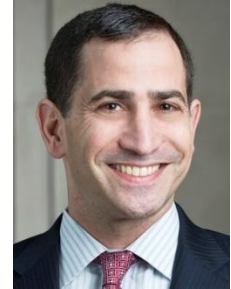


Emerging Environmental Justice Concerns For Calif. Cos.

By **Brian Israel** (March 17, 2022)

According to the U.S. Environmental Protection Agency, environmental justice is

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.



Brian Israel

Importantly, environmental justice concerns are not new.

For example, in February 1994, former President Bill Clinton signed Executive Order No. 12898 on federal efforts focusing on environmental justice in minority and low-income populations.

Pursuant to the executive order, "each Federal agency shall make achieving environmental justice part of its mission."^[1]

Despite decades of awareness of environmental justice issues, both federal and state governments have struggled to identify concrete action to address the reality of persistent disproportionate impacts from environmental stressors.

This time may be different. Both California and the Biden administration are focused on taking concrete, verifiable and comprehensive actions to address persistent environmental inequities and also address climate justice.

This article discusses recent regulatory and enforcement efforts by both the Biden administration and the state of California, and further provides guidance for companies seeking to understand how environmental justice issues may affect them.

Biden Administration Starting to Make Environmental Justice Goals Concrete

Since the early days of his administration, President Joe Biden has issued a number of executive orders and memoranda that set the stage for addressing environmental justice on a national level.

Most significantly, Executive Order No. 14008 on tackling the climate crisis, issued on Jan. 27, 2021, describes a governmentwide approach to addressing climate change and environmental justice and announces the Justice40 Initiative, which aims to deliver 40% of the overall benefits of federal investments in climate and sustainable transportation to disadvantaged communities.

The EPA followed suit, and on April 30, 2021, the Office of Enforcement and Compliance Assurance issued a memorandum titled "Strengthening Enforcement in Communities with Environmental Justice Concerns," calling for increased facility inspections in overburdened communities, the implementation of remedies that benefit overburdened communities, and increased engagement with communities about enforcement cases that affect them.

On June 21, 2021, the OECA issued another memorandum titled "Strengthening

Environmental Justice Through Criminal Enforcement," calling for increased outreach to crime victims in overburdened communities and enhanced remedies, including restitution, for redressing harms these victims suffer.

Then on Oct. 1, 2021, the EPA released its draft strategic plan for fiscal years 2022-2026, which includes several environmental justice initiatives and specific numerical goals — such as, for example, ensuring that 55% of all the EPA's inspections relate to communities with environmental justice concerns.

Earlier this year, on Jan. 5, the EPA released a draft environmental justice action plan called "EJ Action Plan: Building Up Environmental Justice in EPA's Land Protection and Cleanup Programs," focusing on strategies to strengthen compliance and enforcement, incorporate environmental justice considerations in the agency, increase community engagement, and advance the Biden administration's Justice40 initiative.

And on Jan. 26, following his November "Journey to Justice" Tour, EPA Administrator Michael S. Regan announced a number of actions the EPA will take to respond to the concerns of overburdened communities, including conducting unannounced inspections of suspected noncompliant facilities, and expanding air monitoring tools and technologies to enhance enforcement, among other actions.

The administrator's announcement also describes various agencywide and community-specific actions that the EPA plans to undertake as part of its renewed commitment to addressing environmental justice issues in communities that are "marginalized, underserved, and overburdened by pollution."

California Is Leading the Way on Environmental Justice Policy

Both before the Biden administration and since, California has taken a number of important actions that have further incorporated environmental policy into government activities and affirmed California's status as a leader in environmental justice policy.

A review of the environmental justice developments in 2021 and in the first part of this year signals an increase in state implementation of environmental justice policy that we expect will continue in 2022.

Companies with operations in California should pay close attention to these developments and prepare for a future where environmental justice concerns take center stage.

