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## Implementing Environmental Justice: The New Agenda for California State Agencies

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# ARTICLE

  

## IMPLEMENTING ENVIRONMENTAL JUSTICE: THE NEW AGENDA FOR CALIFORNIA STATE AGENCIES

BY ELLEN M. PETER\*

### I. INTRODUCTION

On October 6, 1999, Governor Gray Davis signed SB 115, the first bill explicitly enacting an environmental justice policy into California's statutes.<sup>1</sup> The bill defines "environmental justice" as: "the fair treatment of people of all races, cultures, and incomes with respect to the development, adoption, implementation, and enforcement of environmental laws, regulations, and policies."<sup>2</sup> Under this legislation, the Governor's Office of Planning and Research (hereinafter OPR) "shall be the coordinating agency in state government for environmental justice programs" and is designated to meet the ambitious goal expressed in this definition.<sup>3</sup> In separate statutes, the California Environmental Protection Agency (hereinafter Cal

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<sup>1</sup> 1999 CAL. STAT. ch. 690, pp. 4043-44. SB 115 was authored by Senator Hilda Solis, and its provisions are codified in separate statutes. CAL. GOVT. CODE § 65040.12 (West Supp. 2001); CAL. PUB. RES. CODE §§ 72000-01 (West Supp. 2001).

<sup>2</sup> CAL. GOVT CODE § 65040.12(c) (West Supp. 2001).

<sup>3</sup> CAL. GOVT CODE § 65040.12 (West Supp. 2001).

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EPA) is required to conduct its activities in a manner that ensures this goal is attained.<sup>4</sup>

Former Governor Pete Wilson had vetoed five earlier bills addressing the topic.<sup>5</sup> In his veto messages, Governor Wilson asserted the concern for environmental justice was adequately met under the California Environmental Quality Act (hereinafter CEQA).<sup>6</sup> Regardless of whether CEQA already had provided authority to achieve environmental justice, these new California statutes undeniably raise the profile of the issue for California state administrative agencies. In particular, the directive to Cal EPA to pursue environmental justice imposes a significant affirmative duty.

The environmental justice bills<sup>7</sup> signed into law by Governor Davis generally refer to the term "environmental justice" as "fair treatment," but the application of this definition is not spelled out. Rather, the execution of the environmental justice definition is assigned to California's administrative agencies under a procedural scheme coordinated by OPR<sup>8</sup> and implemented, in part, by Cal EPA.<sup>9</sup> As always, the devil is in the details, and state agencies have begun to wrestle with the statutory mandate to achieve environmental justice.

The purpose of this article is to give an account of the commencement of this process and to highlight some of the issues presented to the Davis administration. Preliminarily, some background is required for context. The achievement of environmental justice does not start on a fresh slate. Federal

<sup>4</sup> CAL. PUB. RES. CODE § 72000 (West Supp. 2001).

<sup>5</sup> See *infra* notes 68 to 90 and accompanying text, III A. Historical Legislative Antecedents.

<sup>6</sup> See CAL. PUB. RES. CODE §§ 21000-21178 (West 1996 & Supp. 2001). The environmental impact report procedure in CEQA has long permitted the consideration of economic or social effects to determine the significance of the physical changes of a proposed project. CAL. CODE REGS. tit.14, § 15131 (2000).

<sup>7</sup> In 2000, Governor Davis signed three more bills, including a modification of the procedural scheme imposed by the 1999 legislation. Described in detail *infra*, in part II D of this article, these three bills are SB 89, 2000 CAL. STAT. ch. 728, pp. 3596-98 [amended and added provisions to CAL. GOV'T CODE § 65040.12 (West Supp. 2001) and CAL. PUB. RES. CODE §§ 72000, 72001.5, 72002-04 (West Supp. 2001)], AB 970, 2000 CAL. STAT. ch. 329, pp. 1665-75. [added CAL. PUB. RES. CODE § 25550(g) (West Supp. 2001)] and AB 1740, 2000 CAL. STAT. ch. 52, pp. 91-92 [budget bill appropriation for Cal EPA, item 0555-001-0001].

<sup>8</sup> CAL. GOV'T CODE § 65040.12 (West Supp. 2001).

<sup>9</sup> CAL. PUB. RES. CODE §§ 72000-04 (West Supp. 2001).

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statutes and federal executive initiatives impose separate legal requirements. These federal mandates both require actions by California state agencies and provide guidance on how to interpret the new California statutes. Thus, this article begins with an account of the legal and historical development of the concept of environmental justice.

## II. THE FEDERAL MANDATES FOR ENVIRONMENTAL JUSTICE

The environmental justice movement grew out of the civil rights movement.<sup>10</sup> Thus, the environmental justice legal challenges are founded on civil rights authorities, including Title VI of the Civil Rights Act of 1964.<sup>11</sup>

### A. TITLE VI OF THE CIVIL RIGHTS ACT OF 1964 IS THE FEDERAL BASIS FOR ENVIRONMENTAL JUSTICE MANDATES

#### 1. *Title VI and Disparate Impact*

Claims of environmental injustice rarely can be attributed to direct animus against the affected racial or economic group.<sup>12</sup> Proof of purposeful intent to discriminate is required to sustain a claim under the equal protection clause of the 14th Amendment to the U.S. Constitution,<sup>13</sup> and few environmental justice cases predicated on this constitutional theory prevail.<sup>14</sup> Environmental justice advocates commonly rely on other legal theories such as regulations promulgated under civil rights statutes, which do not require proof of intentional discrimination.

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<sup>10</sup> See, e.g., LUKE W. COLE & SHEILA R. FOSTER, FROM THE GROUND UP-ENVIRONMENTAL RACISM AND THE RISE OF THE ENVIRONMENTAL JUSTICE MOVEMENT 20-21 (2001) (hereinafter *GROUND UP*). Environmental justice is one of the top topics of law review commentators, and hundreds of articles on the topic have been published during the last decade (a search of the Lexis law review data base in February 2001 for "environmental justice" identified over 800 articles). Many of these articles trace the history of the environmental justice movement. See, e.g., Alice Kaswan, *Environmental Justice: Bridging the Gap Between Environmental Laws and "Justice,"* 47 AM. U. L. REV. 221, 256-66 (1997).

<sup>11</sup> 42 U.S.C. § 2000d (1994).

<sup>12</sup> COLE, *GROUND UP*, *supra* note 11 at 63-65, 71, 74.

<sup>13</sup> See, e.g., *Washington v. Davis*, 426 U.S. 229, 239 (1976).

<sup>14</sup> See, e.g., *R.I.S.E., Inc. v. Kay*, 768 F.Supp. 1144, 1150 (E.D. Va. 1991), *aff'd*, 977 F.2d 573 (4th Cir. 1992).

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In July 1964, Congress passed the Civil Rights Act of 1964 which, in separate statutory titles, prohibits discrimination based on race, color or national origin in various settings such as public accommodations and public schools.<sup>15</sup> Title VI prohibits such discrimination in programs or activities by recipients of federal funds:

No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.<sup>16</sup>

In a multiplicity of opinions, the U. S. Supreme Court held that a claim brought directly under Title VI, like one based on the equal protection clause, requires a showing of discriminatory intent, but federal agencies may validly adopt regulations implementing Title VI that also prohibit discriminatory impacts.<sup>17</sup> Disparate impact regulations are directed to policies and practices that are neutral on their face but which have the effect of discriminating.<sup>18</sup> Executive Order 12250, signed by President Jimmy Carter in 1980, designated the U. S. Attorney General as the coordinator to implement and enforce Title VI and to review all of the regulations promulgated by

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<sup>15</sup> See 42 U.S.C. §§ 2000a-d (1994).

<sup>16</sup> 42 U.S.C. § 2000d (1994), Pub. L. No. 88-352, Title VI, § 601, 78 Stat. 241 (1964).

<sup>17</sup> *Guardian Ass'n v. Civil Serv. Comm'n of City of New York*, 463 U.S. 582, 584, fn. 2, 607, fn. 27 (1983). Subsequently, an unanimous U.S. Supreme Court restated the *Guardians* holding when it considered the regulations promulgated under section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794. *Alexander v. Choate*, 469 U.S. 287, 293 (1985).

<sup>18</sup> Attorney General Janet Reno's July 14, 1994 memorandum to heads of departments and agencies that provide federal financial assistance emphasized that the disparate impact standard is to be fully utilized in Title VI. This Attorney General memorandum, issued to commemorate the 30th anniversary of the passage of Title VI of the Civil Rights Act, committed the U. S. Department of Justice to ensuring that all federal agencies met their Title VI responsibilities to eliminate "facially neutral policies and practices that act as arbitrary and unnecessary barriers to equal opportunity. . . ." The only exception is when these policies are "necessary to the program's operation and there is no less discriminatory alternative." Attorney General Janet Reno, July 14, 1994, memorandum "Use of Disparate Impact Standard in Administrative Regulations Under Title VI of the Civil Rights Act of 1964" is available at <<http://www.epa.gov/civilrights/docs/tab15.pdf>> (visited Feb. 19, 2001).

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all federal agencies to implement Title VI.<sup>19</sup> By 1983, in response to Title VI and to conform with Executive Order 12250, every Cabinet department and about 40 federal agencies adopted disparate impact regulations; these Title VI regulations prohibit practices that have the effect of discrimination, and proof of intentional discrimination is not required to prove a regulatory violation.<sup>20</sup>

## 2. U.S. EPA's Regulations Implementing Title VI

U.S. EPA initially released its Title VI regulations, in coordination with the U.S. Department of Justice, on July 5, 1973.<sup>21</sup> Revised regulations were released on January 12, 1984 and remain in effect.<sup>22</sup> In response to Executive Order 12250, under these U.S. EPA regulations, the standard of proof is disparate impact, proof of intentional discrimination is not required and discrimination based on race, color, national origin, sex and disability is prohibited.<sup>23</sup> U.S. EPA's Office of Civil Rights is responsible for developing and administering that agency's compliance programs.<sup>24</sup>

Title VI applies to the recipients of federal funds, and the U.S. EPA regulations define "recipient" broadly.<sup>25</sup> In the Civil

<sup>19</sup> Exec. Order No. 12,250, 45 Fed. Reg. 72995 (1980), *reprinted in* 42 U.S.C.A. § 2000d-1 (1994).

<sup>20</sup> *See e.g.*, *Guardian Ass'n v. Civil Serv. Comm'n of City of New York*, 463 U.S. 582, 619 (1983) (Marshall, J., dissenting). *See also e.g.*, 7 C.F.R. § 15.3(b)(2) (2000) (Department of Agriculture); 43 C.F.R. § 17.3(b)(2)-(3) (2000) (Department of Interior).

<sup>21</sup> 38 Fed. Reg. 17968 (1973).

<sup>22</sup> 49 Fed. Reg. 1656 (1984) (codified at 40 C.F.R. pt. 7 (2000)). In keeping with the statutory mandate, the U.S. EPA Title VI regulations are not directed to discrimination based on income.

<sup>23</sup> 40 C.F.R. § 7.35(b) (2000) provides:

A recipient shall not use criteria or methods of administering its program which have the effect of subjecting individuals to discrimination because of their race, color, national origin, or sex, or have the effect of defeating or substantially impairing accomplishment of the objectives of the program with respect to individuals of particular race, color, national origin, or sex.

<sup>24</sup> *See* 40 C.F.R. § 7.105-135 (2000).

<sup>25</sup> 40 C.F.R. § 7.25 (2000) provides:

Recipient means, for the purposes of this regulation, any state or its political subdivision, any instrumentality of a state or its political subdivision, any public or private agency, institution, organization, or other entity, or any person to which Federal financial assistance is extended directly or through another recipient, including any successor, assignee, or transferee of a recipient, but ex-

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Rights Restoration Act of 1987, Congress clarified the far-reaching coverage of Title VI.<sup>26</sup> Essentially, any federal dollar to any state agency, local agency or private organization, including pass-through monies, are subject to Title VI restrictions.<sup>27</sup> Moreover, a federal dollar to one state agency program imposes the Title VI obligations for all programs of that state agency.<sup>28</sup> Title VI's reach is comprehensive and pervasive.

### 3. *Administrative Adjudications Under U.S. EPA's Title VI Regulations*

U.S. EPA's Title VI regulations set forth compliance procedures, including a complaint mechanism.<sup>29</sup> As of November 30, 2000, the U.S. EPA Office of Civil Rights had received 108 Title VI complaints.<sup>30</sup> The first complaint was filed in September 1993 against a new commercial hazardous waste incinerator and landfill in Mississippi, and it was dismissed in March 1997 when the permit application became inactive.<sup>31</sup> Of these 108 complaints, to date, only one complaint has been decided on the merits.<sup>32</sup>

The first, and currently only, substantive decision of the U.S. EPA Office of Civil Rights was in response to a complaint

cluding the ultimate beneficiary of the assistance.

<sup>26</sup> Pub. L. 100-259, 102 Stats. 28 (1988) (codified at 42 U.S.C. § 2000d-4a (1994)).

<sup>27</sup> 40 C.F.R. § 7.25 (2000) (defining "recipient").

<sup>28</sup> 42 U.S.C. § 2000d-4a (2000). The Civil Rights Restoration Act of 1987 was adopted partially in response to the decision in *Grove City College v. Bell*, 465 U.S. 555, 570-74 (1984). See *NCAA v. Smith*, 525 U.S. 459, 466 fns. 3, 4 (1999).

<sup>29</sup> See 40 C.F.R. § 7.120 (2000). The U.S. EPA Office of Civil Rights web page provides a list of Title VI complaints filed with U.S. EPA, summary information about these complaints and information concerning the one substantive decision rendered by the U.S. EPA Office of Civil Rights. See <<http://www.epa.gov/civilrights/t6complnt.htm>> (visited Feb. 19, 2001). The most recent information available to the author from this source was the complaint summary dated November 30, 2000.

