

# Environmental Justice in the World of Insurance

Environmental Justice has been a focal point under the Biden Administration and recent actions by the U.S. [Environmental Protection Agency \(EPA\)](#) signal a shift toward increased oversight and enforcements against industries that affect disadvantaged communities. Some suggest that sweeping environmental justice regulations will directly impact many current operations and be a deciding factor when siting future industries.<sup>1</sup>

This said, what exactly is environmental justice, where did the national movement originate, what future impacts may emerge, and which considerations warrant attention while evaluating environmental insurance coverage?



## SECTION I

### What is Environmental Justice?

Despite progress in the United States, a long history of racial discrimination and economic disparity has resulted in underprivileged communities facing the unequal burden of pollution and climate change. It is well documented that communities of color and low-income populations reside in some of the most polluted areas, and those populations most immediately and severely affected by the results of climate change are often those without resources to respond.<sup>2</sup>

<sup>1</sup> <https://www.natlawreview.com/article/environmental-justice-and-why-you-should-care>

<sup>2</sup> <https://www.nytimes.com/2019/09/05/us/politics/environmental-justice-climate-town-hall.html>

In short, environmental justice embraces the principle that all communities and all people in any location have the right to equal protection under our environmental laws.

Per the National Law Review, “Environmental Justice is the concept that all people – regardless of race, color, national origin, or income – should receive fair treatment and have meaningful involvement with respect to the development, implementation, and enforcement of environmental laws, regulations and policies.”<sup>3</sup>

### History of Environmental Justice

While environmental justice seems to be a trending topic these days, community activists have been fighting the battle for decades.

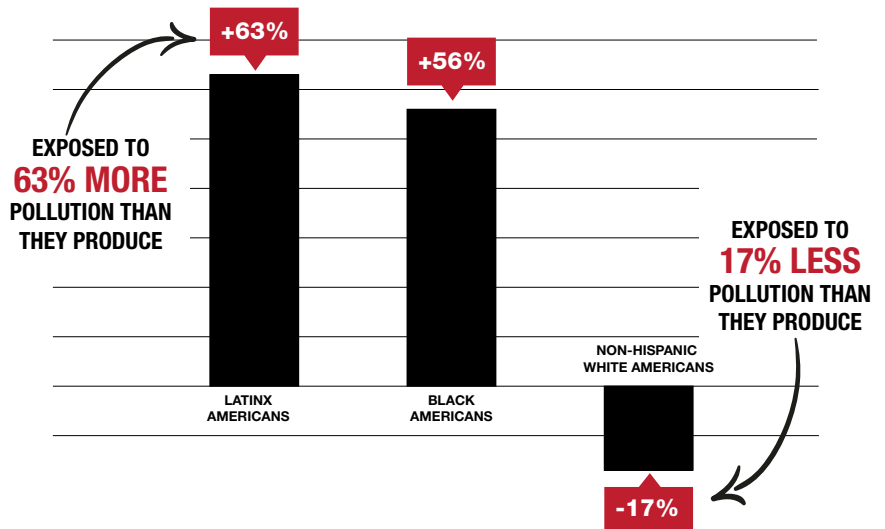


**1969:** Hazel Johnson, who some refer to as the “mother of Environmental Justice,” began pushing for more equitable conditions in Chicago. As an African American resident of low-income public housing, Johnson watched her family members and neighbors suffer from adverse health and safety conditions because of various nearby landfills, industrial operations and wastewater discharges.<sup>4</sup> Johnson sought to fight environmental racism and petitioned local officials and state agencies for broad reform in these most vulnerable “fence line” communities.



**1994:** While community activism helped push environmental justice forward on a local and regional level, environmental justice did not reach a national stage until the mid-1990’s. In 1994, President Bill Clinton signed an Executive Order (EO 12898) which instructed the different federal agencies to develop their own environmental justice policies that would limit the “disproportionately high and adverse” effects of environmental harms on low-income communities and people of color – generally, those who are more likely to be burdened by pollution and/or contaminated water sources.<sup>5</sup> Under this order, the Environmental Justice Advisory Council was also empowered to influence the priorities of the EPA.