California law defines environmental justice as

the fair treatment and meaningful involvement of people of all races, cultures, incomes, and national origins, with respect to the development, adoption, implementation, and enforcement of environmental laws, regulations, and policies.[2]

The law further describes environmental justice as including a healthy environment for all people; the reduction or elimination of pollution burdens for populations and communities experiencing the adverse effects of that pollution; the provision of technical assistance to communities most affected by pollution; and the promotion of meaningful participation of such communities in environmental and land use decision-making processes.

The law requires that government entities, at a minimum, consider the recommendations

from communities most affected by pollution when making environmental and land use decisions.

A.B. 617, signed into law in 2017, focuses on implementing policies to improve air quality and public health in communities that experience disproportionate burdens from exposure to air pollutants.

The law directs the California Air Resources Board, or CARB, and local air districts to protect overburdened communities. It requires the implementation of community-level air monitoring and emission reduction plans; expedited best available retrofit control technology; enhanced emission reporting requirements; and increased penalty provisions.

CARB may also direct grant funding to communities determined to have the highest air pollution burden.

In response to A.B. 617, CARB established the Community Air Protection Program to reduce exposure in communities most affected by air pollution.

Air monitoring and emission reduction programs have already been implemented in a number of communities. These efforts can be monitored via CARB's CommunityHub dashboard.

Despite these programs, some nonprofit organizations have raised doubts about A.B. 617's effectiveness and criticized its implementation.

Pressure from such organizations and renewed focus on environmental justice issues on both the state and federal levels could lead to more aggressive state efforts to apply and possibly strengthen A.B. 617.

The California Attorney General's Increased Enforcement Related to Environmental Justice

In 2018, the California Attorney General's Office founded a Bureau of Environmental Justice with the mission of "protect[ing] people and communities that endure a disproportionate share of environmental pollution and public health hazards."

In April 2021, California Attorney General Rob Bonta announced the expansion of the bureau to 11 attorneys.

The bureau focuses on addressing environmental injustices by:

- "Ensuring compliance with the California Environmental Quality Act ... and land use planning laws";
- "Penalizing and preventing illegal discharge to air and water from facilities located in communities already burdened disproportionately with pollution";

- "Eliminating or reducing exposure to lead and other toxins in the environment and consumer products";
- "Remediating contaminated drinking water"; and
- "Challenging the [federal government's] actions that repeal or reduce public health and environmental protections." [3]

Bonta has recently taken a number of legal actions that demonstrate his commitment to ramping up his office's involvement in upholding environmental justice objectives.

For example, in July 2021, Bonta filed a lawsuit in the San Bernardino County Superior Court against the city of Fontana challenging the approval of a warehouse project located close to a polluted community. [4]

Among other things, the lawsuit — California v. City of Fontana — alleges that the city's environmental review of the project failed to adequately consider the project's environmental impacts in violation of the CEQA. The proposed project would be located in a low-income neighborhood that is already exposed to especially high levels of air pollution.

Several months later, in September 2021, Bonta secured a decision from the Fresno County Superior Court in *Comite Progreso de Lamont v. San Joaquin Valley Unified Air Pollution Control District*. The ruling required the San Joaquin Valley air district to comply with state air monitoring requirements for refineries. [5]

In 2017, California's Legislature passed A.B. 1647 to require refineries to monitor the air pollution from their facilities crossing into neighboring communities. But in December 2019, the San Joaquin Valley air district adopted regulations that essentially exempted refineries in its jurisdiction from this requirement.

The Fresno Superior Court found these regulations unlawful and ordered the district to adopt new regulations.

As 2021 drew to a close, Bonta announced a settlement in December with the city of Huntington Park intended to bring the city into compliance with S.B. 1000, which requires local governments to address environmental justice in land use planning. [6]

According to Bonta, the city failed to meet S.B. 1000's requirements when it adopted its 2030 general plan.

To comply with S.B. 1000, the general plan must identify and describe any disadvantaged communities in its jurisdiction; include meaningful and tailored environmental justice goals, policies, and objectives to address the needs of these communities; and be developed in coordination with the local community.