<sup>30</sup> See <<http://www.epa.gov/civilrights/docs/t6stnov2000.pdf>> (visited Feb. 19, 2001).

<sup>31</sup> See chart at 22 <<http://www.epa.gov/civilrights/docs/t6csnov2000.pdf>> (visited Feb. 19, 2001).

<sup>32</sup> Of the remaining 107 complaints, 61 complaints are still pending with the U.S. EPA Office of Civil Rights and 46 complaints were dismissed. The U.S. EPA Office of Civil Rights' decisions for dismissal are based on various grounds, including the complaints were not timely filed, the complaint allegations were insufficient and there were no federal monies connected to the project. The summary chart is available at <<http://www.epa.gov/civilrights/docs/t6nov2000.pdf>> (visited Feb. 19, 2001).

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by the St. Francis Prayer Center challenging the issuance of a prevention of significant deterioration permit under the Clean Air Act for the proposed Select Steel recycling plant near Flint, Michigan (hereinafter *Select Steel*).<sup>33</sup> In October 1998, five months after receipt of the complaint, the U.S. EPA Office of Civil Rights found no violation of Title VI or its implementing regulations; the complaint was then dismissed. In reaching its decision, the agency decided that, to prove a violation, the complainant must demonstrate that the impact is *both* disproportionate and adverse. A key element of the decision is the use of the Clean Air Act's National Ambient Air Quality Standards as the criterion for adverse impact. These air quality standards are set by U.S. EPA at a level presumptively sufficient to protect public health, with a margin of error. The U.S. EPA Office of Civil Rights' determination that these air quality standards were met by the *Select Steel* proposed project was the basis for the dismissal of the complaint.<sup>34</sup>

Twelve complaints were filed against California-based projects with the U.S. EPA Office of Civil Rights between December 1994 and October 2000.<sup>35</sup> Three of these complaints were accepted for review, three are presently under review and the remaining six were rejected as either untimely, in litigation or because there was no recipient of U.S. EPA funds. California state agencies were named in nine of the twelve complaints.<sup>36</sup> Since there was no resolution on the merits, no direct guidance to California state agencies has been given by the U.S. EPA Office of Civil Rights in any of these cases.<sup>37</sup>

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<sup>33</sup> EPA File No. 5R-98-R5 (Select Steel Complaint) letter at <<http://www.epa.gov/region5/steelcivr.htm>> (visited Feb. 19, 2001) decision at <[http://www.epa.gov/civilrights/docs/ssdec\\_ir.pdf](http://www.epa.gov/civilrights/docs/ssdec_ir.pdf)> (visited Feb. 19, 2001).

<sup>34</sup> U.S. EPA Office of Civil Rights, Investigation Report of Title VI Administrative Complaint File No. 5R-98-R5 (Select Steel Complaint) at 27-29 <[http://www.epa.gov/civilrights/docs/ssdec\\_ir.pdf](http://www.epa.gov/civilrights/docs/ssdec_ir.pdf)> (visited Feb. 19, 2001). This decision by the U.S. EPA Office of Civil Rights generated strong criticism by community-based environmental justice organizations and their representatives. Luke W. Cole, "Wrong on the Facts, Wrong on the Law": Civil Rights Advocates Excoriate EPA's Most Recent Title VI Mistake, 29 *Envtl. L. Rep. (Envtl. L. Inst.)* 10775 (Dec. 1999).

<sup>35</sup> See complaint chart <<http://www.epa.gov/civilrights/t6complnt.htm>> (visited Feb. 19, 2001).

<sup>36</sup> See *id.*

<sup>37</sup> Although not based on a Title VI claim, U.S. EPA's Environmental Appeals Board, another arm of U.S. EPA, has considered and resolved a California environmental justice complaint challenging an air quality permit in Shasta County. There,



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Under Title VI, the U.S. EPA Office of Civil Rights has given California state agencies only precedential guidance, the *Select Steel* decision, and attempts at advisory guidances.<sup>38</sup> However, even though U.S. EPA failed to resolve on the merits any of the Title VI complaints filed against California state agencies, these complaints sparked some action by California agencies. For example, in response to complaints about availability of documents translated into Spanish, the Department of Toxic Substances Control expanded their public participation efforts.<sup>39</sup>

#### B. EXECUTIVE ORDER 12898 EXPANDS ENVIRONMENTAL JUSTICE OBLIGATIONS

President Bill Clinton issued Executive Order 12898 on February 11, 1994 and directed each federal agency to "make achieving environmental justice part of its mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of its pro-

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the Environmental Appeals Board adopted an analytical format similar to the U.S. EPA Office of Civil Rights' *Select Steel* approach. See *infra* notes 50 through 55 and accompanying text, *In re: Knauf Fiber Glass, GmbH*, PSD Permit No. 97-PO-06, PSD Appeal Nos. 98-3 through 98-20 (*Knauf I*) Order Denying Review in Part and Remanding in Part. 1999 WL 64235 (E.P.A. Feb. 4, 1999) available at <<http://www.epa.gov/eab/disk11/knauf.pdf>> (visited Feb. 19, 2001) and *In re: Knauf Fiber Glass, GmbH*, PSD Permit No. 97-PO-06, PSD Appeal 99-8 through 99-72, (*Knauf II*) 2000 WL (E.P.A. March 14, 2000) available at <<http://www.epa.gov/eab/disk11/knauf00.pdf>> (visited Feb. 19, 2001).

<sup>38</sup> On June 27, 2000, the U.S. EPA issued for comment the Draft Title VI Guidance for EPA Assistance Recipients Administering Environmental Permitting Programs and the Draft Revised Guidance for Investigating Title VI Administrative Complaints Challenging Permits. 65 Fed. Reg. 39650 (June 27, 2000). To date, these guidance have not yet been finalized. Even if these draft guidances are finalized during the new George W. Bush administration, the guidances provide only direction, but no certainty. Also, these draft guidances are the object of great criticism in some circles. See e.g., *The Draft Civil Rights Guidance: The Controversy Continues*, THE ENVIRONMENTAL FORUM at 46-54 (Sept./Oct. 2000).

<sup>39</sup> September 14, 2000 testimony of the director of the Department of Toxic Substances Control to the California Senate Select Committee on Environmental Justice. IMPLEMENTATION OF SB 115 (SOLIS): WHERE ARE WE? A HEARING OF THE SENATE SELECT COMMITTEE ON ENVIRONMENTAL JUSTICE, SEPT. 14, 2000, STATE CAPITOL, SUMMARY REPORT (hereinafter WHERE ARE WE? SENATE OVERSIGHT HEARING) at 4. This summary report was prepared by the Senate staff. The legislative hearing was videotaped, and copies of the tapes are publicly available through the California State Senate.

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grams, policies, and activities on minority populations and low-income populations in the United States. . .<sup>40</sup> Executive Order 12898 expands the scope of environmental justice to include low-income populations.

It also required each federal agency to examine its programs and policies and to develop an agencywide environmental justice strategy within the following year.<sup>41</sup> This federal agency effort pursuant to Executive Order 12898 is separate from the one launched by federal agencies in response to the Title VI directives.<sup>42</sup> Executive Order 12898 ordered the U.S. EPA Administrator to convene an Interagency Working Group on Environmental Justice with heads, or their designated representatives, of specified federal agencies, including Departments of Defense, Health & Human Services, Transportation and Justice. This working group was charged with providing guidance to all federal agencies as they develop their environmental justice strategies, coordinating research, assisting in data collection and evaluation, holding public meetings and developing interagency model projects on environmental justice.<sup>43</sup>

Although Executive Order 12898 is only directed to federal agencies, the federal agencies' environmental justice strategies derivatively impact state and local programs.<sup>44</sup> While broad in scope, Executive Order 12898 also clarified

<sup>40</sup> Exec. Order No. 12,898, § 1-101, 59 Fed. Reg. 7629 (1994).

<sup>41</sup> Exec. Order No. 12,898, § 1-1, 59 Fed. Reg. 7629 (1994).

<sup>42</sup> See Exec. Order No. 12,898, § 6-602 (noting that it "is intended to supplement but not supersede" Executive Order 12250 prohibiting discrimination in federally assisted programs).

<sup>43</sup> See Exec. Order No. 12,898, § 1-1, 59 Fed. Reg. 7629 (1994).

<sup>44</sup> Exec. Order No. 12,898, § 1-103, 59 Fed. Reg. 7629 (1994) provides, in part: The environmental justice strategy shall list programs, policies, planning and public participation practices, enforcement and/or rulemakings related to human health or the environment that should be revised to, at a minimum: (1) promote enforcement of all health and environmental statutes in areas with minority populations and low-income populations; (2) ensure greater public participation; (3) improve research and data collection relating to the health of and environment of minority populations and low-income populations; and (4) identify differential patterns of consumption of natural resources among minority populations and low-income populations. In addition, the environmental justice strategy shall include, where appropriate, a timetable for undertaking identified revisions and consideration of economic and social implications of the revisions.

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that it was intended to improve the internal management of the federal executive branch and did not create any new rights to judicial review.<sup>45</sup>

In the accompanying February 11, 1994 Memorandum for the Heads of All Departments and Agencies, President Clinton emphasized Executive Order 12898's connection with Title VI and focused on the need for public participation by minority communities and by low-income communities.<sup>46</sup> Also, in this memorandum, President Clinton underscored that the National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321 et seq., was an existing mechanism to optimize public participation and to consider mitigation measures which would minimize significant and adverse environmental effects of proposed federal actions on minority and low-income communities.<sup>47</sup>

Administrator Carol M. Browner issued U.S. EPA's environmental justice strategy on April 3, 1995.<sup>48</sup> As required by Executive Order 12898, other federal agencies issued their own strategies, and, in response, during the last five years, some California state agencies molded their programs to conform with the federal agency environmental justice strategies.<sup>49</sup>

As mentioned above, one final element of U.S. EPA's direction to California state agencies on environmental justice is provided through Environmental Appeals Board decisions.<sup>50</sup>

<sup>45</sup> Exec. Order No. 12,898, § 6-609, 59 Fed. Reg. 7629 (1994).

<sup>46</sup> See Memorandum from the White House, Feb. 11, 1994 at <<http://www.epa.gov/docs/oejpubs/prezmemo.txt.html>> (visited Feb. 19, 2001).

<sup>47</sup> Subsequently, U.S. EPA issued a guidance on NEPA and environmental justice. U.S. EPA, OFFICE OF FEDERAL ACTIVITIES, FINAL GUIDANCE FOR INCORPORATING ENVIRONMENTAL JUSTICE CONCERNS IN EPA'S NEPA COMPLIANCE ANALYSIS (April 1998). Available at <<http://es.epa.gov/oeca/ofa/ejepa.html>> (visited Feb. 21, 2001).

<sup>48</sup> See <<http://www.epa.gov/docs/oejpubs/strategy/strategy.txt.html>> (visited Feb. 21, 2001).

<sup>49</sup> See *infra* notes 167 through 182 and accompanying text concerning actions of the California Department of Transportation and the Federal Highway Administration.

<sup>50</sup> U.S. EPA's Environmental Appeals Board is the final agency decision maker on administrative appeals under all major environmental statutes that U.S. EPA administers. It was created in 1992 in recognition of the growing importance of U.S. EPA adjudicatory proceedings and as a mechanism for implementing and enforcing the environmental laws. 57 Fed. Reg. 5320 (1992). The Environmental Appeals Board's caseload includes appeals from permit decisions in accordance with regula-

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These decisions reflect the issuance of Executive Order 12898 and show an increasing focus on environmental justice concerns. In an early decision, the Environmental Appeals Board concluded there was no authority to consider environmental justice claims; however, after Executive Order 12898 was issued, the Board has considered environmental justice complaint allegations on their merits.<sup>51</sup>

One example in California of an Environmental Appeals Board decision addressing environmental justice was a challenge to a prevention of significant deterioration permit issued by the Shasta County Air Quality Management District to Knauf Fiber Glass, Gmbht for a new fiberglass manufacturing facility. In the Environmental Appeals Board's first ruling on this complaint on February 4, 1999, the permit was remanded because neither the local air district or U.S. EPA Region IX introduced evidence in the record to show that environmental justice issues were addressed.<sup>52</sup> After the record was supplemented, in its subsequent March 14, 2000 Order Denying Review, the Environmental Appeals Board examined the new evidentiary record on the environmental justice complaints based on an alleged disproportionate impact on a nearby low-income population.<sup>53</sup> Although willing to require examination of environmental justice claims, the Environmental Appeals Board upheld the analysis by U.S. EPA's Region IX that there was no adverse impact from PM10 particulate matter emissions, and, thus, no environmental justice violation.<sup>54</sup> This Environmental Appeals Board analysis reflects the approach taken by the U.S. EPA Office of Civil Rights in

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tions delegating this authority from the U.S. EPA Administrator. 40 C.F.R. § 1.25(e) (2000).

<sup>51</sup> The historical development of the Environmental Appeals Board's environmental justice decisions is contained in Richard J. Lazarus & Stephanie Tai, *Integrating Environmental Justice into EPA Permitting Authority*, 26 *ECOLOGY L.Q.* 617, 655-77 (1999).

<sup>52</sup> See *supra* note 37, the *Knauf I* case concluded with an Order Denying Review in Part and Remanding in Part at <<http://www.epa.gov/eab/disk11/knauf.pdf>> (visited Feb. 19, 2001).