However, at the time, President Clinton’s executive order lacked concrete requirements that environmental justice be considered in siting, rulemaking and permitting decisions, and more importantly, it did not create a framework for judicial review regarding compliance with the executive order. To that end, this meant that no person or organization could try to ensure that the order was enforced to any degree.



Source: <https://www.weforum.org/agenda/2020/07/what-is-environmental-racism-pollution-covid-systemic/>

<sup>3</sup> <https://www.natlawreview.com/article/environmental-justice-and-why-you-should-care>

<sup>4</sup> <https://grist.org/equity/hazel-johnson-environmental-justice-month-chicago/>

<sup>5</sup> <https://grist.org/politics/joe-biden-environmental-justice-executive-order-bill-clinton/>



**2014:** Nevertheless, the executive order still brought national attention to environmental justice issues and by 2014, all states had enacted similar policies requiring state agencies to address environmental justice.<sup>6</sup>

## SECTION II

### Environmental Justice under the Biden Administration

Fast forward to present day, environmental justice has been reinvigorated on a national level under the Biden administration. Within the first weeks of taking office, President Biden issued his own Executive Order (EO 14008) which articulated the commitment to address environmental justice issues including inequity due to climate change.

*The executive order created three (3) new committees focusing on environmental justice including:*

1. The White House Interagency Council on Environmental Justice (CEJ)
2. An Office of Health and Climate Equity at the Health and Human Services Department
3. An Environmental Justice Office within the Justice Department

Where previously the EPA led oversight and environmental justice implementation efforts, the new White House Interagency Council on Environmental Justice is comprised of many federal agencies – Agriculture, Defense, Labor, Housing, Energy, Environment, Transportation, etc. – which expand the reach of environmental justice. Per the executive order, the Council on Environmental Justice will be tasked with developing strategies to address current and historic environmental injustice, developing clear performance metrics for federal agencies to ensure accountability, and publishing performance scorecards on environment justice implementation publicly.<sup>7</sup>

Biden’s executive order also stipulated that 40% of federal sustainability investments must benefit disadvantaged ‘fence line’ communities, which shoulder undue pollution burdens. The initiative, which has been touted as the “Justice 40 Initiative,” could include investments in clean energy, clean transit, affordable housing and clean water infrastructure.<sup>8</sup> The initiative is already being put into action. For example, in early May 2021, the U.S. Department of Energy allocated more than 15 million dollars of funding to install solar energy in low-income communities and to train community members interested in the trade.<sup>9</sup>

### EPA Guidance and Potential Future Impacts – What Does This Mean?

Aside from increased investments into disadvantaged communities, many expect increased scrutiny and enforcement resulting from this administration’s renewed focus on environmental justice.

**The National Law Review suggests that companies with facilities located in vulnerable environmental justice areas should expect heightened scrutiny moving forward, including potential civil or criminal penalties.**<sup>11, 12</sup> Facility owners and operators should expect a number of changes related to enhanced regulatory scrutiny of certain sites, changes in enforcement and enforcement terms, increased facility inspections from governmental agencies and an increased demand for monitoring, notification and community engagement. With the Biden administration’s renewed emphasis on environmental justice, some forewarn that companies which own or operate facilities should pay close attention to any environmental justice metrics which may apply. Chemical facilities, power plants, treatment plants, refineries and heavy metal plants are likely to be the operations most commonly targeted.<sup>13</sup>

Recent EPA actions have supported the claim that increased oversight and enforcement is inevitable. In early April 2021, the current EPA administrator, Michael Regan, implored each regional office to pursue environmental violations more strongly in disadvantaged communities.