Then, in January, Bonta requested that the U.S. Court of Appeals for the Ninth Circuit rehear *Center for Community Action & Environmental Justice v. Federal Aviation*

Administration, an environmental challenge to the FAA's 2019 approval of the Amazon Air Regional Air Hub at San Bernardino International Airport.[7]

Former Attorney General Xavier Becerra and local environmental justice groups filed a federal lawsuit in early 2020 after the FAA approved the proposed 660,000-square-foot logistics center at the former Norton Air Force Base, on the basis that the FAA failed to sufficiently consider the cumulative impacts the project would have on the surrounding, overburdened community.

A three-member panel of the Ninth Circuit rejected the challenge in November 2021.

A month later, on Feb. 15, Bonta filed California v. McWane Inc. — a lawsuit against McWane, operating as AB&I Foundry — in the Alameda County Superior Court for allegedly unlawfully emitting hexavalent chromium in connection with operations at a metal foundry in East Oakland.[8]

The foundry neighbors a low-income community and a community of color that, according to the attorney general's complaint, suffers health burdens due to high levels of pollution in the area.

Finally, in September 2021, Bonta announced \$10 million in grants to research the effects of vehicle-related air pollution on public health and the environment and to mitigate impacts to environmental justice communities in California.

We will likely see the attorney general's office continue to intervene where development decisions involve environmental justice issues in the remainder of 2022.

Legislative Efforts to Implement Stronger Environmental Justice Policies in California

Several bills seeking to expand environmental policy were introduced last year.

For example, A.B. 1296 and S.B. 342 proposed adding two additional members to the South Coast Air Quality Management District, or SCAQMD, board to work with communities in the South Coast Air Basin that are disproportionately burdened by and vulnerable to high levels of pollution and issues of environmental justice.

The SCAQMD is responsible for the air quality in most of Los Angeles County, the urban parts of San Bernardino and Riverside Counties and all of Orange County.

A.B. 1296 died pursuant to Article IV, Section 10(c) of the California Constitution in January, and S.B. 342 was refused passage in the same month.

S.B. 499 would prohibit local governments from designating land uses that could significantly degrade local air, water or soil quality or adversely affect health outcomes in disadvantaged communities. This bill was returned to the secretary of senate pursuant to Joint Rule 56 on Feb. 1.

A.B. 1547, acknowledging that the expansion of the logistics industry presents air quality and environmental justice challenges for communities struggling with poor air quality, would require local governments, before approving a warehouse development project, to:

- Conduct a cumulative analysis of the air quality impacts of the project;

- Require the project applicant to develop certain agreements that affected residents or groups representing the community interest may elect to sign; and
- Ensure public participation by residents affected by the project.

The bill died pursuant to Article IV, Section 10(c) of the California Constitution in January.

A.B. 1001 received a fair amount of attention last spring because of its potential impact on environmental permitting. As it was originally drafted, it would have required, among other things, that the California Environmental Protection Agency publish, maintain and update a list of overburdened communities. It would have also required permit applications for new or existing facilities located or proposed to be located in overburdened communities to be accompanied by an environmental justice impact statement that assessed the potential environmental and public health stressors associated with the facility.

The bill was amended and passed the California Assembly in January, and was read for the first time in the Senate in February, and many of the earlier, attention-grabbing provisions of the bill were struck.

The bill no longer includes any language requiring that permit applicants prepare an environmental justice impact statement.

The bill now proposes adding only the following two provisions related to environmental justice to the general provisions of the environmental quality regulation in the Public Resources Code:

21081.8. (a) For projects that have adverse effects on the air or water quality of a disadvantaged community as identified pursuant to Section 39711 of the Health and Safety Code, mitigation measures identified in an environmental impact report or mitigated negative declaration to mitigate those adverse effects may include measures for avoiding, minimizing, or compensating for the adverse effects on that community.