<sup>53</sup> See *supra* note 37 *Knauf II* at 22 at <<http://www.epa.gov/eab/disk11/knauf00.pdf>> (visited Feb. 19, 2001).

<sup>54</sup> See *id.* at 24. (The standard of review applied by the Environmental Appeals Board in *Knauf II* was "clearly erroneous" which poses a significant barrier to environmental justice advocates.)

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the *Select Steel* decision; a reliance on existing Clean Air Act standards to determine if an impact is adverse. The Environmental Appeals Board also rejected the complaints about the quantity and quality of the public participation efforts by the Shasta County air district.<sup>55</sup>

### III. STATE LAW ENVIRONMENTAL JUSTICE INITIATIVES — OUTSIDE OF AND WITHIN CALIFORNIA

To comply with Title VI and with federal agency mandates arising from their implementation of Executive Order 12898, the fifty states responded in widely differing ways. A December 2000 study released by the Public Law Research Institute, located at the University of California's Hastings College of Law, summarizes the actions, as well as the lack of action, by the fifty state governments.<sup>56</sup>

Currently, only California has general environmental justice legislation in effect.<sup>57</sup> As explained below, California's statutes do not impose direct requirements. Instead, the legislation establishes a procedural framework for California state agencies to design environmental justice programs under the coordination of OPR and, for the six entities<sup>58</sup> which are part

<sup>55</sup> See *id.* at 24.

<sup>56</sup> Hilary Gross, Hannah Shafsky & Kara Brown, *Environmental Justice: A Review of State Responses*, Public Law Research Institute, University of California, Hastings College of the Law (Dec. 2000) at <<http://www.uchastings.edu/plri/PDF/environmentjustice.pdf>> (visited Feb. 20, 2001).

<sup>57</sup> Although previously both Florida and Maryland had general environmental justice statutes, these statutes have been repealed. In 1994, the Florida Legislature created the Environmental Equity and Justice Commission to examine possible disproportionate and cumulative concentrations of environmental hazards in low-income and minority communities and to propose recommendations, including the possible creation of a permanent institutional review. 1994 Fla. Stat. § 760.85, ch. 94-219. This statute was repealed. 1999 Fla. Laws, ch. 99-5 § 75, eff. June 29, 1999. In 1997, the Maryland Legislature established a Advisory Council on Environmental Justice, but, by its own terms, these statutory provisions were automatically repealed in 1999. 1997 Md. Code Ann. art. 41, § 18-315.

<sup>58</sup> As part of the Governor's Reorganization Plan No. 1 of 1991, Governor Wilson created Cal EPA and moved certain agencies from the jurisdiction of the Resources Agency to Cal EPA. GOV. REORG. PLAN NO. 1 OF 1991 § 80. Cal EPA, as a result, "consists of the State Air Resources Board, the Office of Environmental Health Hazard Assessment, the California Integrated Waste Management Board, the State Water Resources Control Board, and each California regional water quality control board, and the following departments: Pesticide Regulation and Toxic Substances Control."

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of Cal EPA, under Cal EPA's direction. Several states have environmental justice statutes with a more limited focus; for example, some states limit the concentration, by geographical area, of hazardous waste or high-impact solid waste management facilities.<sup>59</sup>

Even without statutory mandates for environmental justice, some states administratively adopted environmental justice strategies and programs. Tennessee is an example of a state, without a specific environmental justice statute, which chose to develop an administrative environmental justice strategy. After pulling together stakeholders, from state and local governments and from community-based organizations, Tennessee released a draft environmental justice policy and program for comment at a November 14, 2000 public hearing. This draft, numbering over 100 pages, attempts to establish goals and propose strategies to promote environmental justice.<sup>60</sup> Some other states without state statutory obligations are also starting similar efforts.<sup>61</sup>

As previously related, California adopted general environmental justice legislation with procedural characteristics similar to Executive Order 12898. Effective on January 1, 2000, California's environmental justice legislation, described in detail below, sets forth a definition of environmental justice and then describes goals and a procedural framework.<sup>62</sup> In this first legislation, OPR, part of the Governor's Office, is designated as "the coordinating agency in state government for environmental justice programs."<sup>63</sup> Little guidance is given by

CAL. GOV'T CODE § 12812 (West 1992).

<sup>59</sup> Alabama statutes prohibit more than one commercial hazardous waste treatment facility or disposal site within each county. Ala. Code § 22-30-5.1 (Michie 2000). In Arkansas, there is a presumption against the construction and operation of any high-impact solid waste management facility within 12 miles of any existing similar facility. Ark. Stat. Ann. § 8-6-1504 (2000). See *generally* Gross, et al, *supra* note 56 at 17-56.

<sup>60</sup> Tennessee environmental justice report is available at <<http://www.state.tn.us/environment/epo/ej/plan/index.html>> (visited Feb. 21, 2001).

<sup>61</sup> See, e.g., State of New York environmental justice efforts at <<http://www.dec.state.ny.us/website/ej/index.html>> (visited Feb. 21, 2001).

<sup>62</sup> SB 115 was signed into law by Governor Davis on October 6, 1999. 1999 CAL. STATS. ch. 690, pp. 4043-44 (codified at CAL. GOV'T CODE § 65040.12 and CAL. PUB. RES. CODE §§ 72000-01 (West Supp. 2001)).

<sup>63</sup> CAL. GOV'T CODE § 65040.12(a) (West Supp. 2001).

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the Legislature to the OPR director as to how to accomplish the coordination role. The director is instructed to consult with the secretaries of specified state agencies and interested members of the public and private sectors and to coordinate and share information with specified federal agencies as they implement federal Executive Order 12898. California's first statutory foray into environmental justice also instructs Cal EPA, *inter alia*, to "promote enforcement of all health and environmental statutes within its jurisdiction . . ." and "conduct its programs, policies, and activities that substantially affect human health on the environment . . ." to ensure the fair treatment of all people, including minority and low-income populations.<sup>64</sup> Cal EPA is also directed to develop a "model environmental justice mission statement" for the six entities under its jurisdiction.<sup>65</sup>

Although this 1999 legislation established broad goals and described a general process, the California Legislature left the specific, substantive implementation of these mandates unstated. Similarly, the following year, and also described in detail below, the Legislature amended and Governor Davis signed additional bills<sup>66</sup> addressing environmental justice. But, again, the emphasis is on procedure, such as the establishment of a Working Group on Environmental Justice and of an advisory group to this Working Group, not on the specification of substantive requirements.<sup>67</sup>

Implementation of the Legislature's broadly-worded environmental justice goal is left to OPR for all state agencies and to Cal EPA for the six entities under its jurisdiction. Given the lack of legislative specificity, OPR and Cal EPA could choose from a variety of alternatives consistent with their general statutory authority. Possibilities for implementation include: (1) model environmental justice programs developed

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<sup>64</sup> CAL. PUB. RES. CODE § 72000(b) and (a) (West Supp. 2001).

<sup>65</sup> CAL. PUB. RES. CODE § 72001 (West Supp. 2001).

<sup>66</sup> During 2000, three bills were enacted which mentioned environmental justice. See *infra* notes 132 through 149 and accompanying text, III D of this article. These bills are SB 89, 2000 CAL. STAT. ch. 728, pp. 3596-98 (amended and added CAL. PUB. RES. CODE § 65040.12, CAL. PUB. RES. CODE §§ 72000, 72001.5, 72002-04), AB 970, 2000 CAL. STAT. ch. 329, pp. 1665-75 (added CAL. PUB. RES. CODE § 25550(g)) and AB 1740, 2000 CAL. STAT. ch. 52, pp. 91-91 (budget bill appropriation for Cal EPA).

<sup>67</sup> CAL. PUB. RES. CODE §§ 72002-03 (West Supp. 2001).

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by the federal government or by other states, (2) proposals contained in legislative environmental justice bills adopted by the Legislature but vetoed by former Governor Pete Wilson and (3) existing state agency programs and pilot projects. In addition, existing statutory authority already granted to OPR, Cal EPA and other California state agencies for planning, permitting and environmental review provide options for implementation of the environmental justice legislation. These former and ongoing legislative and administrative efforts both suggest choices and pose questions for implementation of California's environmental justice statutory mandates.

## IV. CALIFORNIA ENVIRONMENTAL JUSTICE STATUTES

## A. HISTORICAL LEGISLATIVE ANTECEDENTS

Before California's environmental justice legislation was first enacted in October 1999, the Legislature adopted five environmental justice-related bills during 1991, 1992, 1997 and 1998. All of these bills were vetoed by then-Governor Pete Wilson. As a result of these vetoes, there was no independent state statutory impetus, and environmental justice activities by California state agencies varied widely during the decade.

The first environmental justice bill introduced in the California Legislature was AB 937 authored by Assemblymember Royball-Allard and introduced on March 4, 1991.<sup>68</sup> As passed by both the State Senate and Assembly, AB 937 proposed to amend the Permit Streamlining Act<sup>69</sup> to require the submission of project site demographics, such as race and income census data, for specified potentially high-impact development projects. If this demographic information was not submitted for hazardous waste incinerators and similar projects, an application could not be approved. Although AB 937 only applied prospective and did not require public officials to consider the demographic information in its approval process,<sup>70</sup> AB 937 was vetoed.

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<sup>68</sup> AB 937, Calif. Legislature 1991-92 Reg. Sess. available LEXIS, Cal. Library, LEGIS; CACOMM..

<sup>69</sup> See CAL. GOV'T CODE §§ 65920-64 (West 1997 & Supp. 2001).

<sup>70</sup> See *supra* note 68, Cal. Senate Comm. on Local Government Staff Analysis (July 17, 1991 hearing).



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Governor Pete Wilson's veto message on AB 937 noted that waste facilities "are necessary to the quality of life in California and must be developed."<sup>71</sup> The Governor's explanation for the veto continued:

I am sympathetic to the concern that these facilities are sited near low-income and minority communities, I believe that this possibility is minimized by the extensive environmental studies that must be completed under the California Environmental Quality Act, and the public hearings required by law on any such siting decision.<sup>72</sup>

The following year, on February 19, 1992, Assemblymember Royball-Allard re-introduced a similar bill, AB 3024. The final version of AB 3024 specifically noted that, in order to avoid duplication, a separate site demographics statement was not required if the information was included in the environmental impact report for the project or in another public document filed with the permit application.<sup>73</sup> However, this second effort was also futile, and then-Governor Wilson vetoed AB 3024 on September 30, 1992 with even blunter language.<sup>74</sup>

Although the Legislature considered other environmental justice measures, it was not until 1997 that the Legislature presented two more bills to Governor Wilson. Instead of limiting the environmental justice analysis to the demographics of a particular project site, in these bills, the Legislature chose to integrate environmental justice into the land use element of the general plan, SB 451 (Watson), and into the California

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<sup>71</sup> See *supra* note 68, Cal. Senate Comm. on Local Government Staff Analysis (June 24, 1992 hearing).

<sup>72</sup> AB 3024, Calif. Legislature 1991-92 Reg. Sess. available LEXIS, Cal. Library, LEGIS; CACOMM. Assembly Comm. on Local Government Staff Analysis (April 8, 1992 hearing).

<sup>73</sup> See *id.* (AB 3024 (1992) enrolled version proposed an addition to CAL. GOV'T CODE § 65957.2(d)).

<sup>74</sup> See *id.* The veto message on AB 3024 (1992) stated:

This bill would impose an unnecessary burden upon the applicants for potentially high-impacted development projects. Existing law allows an interested party to provide any information on the demographics pertaining to proposed site. In addition, the appointed or elected officials who consider such projects at the local level are generally aware of the constituency within the affected area. Where questions arise, the local agencies already have the authority to request any information, including local demographics. 1991-92 CAL. ASSEMBLY JOURNAL REG. SESS. VOL. 6 at 10253 (Sept. 30, 1992).

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Environmental Quality Act, SB 1113 (Solis). Both bills were vetoed.<sup>75</sup>

SB 451, introduced on February 19, 1997 by Senator Diane Watson, utilized long-range planning mechanisms to site future waste facilities.<sup>76</sup> Instead of utilizing a project-by-project approach as proposed in the 1991 and 1992 bills by Assemblymember Royball-Allard and vetoed, SB 451 used the land use elements of county and city general plans<sup>77</sup> to achieve its goals. As introduced, SB 451 proposed to use the land use element to achieve an equitable distribution of all solid, liquid and hazardous waste facilities.<sup>78</sup> The SB 451 version adopted by both the State Senate and Assembly narrowed the focus. In the final version, the land use element of the general plan was to locate facilities handling "hazardous materials in order to avoid concentrating these uses in close proximity to schools or residential communities and to provide for the fair treatment of people, regardless of race, culture or income level."<sup>79</sup>

To minimize costs, the SB 451 requirements were not triggered until the next scheduled review of the land use element; even then, cities and counties were exempt from these new requirements if, during the anticipated life of the land use element, no hazardous waste facility was planned to be sited either specifically near schools and homes or generally in the area.<sup>80</sup> The final version of SB 451 also added an amendment that specifically clarified that there is only the right to comment on proposed general plans and stated that

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<sup>75</sup> See 1997-98 CAL. SENATE FINAL HIST. at 356 (Sept. 28, 1997 veto); 1997-98 CAL. SENATE FINAL HIST. at 819 (Oct. 7, 1997 veto).

<sup>76</sup> As introduced, SB 451 (1997-98 legislative session) at <[http://www.leginfo.ca.gov/pub/97-98/bill/sen/sb\\_0451-0500/sb\\_451\\_bill\\_19970219\\_introduced.pdf](http://www.leginfo.ca.gov/pub/97-98/bill/sen/sb_0451-0500/sb_451_bill_19970219_introduced.pdf)> (visited Feb. 21, 2001).