<sup>6</sup> <https://grist.org/politics/joe-biden-environmental-justice-executive-order-bill-clinton/>

<sup>7</sup> <https://www.natlawreview.com/article/environmental-justice-and-why-you-should-care>

<sup>8</sup> <https://grist.org/politics/joe-biden-environmental-justice-executive-order-bill-clinton/>

<sup>9</sup> <https://www.energy.gov/articles/doe-launches-initiatives-accelerate-solar-deployment-underserved-communities>

<sup>10</sup> <https://news.bloomberglaw.com/environment-reporter/biden-epa-sends-early-signal-of-aggressive-pollution-enforcement>

<sup>11</sup> <https://www.natlawreview.com/article/environmental-justice-and-why-you-should-care>

<sup>12</sup> <https://news.bloomberglaw.com/environment-reporter/biden-epa-sends-early-signal-of-aggressive-pollution-enforcement>

<sup>13</sup> Ebid

Some have surmised that President Biden's early efforts point toward further policy and legal changes that could shape the regulatory landscape over the coming years.<sup>10</sup>

In a series of memorandums issued between April-July 2021, Larry Starfield, the Acting Chief of EPA's Office of Enforcement and Compliance, outlined steps to advance environmental justice enforcement. Amongst other measures, the recent memo discussed increasing facility inspections in disadvantaged communities, addressing non-compliance in a timelier manner, monitoring 'fence line' conditions, engaging with the community and seeking restitution for victims of environmental crime.<sup>14</sup> Each memo underscores how harsher criminal penalties and accelerated cleanup obligations can help progress the Biden administration's environmental justice goals.<sup>15</sup>

In early May 2021, EPA Administrator Regan put his words into practice, and interjected in a Chicago permitting case. A car and metal shredding operation was slated for development in the economically disadvantaged and majority-Latino southeast side of Chicago – coincidentally the same neighborhood where Hazel Johnson started her environmental justice movement decades ago. Administrator Regan requested that permit authorization be put on hold until a better understanding of the environmental and social impacts be known. The Mayor of Chicago agreed and denied the permit until further notice.<sup>16, 17</sup>

In another recent and widely publicized enforcement action, EPA officials invoked emergency powers under the Clean Air Act to shut down the Limetree Bay refinery in the U.S. Virgin Islands. The refinery has a prolonged history of repeated accidental releases and non-compliance issues which have been directly impacting the nearby low-income housing community. The EPA's decision in May 2021 to stop operations entirely is extraordinary and has only been seen on three other occasions.<sup>18, 19</sup>

The federal focus on environmental justice has spurred many states to pursue their own environmental justice initiatives. As the current trend for specific requirements at the state and federal level builds, environmental justice could become depoliticized and be a baseline industry expectation like NPDES permitting or air emissions standards.

At the state level, states like New Jersey, Massachusetts and Connecticut have enacted or are in the process of drafting updated regulations which will have substantive environmental justice requirements for existing and future industry permitting. In New Jersey, an Environmental Justice Impact Statement will be a prerequisite for all permit applications and renewals for certain qualifying facilities.<sup>20</sup> New Jersey DEP is still in the process of determining the guidelines for implementing and enforcing the new Environmental Justice Law, however.<sup>21</sup>

All this supports the notion that environmental justice will be a central focus for environmental engagement moving forward. And with the interagency council expanding focus beyond the purview of the EPA, environmental justice principles, initiatives and enforcement actions might now, and in the future, be seen across all federal agencies and more widely in state regulations as well.