(b) If the mitigation measures include compensating for adverse effects on the air or water quality of a disadvantaged community, the compensating measures shall mitigate those effects directly in the affected disadvantaged communities.

and

21098.5. In implementing this division, all public agencies shall give consideration to the principles of environmental justice, as set forth in subdivision (e) of Section 65040.12 of the Government Code, by ensuring the fair treatment and meaningful involvement of people of all races, cultures, incomes, and national origins.

Although most of these legislative efforts appear to have either failed or lost their potency, companies should continue monitoring proposed legislation.

These legislative efforts will provide insights into how California agencies consider environmental justice issues in environmental permitting decisions.

Environmental Justice — Key Considerations for Companies in California

With renewed focus on environmental justice at the state and federal levels, it is crucial that companies in California develop strategies for navigating these issues.

First, companies should investigate whether communities surrounding a proposed or existing facility are considered overburdened.

Companies should consider performing environmental justice analyses when selecting sites for new projects or when considering expanding operations at existing facilities.

At a minimum, a facility located in an environmental justice or overburdened community is likely to experience a higher level of agency scrutiny when it comes to permitting, inspections and enforcement. See, for example, the controversial approval of an elementary and middle school on a hazardous waste site by the city of Cudahy, which was found to be unlawful under the CEQA.

To help identify communities that are disproportionately burdened by pollution, California provides a screening tool called CalEnviroScreen. The tool was developed by CalEPA's Office of Environmental Health Hazard Assessment.

In October of last year, the latest version of CalEnviroScreen, version 4.0, was released.

Version 4.0 incorporates recent publicly available data and, according to CalEPA, uses improved calculations to better reflect environmental conditions or a population's vulnerability to environmental pollutants. A report on the tool's findings was also released in October.

Companies concerned about environmental justice issues or that are selecting a site for a new project can consult CalEnviroScreen to gather information about local communities and determine whether further investigation is necessary.

Second, companies should consider either developing stand-alone environmental justice policies or incorporating environmental justice policies into existing environmental, social and governance policies.

Companies that ignore environmental justice concerns may find themselves behind the ball when issues arise.

And finally, companies with facilities that are or may be located in an overburdened community should work together and form relationships with representatives of the surrounding community to understand their concerns and get ahead of potential issues.

Companies may consider implementing additional fence-line air monitoring programs to maintain transparency with agencies and the community.

Likewise, companies managing legacy contamination issues at environmental justice sites should consider similar actions.

Environmental justice issues will continue to affect industrial development, operations and

remediation in California, and companies should expect increased attention and enforcement at both the state and federal level.

Companies with operations in California or that are considering beginning operations in California should take environmental justice issues seriously and face them head-on.

Brian D. Israel is a partner and chair of the environmental practice group at Arnold & Porter.

Arnold & Porter associate Elise Henry contributed to this article.

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[1] See also, Brian D. Israel, An Environmental Justice Critique of Risk Assessment, 3 N.Y.U. Env't L. J. 469 (1995) (exploring ways in which environmental risk assessments may fail to detect risks in overburdened communities).

[2] Cal. Gov't Code, § 65040.12 (e).

[3] Environmental Justice, State of Ca. Dep't of Justice Off. of the Att'y Gen., <https://oag.ca.gov/environment/justice>.

[4] California v. City of Fontana, Case No. CIVSB2121829 (Cal. Super. Ct. July 23, 2021).

[5] Comite Progreso de Lamont v. San Joaquin Valley Unified Air Pollution Control District, No. 20CECG03416 (Cal. Super. Ct. Sept. 17, 2021).

[6] Agreement Between the California Attorney General and the City of Huntington Park (Dec. 13, 2021).

[7] Ctr. for Cmty. Action and Env't Just. v. FAA, Nos. 20-70272, 20-70464 (9th Cir. 2022).

[8] California v. McWane, Inc., No. 22CV007067 (Cal. Super. Ct. 2022).