategy; and (5) the Justice40 Initiative. The Justice40 Initiative seeks to direct 40% of benefits from federal investment to disadvantaged communities. This includes federal investment in clean energy and energy efficiency, clean transit, affordable and sustainable housing, workforce development, remediation of legacy pollution, and clean water infrastructure.

In addition, multiple environmental justice bills have been introduced in Congress this year. These include H.R. 516 (Bush, D-MO), the Environmental Justice Mapping and Data Collection Act of 2021; H.R. 1889 (Ruiz, D-CA), to require EPA to carry out certain programs relating to environmental justice; H.R. 2397 (DeGette, D-CO), to advance environmental justice by addressing cumulative impacts and underenforcement, and for other purposes; and H.R. 2021 (Grijalva, D-AZ), to restore, reaffirm, and reconcile environmental justice and civil rights.

California Environmental Justice Laws

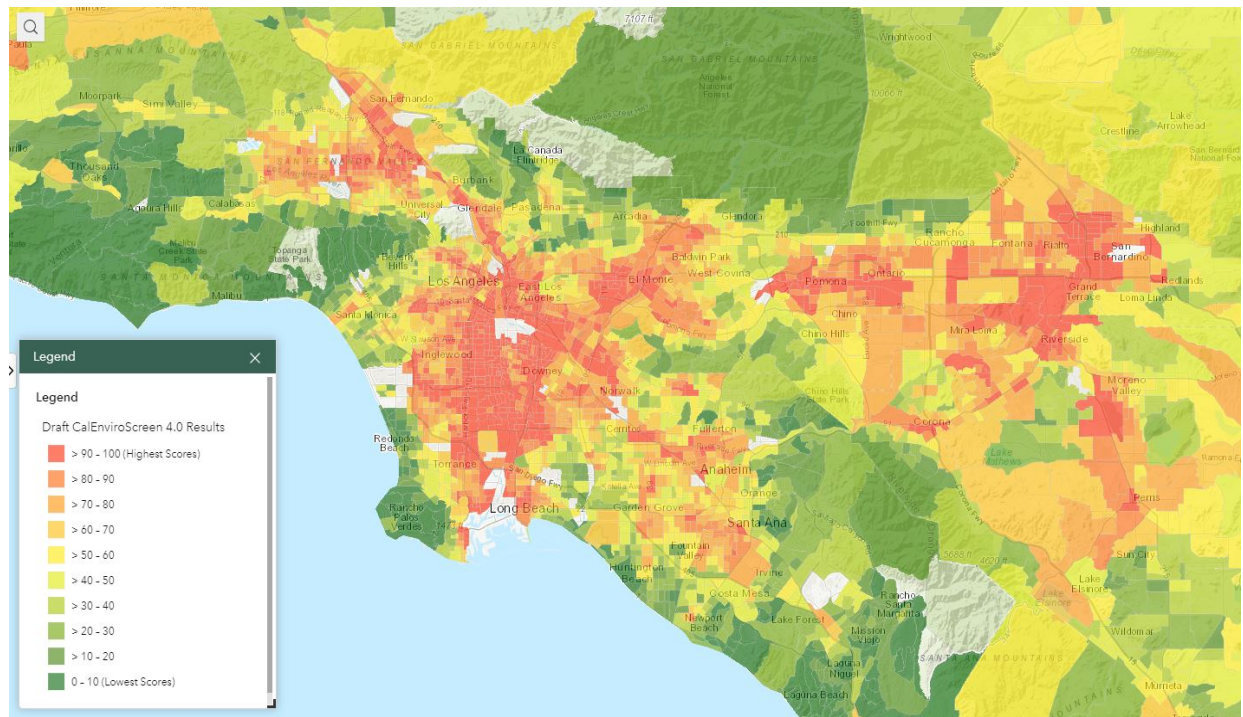
To date California has addressed environmental justice primarily through municipal general plans. Under a 2016 law, cities and counties must include an environmental justice element in their general plans with their next major general plan revisions. Some municipalities have already done so, but most will be doing so in the next few years. Under this law, municipalities must identify disadvantaged communities within their jurisdiction, identify objectives and policies to reduce unique or compounded health risks in disadvantaged communities, and prioritize improvements and programs that address the needs of disadvantaged communities.

Additionally, a new bill has recently been introduced (A.B. 1001), which if it becomes law will require California EPA to publish a list of “overburdened communities,” and will impose heightened procedural and substantive standards on the issuance of environmental permits in those overburdened communities. The bill would set a very high bar for approval of environmental permits, requiring agencies to deny permits or impose conditions upon a finding of adverse cumulative or public health stressors in the overburdened community that are higher than those borne by other communities in the state. This standard could provide abundant litigation fodder for project opponents.

Finally, Los Angeles County is developing a Green Zone Ordinance that will designate 11 Green Zone Districts and impose heightened development standards and operating restrictions in those districts. The Green Zone Ordinance could be adopted as soon as this August 2021. For more details on the LA County Green Zone Ordinance see my article [here](#).

Due Diligence and Mitigation or Avoidance

Fortunately, there are ways to anticipate and address environmental justice issues. The US EPA and California EPA have developed screening tools to determine whether real property is within what they call “disadvantaged communities.” California, for example, has developed CalEnviroScreen, which scores areas throughout the state based on numerous factors. These include population factors such as poverty rates, educational attainment, linguistic isolation, and unemployment. They also include environmental factors such as air and water quality, facility toxics, contaminated sites, and impaired water bodies. The result is the following color-coded map:



Projects and existing operations within the red zones can expect to face heightened scrutiny in entitlement and permitting processes, as well as in enforcement actions. Although California’s environmental justice laws do not prescribe any specific mitigation to address environmental justice concerns, they identify various measures beneficial to disadvantaged communities which provide a roadmap for potential mitigation of environmental justice concerns. Additionally, some environmental justice programs and initiatives provide government funding and support for development of public facilities, services, and programs, which may provide opportunities to improve these areas.

Conclusion

Whether these measures will chase private investment and existing businesses out of the designated environmental justice red zones remains to be seen. What is apparent, however, is that our federal and state government are getting serious about putting teeth in environmental justice, and that development and existing operations in the environmental justice red zones is becoming more difficult and expensive.

April 20, 2021

Snell & Wilmer
Committed to being your perfect fit.®

Albuquerque | Boise | Denver | Las Vegas | Los Angeles | Los Cabos | **Orange County** | Phoenix | Portland | Reno
Salt Lake City | San Diego | Seattle | Tucson | Washington, D.C.