<sup>14</sup> [www.epa.gov/sites/production/files/2021-04/documents/strengtheningenforcementincommunitieswiththeconcerns.pdf](https://www.epa.gov/sites/production/files/2021-04/documents/strengtheningenforcementincommunitieswiththeconcerns.pdf)

<sup>15</sup> <https://www.lexology.com/library/detail.aspx?g=1429c508-5415-4ac6-94de-15e91a52104b>

<sup>16</sup> <https://news.bloomberglaw.com/environment-reporter/biden-epa-sends-early-signal-of-aggressive-pollution-enforcement>

<sup>17</sup> <https://www.eenews.net/stories/1063732139>

<sup>18</sup> <https://www.washingtonpost.com/climate-environment/2021/05/14/limetree-bay-refinery/>  
<sup>19</sup> <https://news.bloomberglaw.com/environment-reporter/biden-epa-sends-early-signal-of-aggressive-pollution-enforcement>

<sup>20</sup> <https://www.erisinfo.com/podcasts/episode-7-spotlight-new-jerseys-environmental-justice-law-means-industry/>

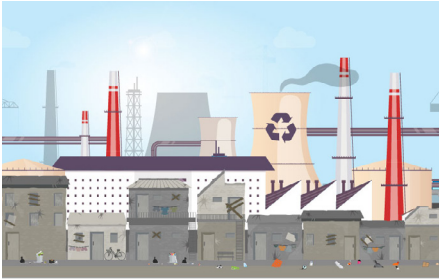
<sup>21</sup> <https://www.nj.gov/governor/news/news/562020/20200918a.shtml>

## SECTION III

### Recent Environmental Justice Claims

As the focus on environmental justice intensifies, there has been an increasing number of lawsuits filed in recent months revolving around the issues.

*In April, the City of Los Angeles filed suit against a scrap metal recycling facility operating in southern Los Angeles.*



The area surrounding the facility, which includes the nearby Watts neighborhood, are considered some of the most disadvantaged areas in the state of California.



Operations at S&W Atlas Iron & Metal Co. Inc. have reportedly subjected this community to metal shards, projectiles and noxious fumes for a prolonged period. Outdoor recreational space at a nearby high school even had metal shards piling to heights of 20+ feet.



The suit alleges that the disadvantaged community shouldered the primary burden of the environmental hazards created by the scrap yard, and in May 2021, the State of California joined the suit to pursue damages against S&W Atlas.<sup>22</sup>

*In late May 2021, several individuals and community organizations filed a lawsuit in the Superior Court of New Jersey pertaining to a proposed warehouse development in Piscataway, New Jersey.*



The suit is seeking to overturn the zoning board's approval of a 230-bay truck terminal warehouse facility on the grounds that a comprehensive assessment of the environment and social impacts was not conducted.



The warehouse is to be sited adjacent to an elementary school and ecological preserve. Piscataway is identified as an overburdened community under New Jersey's new Environmental Justice Law. Nearly 75% of residents are people of color and the township has an "F" rating from the American Lung Association for poor air quality.<sup>23</sup>



The suit contests that the increased trucking to and from the warehouse will further negatively impact the local air quality and bring undue environmental burden.

In New Jersey alone, the Attorney General and Department of Environmental Protection have filed 39 different environmental justice lawsuits since 2018, which have rendered nearly \$20MM in judgements. In May 2021, New Jersey filed seven additional suits for conditions impacting environmental justice communities, including one in Secaucus pertaining to the open-air storage of food waste.<sup>24</sup>

<sup>22</sup> <https://www.law360.com/environmental/articles/1389875/calif-seeks-to-join-la-environmental-justice-suit><sup>3</sup> <https://www.natlawreview.com/article/environmental-justice-and-why-you-should-care>

<sup>23</sup> <https://www.insidernj.com/press-release/piscataway-residents-sue-zoning-board-stop-warehouses-next-school-park/>

<sup>24</sup> <https://hudsonreporter.com/2021/05/11/environmental-justice-lawsuit-filed-against-secaucus-business/>

## SECTION IV

### Environmental Insurance Considerations

*\*\* Note, the items discussed below are not an exhaustive list and each potential risk should be evaluated independently.*

#### *Where is the covered location, and is it in an area of Environmental Justice concern?*

When analyzing for potential coverage, consider both the regional geography as well as the specific site setting for a covered location. While certain states may have state-specific environmental justice resources and regulations, an easy way to determine if a location is in an area of environmental justice concern is via the EPA's EJSCREEN mapping portal.