<sup>77</sup> General plans are comprised of seven required elements, and they must be adopted pursuant to a specific legislative process. See CAL. GOV'T CODE §§ 65302, 65350-62 (West 1997).

<sup>78</sup> See Cal. Sen. Housing and Land Use Comm., Staff Analysis (April 2, 1997) at <[http://www.leginfo.ca.gov/pub/97-98/bill/sen/sb\\_0451-0500/sb\\_451\\_cfa\\_19970402\\_114527\\_sen\\_comm.html](http://www.leginfo.ca.gov/pub/97-98/bill/sen/sb_0451-0500/sb_451_cfa_19970402_114527_sen_comm.html)> (visited Feb. 21, 2001).

<sup>79</sup> See Cal. Senate Floor Analysis, (Sept. 3, 1997) at <[http://www.leginfo.ca.gov/pub/97-98/bill/sen/sb\\_0451-0500/sb\\_451\\_cfa\\_19970904\\_142959\\_sen\\_floor.html](http://www.leginfo.ca.gov/pub/97-98/bill/sen/sb_0451-0500/sb_451_cfa_19970904_142959_sen_floor.html)> (visited Feb. 21, 2001).

<sup>80</sup> See *id.*

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no new legal rights were created by SB 451.<sup>81</sup> Regardless of this limited approach and of the legislative amendments in response to opposition, Governor Wilson vetoed SB 451 on September 28, 1997.<sup>82</sup>

A week later, then-Governor Wilson vetoed SB 1113, the second environmental justice bill presented to him in 1997. Senator Hilda Solis first introduced SB 1113 on February 28, 1997, and the bill's final enrolled version required OPR to propose amendments, by January 2000, to the California Environmental Quality Act Guidelines to provide for the identification and mitigation by public agencies of disproportionately high and adverse environmental effects on minority populations and low-income populations.<sup>83</sup> In that enrolled bill, OPR was required to gather and evaluate data, and both that office and the Secretary of the Resources Agency were instructed to rely on procedures designed to implement federal Executive

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<sup>81</sup> See SB 451 (1997-98 legislative session) August 27, 1997 version at <[http://www.leginfo.ca.gov/pub/97-98/bill/sen/sb\\_0451-0500/sb\\_451\\_bill\\_19970827\\_amended\\_asm.pdf](http://www.leginfo.ca.gov/pub/97-98/bill/sen/sb_0451-0500/sb_451_bill_19970827_amended_asm.pdf)> (visited Feb. 21, 2001). This bill version proposed to add a new statutory subsection, California Government Code section 65351(d).

<sup>82</sup> See 1997-98 CAL. SENATE JOURNAL at 3248. Then-Governor Wilson's SB 451 veto message stated:

This bill would require local governments general plans to provide for the general location of commercial and industrial businesses regulated, due to handling of hazardous materials, in a manner which avoids concentrating those uses in close proximity to schools or residential communities and to provide for the fair treatment of people, regardless of race, culture, and income level. In my 1991 veto of AB 937 I wrote, 'The process to site and develop a solid and/or hazardous waste facility is an intensive exercise in environmental documentation, geographical consideration, public hearings, and state and local permitting procedures.' The law presently contains an abundance of planning requirements, including provision for extensive public hearings to address environmental and other land use planning concerns that include and exceed those contained in this bill. Specifically, regular periodic amendment of local community general plans is required by law to be made in compliance with the extensive projects of the CEQA. This bill will add nothing of practical value to the present extensive and rigorous protections and planning requirements demanded by existing law.

That is why it is understandably opposed by the League of California Cities.

*Id.* Also at <[http://www.leginfo.ca.gov/pub/97-98/bill/sen/sb\\_0451-0500/sb\\_451\\_vt\\_19970928.html](http://www.leginfo.ca.gov/pub/97-98/bill/sen/sb_0451-0500/sb_451_vt_19970928.html)> (visited Feb. 21, 2001).

<sup>83</sup> SB 1113 (1997-98 legislative session) enrolled bill version (Sept. 11, 1997) at <[http://www.leginfo.ca.gov/pub/97-98/bill/sen/sb\\_1101-1150/sb\\_1113\\_bill\\_19970911\\_enrolled.pdf](http://www.leginfo.ca.gov/pub/97-98/bill/sen/sb_1101-1150/sb_1113_bill_19970911_enrolled.pdf)> (visited Feb. 21, 2001).

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Order 12898 in order to meet these new requirements.<sup>84</sup> In vetoing SB 1113 on October 4, 1997, then-Governor Wilson explained that the bill ran counter to his goal to make the CEQA process less cumbersome.<sup>85</sup>

Not to be deterred, Assemblymember Martha Escutia introduced AB 2237 the following year.<sup>86</sup> The Legislature passed the bill in August, 1998, and, although one legislative declaration paralleled the nondiscrimination language of Title VI of the Civil Rights Act of 1964, the provisions of the adopted bill were race and income neutral. AB 2237 required the departments, offices and boards of Cal EPA, the Resources Agency and the Department of Health Services to identify geographical areas with disproportionately high and adverse effects on human health and the environment. These governmental entities were also instructed to modify the selection criteria, to the practicable extent allowed by law, to direct certain grants and loans to ameliorate some of these high and adverse effects.<sup>87</sup> In the last staff analysis in the Legislature, it was

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<sup>84</sup> See *id.*; see also SB 1113 Cal. Senate Floor Analysis (Sept. 10, 1997) at <[http://www.leginfo.ca.gov/pub/97-98/bill/sen/sb\\_1101-1150/sb\\_1113\\_cfa\\_19970910\\_154641\\_sen\\_floor.html](http://www.leginfo.ca.gov/pub/97-98/bill/sen/sb_1101-1150/sb_1113_cfa_19970910_154641_sen_floor.html)> (visited Feb. 21, 2001).

<sup>85</sup> See 1997-98 CAL. SENATE JOURNAL at 3260. Then-Governor Wilson's veto message on SB 1113 stated:

This bill would require changes to the California Environmental Quality Act (CEQA) guidelines which would enable public agencies to address environmental justice matters. This bill would also require the Office of Planning and Research to assist public agencies by identifying communities and populations disproportionately affected by high and adverse environmental effects.

The state environmental laws do not provide separate, less stringent requirements, or lower standards in minority and low-income communities. Environmental laws are, and should remain, color-blind.

The California Environmental Quality Act was not designed to be used as a tool for social movement. The California Environmental Quality Act is a cumbersome process and any changes made to it should be to streamline the current process, not add new requirements that will only negatively affect the economy and people of this state.

*Id.* Also at <[http://www.leginfo.ca.gov/pub/97-98/bill/sen/sb\\_1101-1150/sb\\_1113\\_vt\\_19971004.html](http://www.leginfo.ca.gov/pub/97-98/bill/sen/sb_1101-1150/sb_1113_vt_19971004.html)> (visited Feb. 21, 2001).

<sup>86</sup> AB 2237 (1997-98 legislative session) introduced version at <[http://www.leginfo.ca.gov/pub/97-98/bill/asm/ab\\_2201-2250/ab\\_2237\\_bill\\_19980219\\_introduced.pdf](http://www.leginfo.ca.gov/pub/97-98/bill/asm/ab_2201-2250/ab_2237_bill_19980219_introduced.pdf)> (visited Feb. 21, 2001).

<sup>87</sup> See AB 2237 (1997-98 legislative session) enrolled version at <[http://www.leginfo.ca.gov/pub/97-98/bill/asm/ab\\_2201-2250/ab\\_2237\\_bill\\_19980827\\_enrolled.pdf](http://www.leginfo.ca.gov/pub/97-98/bill/asm/ab_2201-2250/ab_2237_bill_19980827_enrolled.pdf)> (visited Feb. 21, 2001).

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noted that the bill was race and income neutral and that the bill did not require, but appeared to steer, the state agencies towards the goal of awarding loans and grants in a manner that is equitable and commensurate with the threats that communities face.<sup>88</sup>

However, this new legislative attempt was also doomed. Then-Governor Wilson vetoed the bill on September 24, 1998.<sup>89</sup> Although AB 2237 was race and income neutral, the veto message complained about the incorporation of “so-called ‘environmental racism’ or ‘environmental justice’ issues in their selection criteria for environmental loans and grants.”<sup>90</sup>

These five attempts by the California Legislature were all thwarted by gubernatorial vetoes. However, these historical antecedents show the range of options the Legislature agreed could promote environmental justice and could reduce disproportionately high and adverse health and environmental effects. These stymied legislative proposals—data collection for high-impact projects, general plan amendments, impact assessment and mitigation during the CEQA process and targeted environmental loans and grants—all present a menu of options for the future.

#### B. CALIFORNIA’S ENVIRONMENTAL AGENCIES: OPR, CAL EPA AND THE RESOURCES AGENCY

Environmental justice legislation was finally enacted in 1999.<sup>91</sup> Since the statutes were primarily procedural and not substantive, it is useful to understand the general statutory authority for OPR, Cal EPA and the Resources Agency in order to understand the span of options for the implementation of environmental justice requirements in California.

California law provides that OPR shall serve the Governor and the Governor’s Cabinet as “staff for long-range planning and research, and constitute the comprehensive state

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<sup>88</sup> See AB 2237 (1997-98 legislative session) Cal. Assembly Floor Analysis (Aug. 27, 1998) at <[http://www.leginfo.ca.gov/pub/97-98/bill/asm/ab\\_2201-225\\_0/ab\\_2237\\_cfa\\_19980827\\_004505\\_asm\\_floor.html](http://www.leginfo.ca.gov/pub/97-98/bill/asm/ab_2201-225_0/ab_2237_cfa_19980827_004505_asm_floor.html)> (visited Feb. 21, 2001).

<sup>89</sup> AB 2237 (1997-98 legislative session) veto message (Sept. 24, 1998) at <[http://www.leginfo.ca.gov/pub/97-98/bill/asm/ab\\_2201-2250/ab\\_2237\\_vt\\_19980924.html](http://www.leginfo.ca.gov/pub/97-98/bill/asm/ab_2201-2250/ab_2237_vt_19980924.html)> (visited Feb. 21, 2001).

<sup>90</sup> See *id.*

<sup>91</sup> 1999 CAL. STAT. ch. 690, pp. 4043-44.

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planning agency.<sup>92</sup> Specific obligations are imposed on OPR, but the overriding statutory theme is for OPR to take various actions to advance statewide environmental goals and objectives.<sup>93</sup> The statutory subdivisions require the formulation and evaluation of long-range goals and policies for land use, the orderly preparation of intermediate and short-range functional plans for state departments and agencies, require the evaluation of existing plans and programs of state departments and agencies and require the coordination of a statewide environmental monitoring system to assess growth and potential threats to public health and environmental quality.<sup>94</sup>

Although its general plan guidelines are specifically designated as advisory, OPR is also required to “develop and adopt guidelines for the preparation and content of the mandatory elements required in city and county general plans. . . .”<sup>95</sup> Pursuant to California’s general planning law, a land use element is one of the mandatory general plan elements, and, for each city and county, its land use element designates the proposed general distribution and location for housing, industry, solid waste disposal facilities, open space and other categories of public and private uses of land.<sup>96</sup>

Among its other responsibilities, OPR must develop proposed guidelines for the implementation of the CEQA statutes by all public agencies.<sup>97</sup> At least every two years, these guidelines must be reviewed, and OPR must recommend proposed changes or amendments to the Secretary of the Resources Agency.<sup>98</sup>

In 1991, pursuant to a reorganization plan proposed by then-Governor Wilson, Cal EPA was designated as the umbrella agency for six entities already in existence and operating under existing statutes.<sup>99</sup> These six entities are the California Air Resources Board, the California Integrated Waste Management Board, the State Water Resources Control

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<sup>92</sup> CAL. GOV’T CODE § 65040 (West 1997).

<sup>93</sup> See CAL. GOV’T CODE § 65040(a)-(m) (West 1997).

<sup>94</sup> See CAL. GOV’T CODE § 65040(a)-(c), (f), (i) (West 1997).

<sup>95</sup> CAL. GOV’T CODE § 65040.2(a), (c) (West 1997).

<sup>96</sup> See CAL. GOV’T CODE § 65302(a) (West 1997).

<sup>97</sup> See CAL. PUB. RES. CODE § 21083 (West 1996).

<sup>98</sup> See CAL. PUB. RES. CODE § 21087(a) (West 1996).

<sup>99</sup> Gov. Reorg. Plan No. 1 of 1991 § 80.

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Board, the Department of Toxic Substances Control, the Department of Pesticide Regulation and the Office of Environmental Health Hazard Assessment.<sup>100</sup> As expressed in its current strategic plan, Cal EPA seeks to coordinate the activities of these six entities and to emphasize the development of new environmental indicators, which give insight into the movement of pollutants and into their actual health and environmental effects.<sup>101</sup>

In contrast to the recently formed Cal EPA, the Resources Agency has been in existence since 1961.<sup>102</sup> Under the Resources Agency umbrella, fourteen different state agencies<sup>103</sup> exercise various environmental review, planning and enforcement responsibilities. As described in part III D *infra*, one of these agencies, the California Energy Commission, is currently considering environmental justice issues in its power plant siting process.

### C. CALIFORNIA'S FIRST ENVIRONMENTAL JUSTICE LEGISLATION: COMPREHENSIVE DIRECTIVE OR A PROCEDURAL SHELL?

#### 1. Analysis of SB 115's Different Bill Versions

A little more than one year after her bill<sup>104</sup> to incorporate environmental justice into the Public Resources Code CEQA process was vetoed by then-Governor Wilson, Senator Solis tried again. Now, there was a crucial difference. When the new bill, SB 115, was introduced on December 17, 1998, Gray Davis was elected and was awaiting inauguration as California's governor. Although the effective dates were extended a year, the newly-introduced SB 115 was virtually identical to

<sup>100</sup> See CAL. GOV'T CODE § 12812 (West 1992).