EJSCREEN provides a comparison to the national average and those areas receiving higher percentile scores are more disadvantaged for the given index. For instance, an index score of the 90th percentile indicates that on average 90% of Americans live under better conditions (in terms of the applicable environmental factor). Depending on the industry being covered, there may be increased exposure for third-party claims in these areas with greater environmental justice concerns.

#### *What type of industries could an environmental insurance policy cover?*

Industries with any type of air emissions, water discharges or hazardous waste generation could be subject to increased scrutiny under the revitalized state and federal environmental justice initiatives.

Chemical facilities, power plants, treatment plants, refineries and heavy metal plants are likely to be the operations most commonly targeted.<sup>25</sup> In New Jersey, their recent environmental justice bill directly applies to, amongst others, gas fired power plants, incinerators, sludge processing facilities and landfills.<sup>26</sup> These high-risk industries in areas of potential environmental justice heightens the exposure to potential third-party claims. Additionally, increased government scrutiny might mean more frequent compliance inspections, and, in some cases, this could result in additional monitoring and testing costs, remediation costs or various associated regulatory costs.

#### *Does the covered location have active operations or is the policy for proposed redevelopment?*

Many of the new regulations enacted as part of this recent environmental justice movement regulate the siting and permitting of such high-risk industries. Any industrial development will likely require an environmental justice assessment which evaluates potential community impacts as they relate to the future use.

That being said, an insured seeking coverage for industrial development would likely already have or will have to have the proposed project vetted by the appropriate regulatory agencies. While approval to proceed may help with initial environmental justice concerns, there is always the potential for future exposures

#### *Does the insured have a long history of operating on site, and have there been past compliance violations?*

If the insured is seeking coverage for an active facility or one that is being acquired, it is important to understand the operating and permit compliance history of the covered location. The EPA ECHO Facility Search aggregates information on state, local and tribal environmental agency compliance and enforcement records including air emissions, discharges, waste handling, etc. The ECHO Facility Search summary provides information on significant violations, formal enforcements, periods of non-compliance, the number of site inspections and whether a facility is located in an 80th percentile or greater environmental justice area.<sup>27</sup> Evidence of prolonged or repeated violations, especially for high-risk industries in areas of environmental justice concern, may further heighten the risk of third-party claims.

<sup>25</sup> <https://www.natlawreview.com/article/environmental-justice-and-why-you-should-care>

<sup>26</sup> <https://www.nj.gov/governor/news/news/562020/20200918a.shtml>

<sup>27</sup> <https://echo.epa.gov/facilities/facility-search>

*In the Limetree Bay refinery example, repeated violations (amongst other things) led to an on-site inspection which halted all operations.<sup>28</sup> In certain cases, increased regulatory scrutiny due to environmental justice concerns, could lead to more instances of government required shutdowns and consequently, potentially increased business interruption coverage exposure.*



**Have there been environmental justice claims in the community surrounding a covered location?**

It is generally good practice to determine if there is increased awareness around environmental justice in the surrounding community. Evidence of on-going activism or lawsuits for other industries in the area could provide critical information when evaluating potential policy exposures.

## SECTION V

### Current and Future Environmental Justice Resources

As part of the recent Executive Order, the Biden administration has also outlined expectations for a new “Climate and Economic Justice Screening Tool”. The new screening tool will highlight disadvantaged communities that are threatened by the cumulative impacts of climate change, economic and racial inequality, as well as environmental pollution.<sup>29</sup>

The new tool will reportedly consider the EPA’s existing Environmental Justice Screening Tool (EJSCREENS) and California’s comprehensive “CalEnviroScreen” tool during development – both of which are discussed in more detail below. Like these existing Environmental Justice Screening Tools, the new screening tool will factor in proximity to emission sources, exposure pathways, community participation amongst many other economic, environmental and demographic variables.<sup>30</sup> The forthcoming “Climate and Economic Justice Screening Tool” is to be developed by the interagency council and will be a national standard once deployed. However, the timing of such is presently unknown.