<sup>101</sup> See Environment, The Newsletter of the California Environmental Protection Agency, (Fall 2000) at <<http://www.calepa.ca.gov/Publications/Newsletters/2000/00Fall.htm>> (visited Feb. 21, 2001).

<sup>102</sup> See CAL. GOV'T CODE § 12805 (West Supp. 2001).

<sup>103</sup> These agencies are: Bay Conservation and Development Commission, California Coastal Commission, Colorado River Board of California, California Conservation Corps, Department of Fish and Game, Department of Parks and Recreation, Department of Boating and Waterways, California Coastal Conservancy, California Tahoe Conservancy, Santa Monica Mountains Conservancy, Department of Conservation, California Energy Commission, Department of Forestry and Fire Protection and Department of Water Resources.

<sup>104</sup> See *supra* note 85.

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the final version of SB 1113 vetoed in October 1997 by then-Governor Wilson.

In both bills, a new Public Resources Code statute was proposed with a legislative finding that people of “all races, cultures and incomes must be treated fairly with respect to the development, adoption, implementation, and enforcement of environmental statutes, ordinances, regulations and public policies.”<sup>105</sup> In order to address disproportionately high and adverse impacts on minority communities and low-income communities due to proposed projects, OPR and the Secretary of Resources were given responsibilities to amend the CEQA Guidelines and to evaluate and gather data.<sup>106</sup>

SB 115 was amended six times before it passed the Assembly on September 9, 1999 and the State Senate on September 10, 1999. These six bill versions reveal a roller coaster of approaches to achieving environmental justice. In the April 14, 1999 version of SB 115, a new Division 13.1 of the Public Resources Code was proposed. It was entitled “California Environmental Justice Act of 1999,” and the proposed statutory additions to the Public Resources Code immediately followed Division 13 which contains the CEQA statutes.<sup>107</sup> The May 12, 1999 Senate Floor Analysis of this bill version explains that this “bill tracks the federal environmental justice provisions by requiring each state agency to make environmental justice part of its mission, requiring OPR to develop an agencywide environmental justice strategy, and requiring changes to the CEQA guidelines so that environmental justice matters are considered in the CEQA process.”<sup>108</sup>

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<sup>105</sup> In both the enrolled version of SB 1113, vetoed in 1997, and in the first version of SB 115, introduced in December 1998, a new California Public Resources Code section 21001.2 was proposed to be added. *See* SB 1113 (1997-98 legislative session) enrolled bill version (Sept. 11, 1997) at <[http://www.leginfo.ca.gov/pub/97-98/bill/sen/sb\\_1101-1150/sb\\_1113\\_bill\\_19970911\\_enrolled.pdf](http://www.leginfo.ca.gov/pub/97-98/bill/sen/sb_1101-1150/sb_1113_bill_19970911_enrolled.pdf)> (visited Feb. 21, 2001). *Compare with* SB 115 (1999-00 legislative session) introduced version at <[http://www.leginfo.ca.gov/pub/99-00/bill/sen/sb\\_0101-0150/sb\\_115\\_bill\\_19981217\\_introduced.pdf](http://www.leginfo.ca.gov/pub/99-00/bill/sen/sb_0101-0150/sb_115_bill_19981217_introduced.pdf)> (visited Feb. 21, 2001).

<sup>106</sup> *See id.*

<sup>107</sup> California Public Resources Code sections 21180-21181 were proposed to be added as Division 13.1 to that code. SB 115 (1999-00 legislative session) (April 14, 1999 version) at <[http://www.leginfo.ca.gov/pub/99-00/bill/sen/sb\\_0101-0150/sb\\_115\\_bill\\_19990414\\_amended\\_sen.pdf](http://www.leginfo.ca.gov/pub/99-00/bill/sen/sb_0101-0150/sb_115_bill_19990414_amended_sen.pdf)> (visited Feb. 21, 2001).

<sup>108</sup> SB 115 (1999-00 legislative session) Cal. Senate Floor Analysis at 4 (May 12,



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SB 115 was amended for the fourth time on June 23, 1999. All of the proposed legislative amendments were still only incorporated into the Public Resources Code. In the staff analysis for the Assembly Committee on Natural Resources' July 1, 1999 hearing, it was noted that the requirement for OPR to develop a state interagency environmental justice strategy, relying on procedures used to implement the federal executive order, would "ensure consistency between the state and federal efforts."<sup>109</sup> This same staff report also noted that the most controversial provisions of this bill relate to the CEQA guidelines revision to provide for procedures to identify and mitigate disproportionately high environmental effects of projects on minority and low-income populations.<sup>110</sup> In explaining the integration of environmental justice into the CEQA process, this staff analysis observed that OPR and the Secretary of Resources have "significant discretion in determining how the CEQA guidelines should be revised to incorporate environmental justice principles—as long as the state relies on the implementation efforts of the federal CEQ [Council on Environmental Quality] and U.S. EPA."<sup>111</sup> The staff report then describes the flexibility in the federal guidance documents.<sup>112</sup>

In describing the opposition arguments, this July 1, 1999 Assembly staff analysis stated: "[o]pponents believe this bill will shift responsibility to ensure that environmental laws

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1999) at <[http://www.leginfo.ca.gov/pub/99-00/bill/sen/sb\\_0101-0150/sb\\_115\\_cfa\\_19990512\\_200528\\_sen\\_floor.html](http://www.leginfo.ca.gov/pub/99-00/bill/sen/sb_0101-0150/sb_115_cfa_19990512_200528_sen_floor.html)> (visited Feb. 21, 2001).

<sup>109</sup> SB 115 (1999-00 legislative session) Cal. Assembly Committee on Natural Resources at 2-3 (July 1, 1999) at <[http://www.leginfo.ca.gov/pub/99-00/bill/sen/sb\\_0101-0150/sb\\_115\\_cfa\\_19990707\\_145559\\_asm\\_comm.html](http://www.leginfo.ca.gov/pub/99-00/bill/sen/sb_0101-0150/sb_115_cfa_19990707_145559_asm_comm.html)> (visited Feb. 21, 2001).

<sup>110</sup> *See id.* at 5.

<sup>111</sup> *See id.* at 5-6.

<sup>112</sup> *See id.* at 6. Federal guidance documents do not prescribe a specific format for examining environmental justice issues (such as designated a specific chapter or section in an environmental document), but instead direct agencies to integrate analysis of environmental justice into the analysis the agency is already doing of the impacts of the project on the natural or physical environment and the related social, cultural, and economic impacts. The CEQ's [Council on Environmental Quality's] NEPA guidance specifically states that the executive order does not change prevailing legal thresholds and statutory interpretations of NEPA, and that identification of disproportionate impacts does not preclude projects from going forward. Rather, the environmental justice evaluation serves to heighten agency attention to alternatives, mitigation strategies, monitoring needs, and preferences of the affected community.

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uniformly protect everyone from the government to individual project opponents.”<sup>113</sup> However, the opponents did not simply object to the environmental justice proposals, but they suggested an alternative approach which was reflected in the staff analysis:

Instead of the CEQA based approach, the business community believes that state agencies should review programs to identify “gaps that may lead to environmental inequities.” Further, they are “interested in exploring opportunities to prospectively incorporate environmental equity evaluations into the land use planning process.”<sup>114</sup>

SB 115 was passed out of the Assembly Committee on Natural Resources and the Assembly Committee on Appropriations during early July 1999.

On September 3, 1999, the fifth amended version of SB 115 revealed dramatic changes. For the first time, the environmental justice provisions were placed in the Government Code, and OPR was selected as the state agency to take the lead on environmental justice programs. The newly-proposed Government Code section 65040.12 was added as a separate statute and was placed in article 3, which lists all of the powers and duties of OPR. Also, the this version of SB 115 deleted all of the additions or amendments to the Public Resources Code contained in prior versions of that bill. A staff analysis of the September 3, 1999 version of SB 115 noted: “[t]his bill establishes the Office of Planning and Research as the state’s lead agency for implementation of environmental justice programs. Earlier versions of this bill enacted a more detailed program intended to track the key requirements of the federal environmental justice policy and programs. The bill was amended in Assembly Appropriations to delete these provisions.”<sup>115</sup> No further indication of the legislative intent concerning the dramatic revision was revealed.

Six days later, on September 9, 1999, SB 115 was amended for the final time. Once again, there was a substan-

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<sup>113</sup> *See id.* at 7.

<sup>114</sup> *See id.*

<sup>115</sup> SB 115 (1999-00 legislative session) Cal. Senate Third Reading Analysis at 3 <[http://www.leginfo.ca.gov/pub/99-00/bill/sen/sb\\_0101-0150/sb\\_115\\_cfa\\_19990908\\_070744\\_asm\\_floor.html](http://www.leginfo.ca.gov/pub/99-00/bill/sen/sb_0101-0150/sb_115_cfa_19990908_070744_asm_floor.html)> (visited Feb. 21, 2001).

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tial change. Two new statutes were proposed to be added to the Public Resources Code in a new part entitled "Environmental Justice."<sup>116</sup> However, this new proposal was not connected to the CEQA process. Rather, this statutory addition was to Cal EPA's mission. Suddenly, for the first time, Cal EPA was given broad environmental justice responsibilities in the operation of its programs, policies and activities, in the implementation of its enforcement program, in its research and data collection and to in its public participation efforts. In addition, Cal EPA was directed to develop a model environmental justice mission statement by January 1, 2001 for the six entities under its jurisdiction. The Assembly passed SB 115 on the day of this last amendment.<sup>117</sup>

The next day the last staff report was prepared for the final version of the bill.<sup>118</sup> Due to the end-of-legislative session flurry, the staff analysis is very similar to prior ones. However two points bear mention. The staff person was unable to verify support or opposition at the time of writing, so one cannot speculate about the legislative intent from that source of information. More importantly, the staff analysis characterizes the amendments in the Assembly as making "substantive changes, but the intent remains the same."<sup>119</sup> On September 10, 1999, the same date as the Senate Floor Analysis was prepared, the Senate concurred in the Assembly amendments. SB 115 was enrolled, and it was signed by Governor Gray Davis on October 6, 1999.<sup>120</sup>

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<sup>116</sup> SB 115 (1999-00 legislative session) (Sept. 9, 1999 version) at <[http://www.leginfo.ca.gov/pub/99-00/bill/sen/sb\\_0101-0150/sb\\_115\\_bill\\_19990909\\_amended\\_asm.pdf](http://www.leginfo.ca.gov/pub/99-00/bill/sen/sb_0101-0150/sb_115_bill_19990909_amended_asm.pdf)> (visited Feb. 21, 2001) (this version proposed to add CAL. PUB. RES. CODE §§ 72000-01).

<sup>117</sup> Bill History, SB 115 (1999-00 legislative session) at <[http://www.leginfo.ca.gov/pub/99-00/bill/sen/sb\\_0101-0150/sb\\_115\\_bill\\_19991010\\_history.html](http://www.leginfo.ca.gov/pub/99-00/bill/sen/sb_0101-0150/sb_115_bill_19991010_history.html)> (visited Feb. 21, 2001).

<sup>118</sup> SB 115 (1999-00 legislative session) Cal. Senate Floor Analysis (Sept. 9, 1999 version) at <[http://www.leginfo.ca.gov/pub/99-00/bill/sen/sb\\_0101-0150/sb\\_115\\_cfa\\_19990910\\_122236\\_sen\\_floor.html](http://www.leginfo.ca.gov/pub/99-00/bill/sen/sb_0101-0150/sb_115_cfa_19990910_122236_sen_floor.html)> (visited Feb. 21, 2001).

<sup>119</sup> *See id.* at 2.

<sup>120</sup> 1999 CAL. STAT. ch. 690, pp. 4043-44.

2001] *IMPLEMENTING ENVIRONMENTAL JUSTICE* 555*2. The 1999 Environmental Justice Legislation Can Be Interpreted As A Broad Mandate To Both OPR and Cal EPA*

The enacted version of SB 115 placed the definition of environmental justice in Government Code section 65040.12 (c)<sup>121</sup> and, in the other subdivisions of that same section, specified the role of OPR and defined the obligations of its director. OPR “shall be the coordinating agency in state government for environmental justice programs.”<sup>122</sup> Its director shall do all of the following:

- (1) Consult with the Secretaries of the California Environmental Protection Agency, the Resources Agency, the Trade and Commerce Agency, the Business, Transportation, and Housing Agency, any other appropriate state agencies, and all other interested members of the public and private sectors in this state.
- (2) Coordinate the office’s efforts and share information regarding environmental justice programs with the Council on Environmental Quality, the United States Environmental Protection Agency, the General Accounting Office, the Office of Management and Budget, and other federal agencies.
- (3) Review and evaluate any information from federal agencies that is obtained as a result of their respective regulatory activities under federal Executive Order 12898.<sup>123</sup>

Due to the lack of specificity in the legislative direction to OPR and to its director, there will undoubtedly be disagreement as to how those duties should be exercised. However, based on the historical antecedents and on the various versions of the bill, a strong argument can be made for an expansive interpretation of those responsibilities.

As described in part III B *supra*, prior to the passage of the 1999 environmental justice legislation, OPR already had an extensive role in planning, program evaluation, coordination and data collection.<sup>124</sup> Independent of the environmental justice legislation, OPR has the ability and the responsibility

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<sup>121</sup> CAL. GOV’T CODE § 65040.12(c) (West Supp. 2001) provides: For the purposes of this section, ‘environmental justice’ means the fair treatment of people of all races, cultures, and incomes with respect to the development, adoption, implementation, and enforcement of environmental laws, regulations, and policies.