While “CalEnviroScreen” is the gold-standard for state level environmental justice assessment and mapping, it is not the only state mapping tool out there. Other states such as New Jersey, New York and Minnesota have developed their own statewide screening tools.<sup>31, 32</sup>

### EPA’s Environmental Justice Screening and Mapping (EJSCREEN)

The EPA has developed an environmental justice mapping and screening tool – EJSCREEN – that provides a nationally consistent dataset and approach for combining environmental and demographic indicators. This tool allows you to generate a standard report which compares the state, regional and national percentiles for each of the environmental and demographic indicators in a defined area or at a point location.<sup>33</sup>

Layers corresponding to the different EJSCREEN Environmental Justice indexes or demographic indicator can also be toggled on in the EPA Enforcement and Compliance History Online (ECHO) facility search map which aggregates information on state, local and tribal environmental agency compliance and enforcement records for a facility including air emissions, discharges, waste handling, etc.<sup>34</sup> Under the EPA ECHO facility search map, you are also able to query where an area is above the 80th percentile for potential environmental justice exposures based on the separate Environmental Justice indexes.

<sup>28</sup> <https://www.washingtonpost.com/climate-environment/2021/05/14/limetree-bay-refinery/>

<sup>29</sup> <https://grist.org/politics/joe-biden-environmental-justice-executive-order-bill-clinton/>

<sup>30</sup> <https://www.hklaw.com/en/insights/publications/2021/04/environmental-justice-in-the-biden-administration>

<sup>31</sup> <https://seas.umich.edu/news/environmental-justice-screening-tools>

<sup>32</sup> <https://www.nj.gov/dep/ej/>

<sup>33</sup> <https://www.epa.gov/ejscreen>

<sup>34</sup> <https://echo.epa.gov/facilities/facility-search>

<p><b>Under EJSCREEN, there are currently 11 separate EPA environmental justice (EJ) indexes:</b></p>	<ul style="list-style-type: none"> <li>• National Scale Air Toxics Assessment - Air Toxics Cancer Risk</li> <li>• National Scale Air Toxics Assessment - Respiratory Hazard Index</li> <li>• National Scale Air Toxics Assessment - Diesel Particulate Matter (DPM)</li> <li>• Particulate Matter (PM 2.5)</li> <li>• Ozone</li> <li>• Lead Paint Indicator</li> <li>• Traffic Proximity and Volume</li> <li>• Proximity to Risk Management Plan Sites</li> <li>• Proximity to Treatment Storage and Disposal Facilities</li> <li>• Proximity to National Priorities List Sites</li> <li>• Proximity to Major Direct Water Dischargers</li> </ul>
<p><b>Each index considers one environmental factor (same as the name of the given index) in combination with 6 demographic indicators. The demographic indicators taken into consideration include:</b></p>	<ul style="list-style-type: none"> <li>• Percent low-income</li> <li>• Percent minority</li> <li>• Less than high school education</li> <li>• Linguistic isolation</li> <li>• Individuals under age 5</li> <li>• Individuals over age 64</li> </ul>

EPA has standardized how each EJ Index is calculated based on the environmental indicator and an average demographic value for an area (i.e., the demographic index).<sup>35</sup>

An EPA EJSCREEN index does not combine various environmental factors into a cumulative score. Each environmental indicator has its own EJ Index and is compared to the national average. You will typically see EJSCREEN indexes, and the demographic index reported as percentiles as compared to the national average. The higher the percentile indicates that a greater portion of the average population lives in areas where there is less potential for exposure/risk/proximity to certain facilities addressed in that index – in simpler terms, the higher the percentile, the more disadvantaged a community is when compared to the national average.