<sup>122</sup> CAL. GOV’T CODE § 65040.12(a) (West Supp. 2001).

<sup>123</sup> CAL. GOV’T CODE § 65040.12(b) (West Supp. 2001).

<sup>124</sup> See CAL. GOV’T CODE § 65040 (West 1997).

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to recommend amendments to the general plan guidelines<sup>125</sup> and to the CEQA guidelines.<sup>126</sup> As discussed in part V C *infra*, socioeconomic impacts can already be considered in the environmental review process, and, if OPR wishes to suggest additional consideration of environmental justice issues, it has the authority to recommend those changes.<sup>127</sup> OPR already has the duty to adopt guidelines for the preparation and content of the land use element of city and county general plans.<sup>128</sup> OPR could choose to incorporate environmental justice concerns into both the public participation portions of the general plan adoption process and into the substantive land use element requirements. In the days immediately prior to the passage of the 1999 environmental justice legislation, the Legislature decided to remove the proposed environmental justice statutory provisions from the Public Resources Code and place them in the Government Code with the other OPR powers and duties. One interpretation of this action is that the Legislature intended a broad, not a narrow, view of OPR's coordinating responsibilities. Regardless if this conjecture regarding the legislative intent is correct, there is no statute barring OPR from incorporating environmental justice into its general plan guidelines in the next revision.

Cal EPA's specific responsibilities were first added in the final version of SB 115 on September 9, 1999, the day of the final Assembly floor vote and the day before the final Senate floor vote. These Cal EPA responsibilities were in two new Public Resources Code statutes,<sup>129</sup> and there is no legislative history to explain this last minute legislative addition.

Public Resources Code section 72000 requires Cal EPA to adopt specified environmental justice responsibilities in the design of Cal EPA's "mission for programs, policies, and standards."<sup>130</sup> Once again, the scope of those statutory require-

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<sup>125</sup> See CAL. GOV'T CODE § 65040.2 (West 1997).

<sup>126</sup> See CAL. PUB. RES. CODE § 21083 (West 1996).

<sup>127</sup> See CAL. PUB. RES. CODE § 21087 (West 1996).

<sup>128</sup> See CAL. GOV'T CODE § 65040.2 (West 1997).

<sup>129</sup> 1999 CAL. STAT. ch. 690, § 2. CAL. PUB. RES. CODE §§ 72000-01 (West Supp. 2001).

<sup>130</sup> CAL. PUB. RES. CODE § 72000 (West Supp. 2001) provides:

The California Environmental Protection Agency, in designing its mission for programs, policies, and standards, shall do all of the following:

(a) Conduct its programs, policies, and activities that substantially affect

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ments is unclear: are they simply procedural, philosophical statements or do these statutes reflect basic fundamental changes in the focus of Cal EPA and the six entities under its jurisdiction? The latter interpretation is supported by the language of the statutes: Public Resources Code section 72000 provides substantive direction as to the operation of Cal EPA programs and the other new statute, Public Resources Code 72001,<sup>131</sup> is a procedural directive that requires Cal EPA to adopt a mission statement by January 1, 2001.

#### D. CALIFORNIA'S SECOND WAVE OF ENVIRONMENTAL JUSTICE STATUTES

In 2000, three bills were passed by the Legislature and signed by Governor Davis which expanded the environmental justice obligations for state agencies.<sup>132</sup> On June 30, 2000, the 2000-01 fiscal year budget bill for California was signed, and, in the Cal EPA appropriation, \$182,000 was required to be spent "for an environmental justice program and an assistant secretary position for environmental justice."<sup>133</sup> There was

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human health or the environment in a manner that ensures the fair treatment of people of all races, cultures, and income levels, including minority populations and low-income populations of the state.

(b) Promote enforcement of all health and environmental statutes within its jurisdiction in a manner that ensures the fair treatment of people of all races, cultures, and income levels, including minority populations and low-income populations in the state.

(c) Ensure greater public participation in the agency's development, adoption, and implementation of environmental regulations and policies.

(d) Improve research and data collection for programs within the agency relating to the health of, and environment of, people of all races, cultures, and income levels, including minority populations and low-income populations of the state.

(e) Identify differential patterns of consumption of natural resources among people of different socioeconomic classifications for programs within the agency.

<sup>131</sup> CAL. PUB. RES. CODE § 72001 (West Supp. 2001) provides:

On or before January 1, 2001, the California Environmental Protection Agency shall develop a model environmental justice mission statement for boards, departments, and offices within the agency. For purposes of this section, environmental justice has the same meaning as defined in subdivision (c) of Section 65040.12 of the Government Code.

<sup>132</sup> 2000 CAL. STATS. ch. 52; 2000 CAL. STATS. ch. 329; 2000 CAL. STATS. ch. 728.

<sup>133</sup> 2000 CAL. STATS. ch. 52, item 0555-002-0001.

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specific legislative direction given to the new assistant secretary.<sup>134</sup> One key obligation is that the assistant secretary shall review the activities undertaken by each of the six entities under Cal EPA to ensure that environmental justice considerations are addressed in their CEQA review and compliance.<sup>135</sup> The Legislature's specific mention of CEQA compliance, regulatory activities' review and public education efforts provides, in the budget bill, a broad sweep of responsibilities. Since one duty of the assistant secretary is to "identify shortcomings in the environmental justice activities" of the six Cal EPA entities, an aggressive tone for Cal EPA's environmental justice programs was set in this statute.<sup>136</sup>

Also in 2000, the Legislature revisited SB 89, introduced the previous year by Senator Escutia, and passed a revised version.<sup>137</sup> Governor Davis signed it on September 25, 2000.<sup>138</sup>

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<sup>134</sup> *Id.* The assistant secretary shall do all of the following:

(a) Review the activities each board, department, and office within the California Environmental Protection Agency that undertakes to comply with Division 13 (commencing with Section 21000) of the Public Resources Code to ensure that those activities take into account and address environmental justice considerations.

(b) Review the regulatory activities of each board, department, and office within the agency to ensure that those activities take into account and address environmental justice considerations.

(c) Establish a program, in coordination with the assistant secretary for external affairs, to educate and inform the public of the agency's environmental justice activities and programs. This program shall ensure that information is provided to the public and to affected populations in forms and languages that are understandable, informative, and usable.

(d) Coordinate and oversee the environmental justice activities of the agency.

(e) Identify shortcomings in the environmental justice activities of boards, departments, or offices in the agency that may impede the achievement of environmental justice.

(f) Develop, and coordinate the adoption of, the model environmental justice mission statement required pursuant to Section 72001 of the Public Resources Code.

2000 CAL. STATS. ch. 52, item 0555-002-0001.

<sup>135</sup> 2000 CAL. STATS. ch. 52, item 0555-002-0001(a).

<sup>136</sup> 2000 CAL. STATS. ch. 52, item 0555-002-0001(e).

<sup>137</sup> SB 89 (1999–00 legislative session) introduced version (April 12, 1999) at <[http://www.leginfo.ca.gov/pub/99-00/bill/sen/sb\\_0051-0100/sb\\_89\\_bill\\_19981207\\_introduced.pdf](http://www.leginfo.ca.gov/pub/99-00/bill/sen/sb_0051-0100/sb_89_bill_19981207_introduced.pdf)> (visited Feb. 21, 2001) and enrolled version (August 31, 2000) at <[http://www.leginfo.ca.gov/pub/99-00/bill/sen/sb\\_0051-0100/sb\\_89\\_bill\\_20000831\\_enrolled.pdf](http://www.leginfo.ca.gov/pub/99-00/bill/sen/sb_0051-0100/sb_89_bill_20000831_enrolled.pdf)> (visited Feb. 21, 2001).

In this new law, which amended the 1999 legislation, there is again an emphasis on structure and procedure with a formation of a working group and of an advisory group to this working group.<sup>139</sup> The working group, comprised of the heads of the six Cal EPA entities and the OPR director, was established and directed to assist Cal EPA “in developing an agencywide strategy for identifying and addressing any gaps in existing programs, policies, or activities that may impede the achievement of environmental justice.”<sup>140</sup> The new advisory group was to provide recommendations and information to the new working group and to act as a resource.<sup>141</sup>

One statutory amendment in SB 89 requires Cal EPA to develop an agencywide environmental justice strategy in consultation with the newly-formed working group.<sup>142</sup> This amendment clarifies that development of an abstract mission is not sufficient. Instead, the development of operational strategies to accomplish environmental justice goals appears to be part of the environmental justice mandate.<sup>143</sup> One example of a specific action to be considered is reflected in the law outlining the working group’s responsibilities. The working group is required to recommend procedures to ensure public documents, notices and hearings are “concise, understandable, and readily accessible to the public,” including recommendations concerning translation of documents and hearings for limited-English-speaking populations.<sup>144</sup> Once again, this style of direction indicates that the Legislature is not requiring specific actions, but it is intending for the California agencies to investigate and to adopt practices that ensure environmental justice issues are addressed.

Related changes in SB 89 imply that the Cal EPA environmental justice activities are to be a model for other state agencies. The OPR director is a member of the Cal EPA work-

<sup>138</sup> 2000 CAL. STATS. ch. 728.

<sup>139</sup> See CAL. PUB. RES. CODE §§ 72002-03 (West Supp. 2001).

<sup>140</sup> CAL. PUB. RES. CODE § 72002(a) (West Supp. 2001).

<sup>141</sup> See CAL. PUB. RES. CODE § 72003 (West Supp. 2001). In a separate statute, a triennial reporting responsibility for environmental justice activities, to the governor and Legislature, was established. CAL. PUB. RES. CODE § 72004 (West Supp. 2001).

<sup>142</sup> See CAL. PUB. RES. CODE §§ 72000(g), 72002(a) (West Supp. 2001) (agencywide strategy); CAL. PUB. RES. CODE § 72001 (West Supp. 2001) (mission statement).

<sup>143</sup> See CAL. PUB. RES. CODE §§ 72000(a)-(g), 72002(a) (West Supp. 2001).

<sup>144</sup> CAL. PUB. RES. CODE § 72002(c)(5) (West Supp. 2001).



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ing group.<sup>145</sup> In addition, the Government Code section which specifies the environmental justice duties of the OPR director was amended in 2000 to require the director's review and evaluation of any information from the working group.<sup>146</sup>

Although the primary focus is energy, there was another environmental justice-related bill enacted during the 2000 legislative session. One element of the California Energy Security and Reliability Act of 2000 is the expedited siting of power plants.<sup>147</sup> One sentence in this legislation required the consideration of environmental justice in the expedited siting process.<sup>148</sup> However, as before, the Legislature did not specify how the goal of environmental justice was to be met.<sup>149</sup>

The three enactments during 2000 reflect a legislative commitment to environmental justice, but the new legislation continues to emphasize procedural structure. Although the development of operational strategies by state agencies is encouraged, the Legislature continues to grant broad leeway to the executive branch to devise strategies to meet the environmental justice goals.

#### V. IMPLEMENTATION OF ENVIRONMENTAL JUSTICE OBLIGATIONS BY CALIFORNIA STATE AGENCIES

Title VI of the Civil Rights act of 1964, implementation by federal agencies of Executive Order 12898 and complaints by community-based organizations all focused the attention of California state agencies on environmental justice require-

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<sup>145</sup> CAL. PUB. RES. CODE § 72002(b) (West Supp. 2001).

<sup>146</sup> See CAL. GOV'T CODE § 65040.12 (b)(1), (3) (West Supp. 2001).

<sup>147</sup> See 2000 CAL. STAT. ch. 329, § 5 which was introduced as AB 970 (Ducheny) in the 1999-00 legislative session.

<sup>148</sup> CAL. PUB. RES. CODE § 25550(g) provides:

With respect to a thermal powerplant and related facilities reviewed under the process established by this chapter, it shall be shown that the thermal powerplant and related facilities complies with all regulations adopted by the commission that ensure that an application addresses disproportionate impacts in a manner consistent with Section 65040.12 of the Government Code.

<sup>149</sup> See *id.* In contrast, SB 1622 was introduced by Senator Richard Alarcon on February 22, 2000, but it was not passed by the Legislature. The SB 1622 proposal required the California Energy Commission to adopt a mission statement and implementing regulations to address environmental justice. SB 1622 (1999-00 legislative session) (June 15, 2000 version) at <[http://www.leginfo.ca.gov/pub/99-00/bill/sen/sb\\_1601-1650/sb\\_1622\\_bill\\_20000615\\_amended\\_asm.pdf](http://www.leginfo.ca.gov/pub/99-00/bill/sen/sb_1601-1650/sb_1622_bill_20000615_amended_asm.pdf)> (visited Feb. 21, 2001).

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ments, albeit to varying degrees. The California environmental justice statutory enactments in 1999 and 2000, discussed in part III *supra*, provided additional obligations and impetus to state agencies. As these administrative agency responses are rapidly evolving, only a snapshot is presented here for a few state agencies and only at this point in time.

Since OPR and Cal EPA were given specific obligations under state law, their efforts will be examined. Also, it is instructive to examine actions by state agencies who previously responded to federal agency pressures, and a prime example is the California Department of Transportation (hereinafter Caltrans). Community-based complaints also can generate governmental responses, and the California Energy Commission is an example of an agency which modified its permitting process after citizens' concerns were voiced. Finally, the past and current actions of the California Integrated Waste Management Board, an agency within Cal EPA's jurisdiction, will also be examined.