### **California EPA’s “CalEnviroScreen”**

In 2012, California state legislation was signed into effect to provide guidance on how proceeds from the state’s greenhouse gas emissions Cap and Trade Program would be appropriated. The new legislation required prioritizing investments to those disadvantaged and low-income communities in need of assistance. Under SB 535 and 2016’s Assembly Bill (AB) 1550, 25% of the available proceeds will be allocated to projects that provide a benefit to and are located in disadvantaged communities.<sup>36</sup>

As a result, California DEP devised a method to calculate and map the disadvantaged areas across the state. Such areas can be visualized on GeoTracker using the two environmental justice related layers:

1. CalEnviroScreen
2. Senate Bill (SB) 535 - Disadvantaged Communities

<sup>35</sup> <https://www.epa.gov/ejscreen>

<sup>36</sup> <https://oehha.ca.gov/calenviroscreen/sb535>



CalEnviroScreen assesses similar environmental justice metrics as the EPA EJSCREEN Indexes, except CalEnviroScreen provides one overall score encompassing many indicators as opposed to needing different indexes. CalEnviroScreen uses environmental, health and socioeconomic information to produce a numerical score for each census tract in the state and considers both “pollution burden” and “population characteristics” when determining cumulative impacts.<sup>37</sup>

The inputs fall into the following categories:

Pollution Burden		Population Characteristics	
Exposures	Environmental Effects	Sensitive Populations	Socioeconomic Factors
1) Ozone	1) Solid Waste Facilities	1) Asthma	1) Poverty
2) PM 2.5	2) Cleanup Sites	2) Cardiovascular disease	2) Unemployment
3) Diesel OM	3) Groundwater Threats	3) Low Birth Weight Infants	3) Education Attainment
4) Pesticide Use	4) Impaired Waterways		4) Linguistic Isolation
5) Traffic	5) Haz Waste Facilities		5) Low Income Housing
6) Drinking water			
7) Toxic Release			

The factors for an area are averaged and weighted to produce an overall score. Like EPA EJ Indexes, the CalEnviroScreen score represents a comparison to the average and measures the relative pollution burdens and vulnerabilities in one census tract compared to others. The higher the CalEnviroScreen score the greater the environmental injustice for that area of the state.<sup>38</sup>

The public can access CalEnviroScreen data via GeoTracker or through a standalone mapping tool maintained by the Office of Environmental Health Hazard Assessment (OEHHA). Note, CalEnviroScreen version 3.0 is currently displayed in GeoTracker but an updated version 4.0 is available in the separate portal.

As described, using the results of EnviroScreen, CalEPA has designated the highest 25% scoring census tracts as disadvantaged communities. Areas that scored the highest 5% of CalEnviroScreen’s Pollution Burden, but do not have an overall score because of unreliable socioeconomic or health data, are designated as disadvantaged communities also. These Disadvantaged Areas are identified separately under the SB 535 layer in GeoTracker but have the same underlying metrics as CalEnviroScreen.

The public can access CalEnviroScreen data via GeoTracker or through a standalone mapping tool maintained by the Office of Environmental Health Hazard Assessment (OEHHA). Note, CalEnviroScreen version 3.0 is currently displayed in GeoTracker but an updated version 4.0 is available in the separate portal.

<sup>37</sup> <https://oehha.ca.gov/calenviroscreen>

<sup>38</sup> Ebid



While the focus on environmental justice continues to heighten, many sites within targeted industries may be subject to additional environmental testing, leading to fines or other penalties. When assessing properties in geographic locations subject to environment justice regulations, it is important to partner with a knowledgeable carrier who can help properly mitigate the risks and address the coverage considerations described above. Contact your underwriter today to learn more about how our core products and services can help protect your clients' operations.

### Additional References:

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