## A. OPR

On September 14, 2000, the State Senate Select Committee on Environmental Justice conducted an oversight hearing on the implementation of the 1999 statute.<sup>150</sup> A representative from OPR testified that, as of that date, OPR had taken the following actions: surveyed other states to determine their approaches to environmental justice issues; established contacts with relevant state and federal agencies, including U.S. EPA; co-sponsored a daylong roundtable addressing environmental justice and powerplant certification with the Energy Commission; convened an initial meeting of seventeen state agencies in June 2000 to inventory current environmental justice efforts; formed an environmental justice steering committee; and coordinated state review of the June 2000 draft Title VI guidance issued by U.S. EPA.<sup>151</sup>

As to future efforts, the OPR representative's testimony indicated that OPR planned to do the following: work closely with Cal EPA on its required mission statement; continue to monitor state programs as well as state and federal legisla-

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<sup>150</sup> WHERE ARE WE? SENATE OVERSIGHT HEARING, *supra* note 39 at 1.

<sup>151</sup> *See id.* at 2.

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tion; and serve as the state information and referral bank for issues related to environmental justice, including creating a database and a establishing a link on the OPR website.<sup>152</sup> In response to a question from Senator Alarcon, OPR's representative testified that, to her knowledge, there are no plans to initiate the incorporation of environmental justice into the general plans guidelines or CEQA guidelines at this time, but OPR will respond to any legislative mandate.<sup>153</sup>

After this legislative hearing, OPR did place an environmental justice link on its web page; from this link, OPR's January 2001 survey letter and form directed to all state administrative agencies and constitutional officers seeking information about each agency's environmental justice policies and programs is available.<sup>154</sup>

## B. CAL EPA

In July 2000, Cal EPA released its first agencywide Strategic Vision.<sup>155</sup> Winston Hickox, Cal EPA Secretary, described it as a document that "reflects the Davis administration's values and principles."<sup>156</sup> The thirty-page document lists eight strategic goals, including one to "reduce or eliminate the disproportionate impacts of pollution on low-income and minority populations."<sup>157</sup> For each goal, key objectives are listed which form "the primary focus of the Agency's boards, departments, and office strategic plans and program strategies."<sup>158</sup> The objectives adopted to meet the environmental justice goal focus on minimizing public health environmental impacts of existing sources of pollution and on avoiding future impacts through siting decisions.<sup>159</sup> Additional details as to the imple-

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<sup>152</sup> *See id.*

<sup>153</sup> *See id.*

<sup>154</sup> At <<http://www.opr.ca.gov/>> (visited Feb. 21, 2001).

<sup>155</sup> STRATEGIC VISION at 1. (July 2000) available from Cal EPA and at <<http://www.calepa.ca.gov/Publications/Reports/stratplans/2000/vision.pdf>> (visited Feb. 21, 2001).

<sup>156</sup> Winston H. Hickox, *From My Corner*, ENVIRONMENT at 3 (Fall 2000) at <[http://www.calepa.ca.gov/Publications/Newsletters/2000/00\\_Fall.htm#corner](http://www.calepa.ca.gov/Publications/Newsletters/2000/00_Fall.htm#corner)> (visited Feb. 21, 2001).

<sup>157</sup> STRATEGIC VISION, *supra* note 155 at 11.

<sup>158</sup> STRATEGIC VISION, *supra* note 155 at 21.

<sup>159</sup> STRATEGIC VISION, *supra* note 155 at 22.

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mentation of environmental justice goals were to be provided in later statements from Cal EPA.

At the September 14, 2000 legislative oversight hearing, a Cal EPA representative testified that Cal EPA viewed its role as coordinating and promoting environmental justice among the six entities under its jurisdiction.<sup>160</sup> Cal EPA established an internal coordinating committee which is developing the required model mission statement and which submitted combined comments to U.S. EPA on the June 2000 draft Title VI guidance.<sup>161</sup> Cal EPA's expressed goal was to conduct its programs in a way that complaints are avoided.<sup>162</sup> Finally, the testimony highlighted with the budget funding for a full-time assistant secretary for environmental justice, Cal EPA's activities will accelerate once the position is filled.<sup>163</sup>

Public Resources Code section 72001 required Cal EPA to adopt a model mission statement for the six entities under its jurisdiction. In January 2001, a draft mission statement was released by Cal EPA.<sup>164</sup> In addition, Cal EPA released accom-

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Goal 5 Reduce or eliminate the disproportionate impacts of pollution on low-income and minority populations.

Objectives:

- Minimize the public health and environmental impacts of existing facilities.
- Assist the Governor's Office of Planning and Research and local land use agencies in developing model land use ordinances which address siting of future hazardous materials, waste, transportation or handling facilities and activities.
- Reduce the impacts of pollution from existing hazardous materials, waste, transportation and handling facilities or activities.
- Assist the Department of Education in developing model school siting policies to avoid exposing children to pollution.

<sup>160</sup> See *WHERE ARE WE? SENATE OVERSIGHT HEARING*, *supra* note 39 at 3.

<sup>161</sup> *See id.*

<sup>162</sup> *See id.*

<sup>163</sup> *See id.* At a February 13, 2001 OPR-sponsored public meeting of state agency representatives on environmental justice, it was announced that the Cal EPA Assistant Secretary for Environmental Justice position would be filled in March 2001 by the former coordinator of the Environmental Justice Program, U.S. EPA, Region IX. (Author present at public meeting.)

<sup>164</sup> Memorandum from Winston Hickox, Secretary of Cal EPA, to all Board Chairs, Department Directors and Executive Officers (Jan. 25, 2001) (available from author until posted on Cal EPA website). This memorandum disseminated the draft mission statement for comment and noted that it would be the subject of further review by the public. In part, this memorandum stated:

Draft Environmental Justice Model Mission Statement To accord the highest

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panying principles which were designed to guide the six entities under its jurisdiction in developing action plans to implement the general, philosophical mission statement.<sup>165</sup> Since the Legislature's statutory amendment in 2000 indicated that the working group was to provide input on this model mission statement,<sup>166</sup> obviously, Cal EPA's initial release will be a draft subject to additional review and public reaction.

### C. CALTRANS: STATE AGENCY ACTION SPARKED BY FEDERAL ENVIRONMENTAL JUSTICE MANDATES

Thirty years ago, the Federal Highway Administration adopted regulations to implement Title VI of the Civil Rights Act of 1964.<sup>167</sup> Almost immediately Title VI was featured as a basis for relief in lawsuits opposing the construction of federally funded highways.<sup>168</sup> In the intervening years, the Federal Highway Administration specifically required state transportation agencies (such as Caltrans) to meet their Title VI responsibilities.<sup>169</sup> When the Civil Rights Restoration Act of 1987<sup>170</sup> clarified the broad Congressional intent as to the scope of Title VI, Federal Highway Administration officials is-

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respect and value to every individual and community, the California Environmental Protection Agency and its Boards, Departments and Offices shall conduct their public health and environmental protection programs, policies and activities in a manner that is designed to promote equality and afford fair treatment, full access and full protection to all Californians, including low income and minority populations.

<sup>165</sup> See *id.*

BDO [Board, Departments and Offices] EJ Program Elements The specific objectives of the programs developed by each BDO include:

1. Provide communities easy and full access to information.
2. Solicit community participation in decision-making.
3. Evaluate the current legal, regulatory and policy frameworks and address the gaps.
4. Develop timely resolution processes.
5. Identify and address data gaps.
6. Identify options for implementing mitigation.
7. Establish training programs.

<sup>166</sup> See CAL. PUB. RES. CODE § 72001.5 (West Supp. 2001).

<sup>167</sup> See 49 C.F.R. pt. 21, first adopted in 1970, 35 Fed. Reg. 10080 (1970).

<sup>168</sup> See, e.g., *Harrisburg Coalition Against Ruining the Environment v. Volpe*, 330 F.Supp. 918, 921, 926 (D. Pa.1971).

<sup>169</sup> See 23 C.F.R. pt. 200, first adopted in 1976, 41 Fed. Reg. 53982 (1976).

<sup>170</sup> Pub. L. 100-259, 102 Stats. 28 (1988) (codified at 42 U.S.C. § 2000d-4a (1994)).

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sued a guidance to state highway agencies explaining their obligations.<sup>171</sup> Subsequently, when Executive Order 12898 articulated new federal agency responsibilities for environmental justice, the U.S. Department of Transportation issued regulations and guidances to implement that expanded mandate.<sup>172</sup>

This long-standing federal commitment is reflected in the actions by Caltrans. At the September 14, 2000 legislative oversight hearing, the Caltrans representative noted that, although Caltrans was not specifically listed in California's new environmental justice statute, that Caltrans had been working for three decades to improve its public outreach and public participation efforts.<sup>173</sup> In the Caltrans testimony,<sup>174</sup> the issuance of the Community Impact Assessment handbook<sup>175</sup> in June 1997 was highlighted. In this one hundred-eighteen page handbook, environmental justice issues are integrated into the environmental review process, and public participation is emphasized.

After the tragic Loma Prieta earthquake in 1989, Caltrans commenced the Cypress Freeway Replacement Project in Oakland with the goal of relocating the freeway to minimize impacts on the minority, low-income community in West Oakland. This Caltrans project utilized many of the techniques discussed in its Community Impact Assessment Handbook, and this project is one of the ten case studies highlighted by federal highway officials as a successful example of the integration of environmental justice principles into high-

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<sup>171</sup> See Notice, Impacts of the Civil Rights Restoration Act of 1987 on FHWA Programs, N4720.6, (Sept. 2, 1992) at <<http://www.fhwa.dot.gov/legsregs/directives/notices/n4720-6.htm>> (visited Feb. 19, 2001).

<sup>172</sup> U.S. Department of Transportation Order on Environmental Justice, 62 Fed. Reg. 18377 (1997) at <[http://www.fhwa.dot.gov/environment/ejustice/dot\\_ord.htm](http://www.fhwa.dot.gov/environment/ejustice/dot_ord.htm)> (visited Feb. 19, 2001); FHWA Actions to Address Environmental Justice in Minority Populations and Low-Income Populations, Order 6640.23 (Dec. 2, 1998) at <[http://www.fhwa.dot.gov/legsregs/directives/orders/6640\\_23.htm](http://www.fhwa.dot.gov/legsregs/directives/orders/6640_23.htm)> (visited Feb. 19, 2001); U.S. Department of Transportation, Memorandum (Oct. 7, 1999) (concerning metropolitan and statewide planning) at <<http://www.fhwa.dot.gov/environment/ejustice/ej-10-7.htm>>. (visited Feb. 19, 2001).

<sup>173</sup> WHERE ARE WE? SENATE OVERSIGHT HEARING, *supra* note 39 at 7.

<sup>174</sup> See *id.*

<sup>175</sup> 4 CALTRANS ENVIRONMENTAL HANDBOOK, COMMUNITY IMPACT ASSESSMENT (June 1997) at <<http://www.dot.ca.gov/hq/env/resource/pubs/handbook/vol4/envhb4.pdf>> (visited Feb. 21, 2001).

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way construction.<sup>176</sup> However, some community members would disagree with this characterization, and the Cypress Freeway Reconstruction project also spawned a Title VI complaint which is still pending with U.S. EPA Office of Civil Rights.<sup>177</sup>

Environmental justice issues arise most commonly in the permit approval process, but these issues also surface in state agency practices during day-to-day operations. For example, one Caltrans activity, building noise barrier walls adjacent to freeways, illustrates this concept. In Caltrans' District 10, citizen complaints about excessive noise from Highway 99 traffic near their homes outside of Stockton prompted Caltrans to consider construction of noise walls.<sup>178</sup> The initial approach was to locate the walls in the areas where the complaining citizens lived. Upon review, Caltrans discovered that the same high noise level also existed in the nearby neighborhood, which was predominately Latino, even though those citizens had not complained. Caltrans' response was to construct the noise barrier walls in both neighborhoods. When describing this project, a Caltrans official noted that Caltrans' environmental justice focus caused the agency to locate these noise barrier walls in response to traffic noise, measured by decibels, and not in response to noise, measured by citizen complaints.<sup>179</sup>

Other Caltrans efforts were highlighted during the September 14, 2000 testimony at the legislative oversight hearing, including their recently created Office of Community Planning and the Native American Advisory Committee.<sup>180</sup> In response to a question from Senator Alarcon as to implementation at the regional transportation planning agency level, the Caltrans representative commented that his philosophy has always been to assist, then insist.<sup>181</sup>

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<sup>176</sup> See Federal Highway Administration Cypress Freeway case study at <<http://www.fhwa.dot.gov/environment/ejustice/case/index.htm#5>> (visited Feb. 21, 2001).

<sup>177</sup> At <<http://www.epa.gov/civilrights/docs/t6csnov2000.pdf>> at 13 (visited Feb. 21, 2001).

<sup>178</sup> See Presentation by Gregory P. King, Chief, Cultural and Communities Studies Office, California Environmental Program, Caltrans (Feb. 13, 2001) OPR-sponsored environmental justice public meeting for state agency officials.

<sup>179</sup> See *id.*

<sup>180</sup> WHERE ARE WE? SENATE OVERSIGHT HEARING, *supra* note 39 at 8.

<sup>181</sup> See *id.*

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The federally-driven focus of the Caltrans program was highlighted by the final comment of the Caltrans representative. He noted that Caltrans does not have explicit environmental justice requirements tied to state-only transportation funds.<sup>182</sup> In light of the California environmental justice statutes, some may disagree with that interpretation.

#### D. CALIFORNIA ENERGY COMMISSION: A STATE AGENCY CONFRONTED WITH COMMUNITY CONCERNS

The California Energy Commission has the statutory authority to site and to license thermal power plants which are 50 megawatts or larger.<sup>183</sup> In July 1994, the San Francisco Energy Company applied to develop a natural gas-fired cogeneration facility in Bayview-Hunters Point, a predominately low-income and minority community in southeast San Francisco, and sparked an energetic community opposition campaign.<sup>184</sup>

During the next two years, the California Energy Commission moved from its original perspective and adopted environmental justice goals in its proposed decision on this energy project.<sup>185</sup> Although acknowledging the California Energy Commission's recognition of the legitimacy of environmental justice goals, the community groups were not satisfied with the California Energy Commission's technical analysis.<sup>186</sup> The San Francisco Energy Company's project ultimately faltered,

<sup>182</sup> *See id.*

<sup>183</sup> *See* CAL. PUB. RES. CODE §§ 25500-55 (West 1996 & Supp. 2001). Although commonly known as the California Energy Commission, its official title is the State Energy Resources Conservation and Development Commission. CAL. PUB. RES. CODE § 25200 (West 1996).

<sup>184</sup> Cliff Rechtschaffen, *Fighting Back Against a Power Plant: Some Lessons from the Legal and Organizing Efforts of the Bayview-Hunters Point Community* 3 *HASTINGS W.-N.W. J. ENVTL. L. & POL'Y* 407, 407-11 (1996).

<sup>185</sup> *See id.* at fn. 104. The California Energy Commission proposed decision stated:

The Commission regards the goals of environmental justice to include avoiding (and in some cases counteracting) decisions or policies that result in disproportionately high pollution or health risk exposure to minorities or persons of low income. The Commission also recognizes a goal of promoting a significant measure of community self-determination in shaping future development.

*Id.*

<sup>186</sup> *See id.* at 419.



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not because of a decision by the California Energy Commission, but because of action by the San Francisco Board of Supervisors to prohibit the lease of the city-owned property where the project was to be located.<sup>187</sup>

Disputes about the technical analysis of the environmental justice claims were not resolved at this juncture. However, the review of the San Francisco Energy Company's project demonstrates the response of the California Energy Commission when environmental justice, a previously unaddressed issue, was vigorously brought to its attention.

Because the technical issues surrounding environmental justice and power plant siting are complex, the California Energy Commission sponsored its first Environmental Justice Roundtable on April 24, 2000.<sup>188</sup> As described in the roundtable's announcement, the focus was to be on the "social, political, legal, scientific and technical aspects of this important and timely topic."<sup>189</sup> Viewed as a first in a series of public meetings, the California Energy Commission "will bring together panels of scientists, environmentalists, consultants, developers and the public to discuss a wide range of topics including demographic analysis, public participation, health risk analysis and disproportionate impacts."<sup>190</sup>

However, these issues could not be resolved solely in an academic, technical forum. Once again, a complaint by a community-based organization would serve as the impetus for the California Energy Commission to address these issues in a specific factually context. In April 2000, Californians for Renewable Energy, Inc. filed a Title VI complaint with the U.S. EPA's Office of Civil Rights against the California Energy Commission, the California Air Resources Board and the Bay Area Air Quality Management District in connection with their approval of two energy facilities near Pittsburgh, Contra Costa County. The complaint allegations focus on the increased air pollutants in an area already adversely impacted by poor air quality.<sup>191</sup> This Title VI complaint is one of the

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<sup>187</sup> See *id.* at 426.

<sup>188</sup> See <<http://www.energy.ca.gov/env-justice/index.html>> (visited Feb. 21, 2001).

<sup>189</sup> See *id.*

<sup>190</sup> See *id.*

<sup>191</sup> See <<http://www.epa.gov/civilrights/docs/t6csnov2000.pdf>> at 2 (visited Feb. 21, 2001). The Title VI complaint with U.S. EPA Office of Civil Rights was still pending

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many complaints still pending resolution by the U.S. EPA Office of Civil Rights.

Meanwhile, even in advance of the December 2000 energy crises, AB 970 was enacted, and the California Energy Commission was given a September 6, 2000 legislative mandate to expedite power plants approvals.<sup>192</sup> As already discussed in part III D, *supra*, in AB 970, the Legislature required the California Energy Commission to ensure that the definition of environmental justice was met in the expedited power plant siting process, but the Legislature offered no detail how this task was to be accomplished.<sup>193</sup> Emergency regulations were proposed by the California Energy Commission to implement this new statute, and a hearing was conducted on October 12, 2000.<sup>194</sup> In the draft emergency regulations, in response to the California Energy Commission's proposal to collect data to consider environmental justice issues, the California Council for Environmental and Economic Balance<sup>195</sup> submitted written objections. In its October 12, 2000 letter, California Council for Environmental and Economic Balance disagreed with the

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as of November 30, 2000. Previously, on November 18, 1999, another complaint, by the same organization on the same project, was filed with the U.S. EPA Environmental Appeals Board for the potentially significant deterioration air permit issued by the Bay Area Air Quality Management District. On February 9, 2000, the U.S. EPA Environmental Appeals Board decision dismissed this complaint for lack of standing as the community group failed to participate in the administrative proceedings before the Bay Area Air Quality Management District. This decision is at <<http://www.epa.gov/boarddec/orders/delta.pdf>> (visited Feb. 21, 2001).

<sup>192</sup> See 2000 CAL. STATS. ch. 329, pp. 1665-75.

<sup>193</sup> See CAL. PUB. RES. CODE § 25550(g) (West Supp. 2001).

<sup>194</sup> CAL. CODE REGS. tit. 20, §§ 2021-31. (Nov. 15, 2000) (hearing held Oct. 12, 2001) <[http://www.energy.ca.gov/sitingcases/proceedings/2000-11-15\\_FINAL\\_FAST\\_TRACK.PDF](http://www.energy.ca.gov/sitingcases/proceedings/2000-11-15_FINAL_FAST_TRACK.PDF)> (visited Feb. 21, 2001).

<sup>195</sup> As described on its web page, the California Council for Environmental and Economic Balance was created over 20 years ago, and it is "the only statewide private, nonprofit, nonpartisan association to represent the interests of both industry and labor . . ." Information at <<http://www.cceeb.org/>> (visited Feb. 21, 2001). On a related issue, the California Council for Environmental and Economic Balance was listed in the legislative staff reports as opposing SB 115 prior to its enactment. See *e.g.*, Cal. Assembly Staff Report, *supra* at note 109 at 7. At the same time as their SB 115 opposition, the California Council for Environmental and Economic Balance released a short report discussing environmental justice which is organized "under three general themes we think environmental justice policies should embrace: fairness, certainty, and balance." California Council for Environmental and Economic Balance report at <<http://www.cceeb.org/documents/ej99.html>> (visited Feb. 21, 2001).

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proposed regulations and commented that they were broader than required by statute and conflicted with OPR's primary role as the coordinating agency under the 1999 environmental justice legislation.<sup>196</sup>

Following this hearing, on November 15, 2000, the California Energy Commission adopted emergency regulations to implement the six-month expedited power plant licensing process.<sup>197</sup> In the informational requirements for an application, the regulation requires a discussion of the potential for disproportionate impacts from the project on minority or low-income people.<sup>198</sup> One can confidently predict that some community-based organizations believe that the California Energy Commission's requirements are inadequate and that some business groups believe that the same requirements are too onerous.

#### E. CALIFORNIA INTEGRATED WASTE MANAGEMENT BOARD: A STATE AGENCY CAUTIOUSLY POISED TO CONSIDER ENVIRONMENTAL JUSTICE

The Waste Board, designated in statute as the California Integrated Waste Management Board, was established, in its current form, by the Legislature in 1989.<sup>199</sup> In conjunction with local governmental agencies, the Waste Board has the difficult assignment of planning and overseeing the disposal of California's burgeoning mega-tonnage of solid waste.<sup>200</sup> As an entity within Cal EPA,<sup>201</sup> the Waste Board is subject to Cal EPA's environmental justice mandates and receives direction from Cal EPA's environmental justice model mission state-

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<sup>196</sup> The California Council for Environmental and Economic Balance comment letter is part of the public regulatory file on these proposed regulations. In part, this October 12, 2000 letter states:

Under SB 115, the Legislature charged the Governor's Office of Planning and Research with the role of been the state's coordinating agency on environmental justice. *The Legislature established that role in OPR to avoid having individual agencies establishing differing policies on environmental justice. Adoption of subdivision (b) (4) of Section 2022 at this time is premature and runs counter to that policy.*" [emphasis in original]

<sup>197</sup> CAL.CODE REGS. tit 20, §§ 2022-31 (2000).

<sup>198</sup> CAL.CODE REGS. tit 20, § 2022(b)(4) (2000).

<sup>199</sup> See 1989 CAL. STATS. ch. 1095, CAL. PUB. RES. CODE § 40400 (West 1996).

<sup>200</sup> See CAL. PUB. RES. CODE § 40000 (West Supp. 2001).

<sup>201</sup> See CAL. PUB. RES. CODE § 40400 (West 1996).

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ment.<sup>202</sup>

As described by its executive officer during the September 14, 2000 legislative oversight hearing conducted by the Senate Select Committee on Environmental Justice, the Waste Board administers three primary programs: local plan approval, final approval of solid waste facilities permits and direct approval of waste tire storage permits.<sup>203</sup> The Waste Board's first program is the local integrated waste management planning program. In this regard, the Waste Board provides assistance and guidance to local governments in the preparation, modification and implementation of local plans.<sup>204</sup> The Waste Board also reviews and approves the countywide integrated waste management plans.<sup>205</sup> One required component of these plans is a siting element which describes the potential locations of the waste transfer stations and waste disposal sites.<sup>206</sup> The Waste Board's second program is review of the permitting of solid waste facilities by local agencies.<sup>207</sup> In the third program, the Waste Board directly permits waste tire storage facilities.<sup>208</sup>

The siting or expansion of solid waste facilities is a classic context for environmental justice claims.<sup>209</sup> The predecessor to the Waste Board, the Waste Management Board,<sup>210</sup> figures prominently in the environmental justice literature. In 1984, a report on siting waste incinerators was prepared by a consulting firm at the request of the Waste Management Board.<sup>211</sup> Popularly known as the Cerrell report, it exemplifies

<sup>202</sup> See CAL. PUB. RES. CODE §§ 72000-01 (West Supp. 2001).

<sup>203</sup> WHERE ARE WE? SENATE OVERSIGHT HEARING, *supra* note 39 at 7.

<sup>204</sup> See, e.g., CAL. PUB. RES. CODE § 40910 (West 1996).

<sup>205</sup> See CAL. PUB. RES. CODE § 41750-41770.5 (West 1996 & Supp. 2001).

<sup>206</sup> See CAL. PUB. RES. CODE § 41700-04 (West 1996).

<sup>207</sup> See CAL. PUB. RES. CODE § 44001-18 (West 1996 & Supp. 2001).

<sup>208</sup> See CAL. PUB. RES. CODE § 42800-55 (West Supp. 2001).

<sup>209</sup> See generally COLE, GROUND UP, *supra* note 10 (examples and discussion of citizen complaints regarding waste facilities located in minority and low-income areas).

<sup>210</sup> The Waste Management Board, was established by the Nejedly-Z'Berg-Dills Solid Waste Management and Resource Recovery Act of 1972. 1972 CAL. STATS. ch.342 (commencing at CAL. GOV'T CODE § 66700). This statute was repealed. 1989 CAL. STATS. ch. 1095, § 32.

<sup>211</sup> See J. Stephen Powell, Cerrell Associates, *Political Difficulties facing Waste-to-Energy Conversion Plant Siting* at 17-30, 65 (1984). The Cerrell report was cited and quoted in COLE, GROUND UP, *supra* note 10 at 3, 71-72 and in various law review arti-

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the classic dynamics for environmental injustice claims. To minimize political opposition, the Cerrell Report recommended siting incinerators in communities with certain characteristics, including low-income, low educational attainment and a high proportion of Catholics.<sup>212</sup> Following this advice would have an obvious propensity for disproportionate impacts on minority and low-income communities.

Siting and operation of solid waste disposal sites have received attention at the national level, including a March 2000 report by U.S. EPA's National Environmental Justice Advisory Council.<sup>213</sup> A reoccurring theme is the disproportionate siting of solid waste disposal facilities and transfer stations in low-income and minority neighborhoods. In other states, the expansion and siting of solid waste facilities sparked administrative complaints with the U.S. EPA Office of Civil Rights. Here in California, no community group has filed a Title VI complaint against the Waste Board or its predecessor.<sup>214</sup>

The Waste Board is a state agency which did not receive direction from the federal government on environmental justice issues through a Title VI claim. Nor is there a strong history of active federal administrative involvement. Left to chart its own course, the Waste Board did not adopt any affirmative board actions to address environmental justice issues during the Wilson administration. For example, the Waste Board's 1997 vision and mission statement does not mention equity issues.<sup>215</sup>

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cles, see, e.g., Note: *The Road Less Traveled: Pursuing Environmental Justice Through Title VI of the Civil Rights Act of 1964* 13 STAN. ENVTL. L.J. 125, 134 (1994) and Eileen Gauna, *The Environmental Justice Misfit: Public Participation and the Paradigm Paradox* 17 STAN. ENVTL. L.J. 3, fn. 171 (1998). The authors of GROUND UP state that the private sector waste companies disavow the use of the Cerrell report, but these authors note that the communities where California's three commercial hazardous waste dumps are located each meet the Cerrell report's description of a preferred location. COLE, GROUND UP, *supra* note 10 at 71-72.

<sup>212</sup> See *id.*

<sup>213</sup> NATIONAL ENVIRONMENTAL JUSTICE ADVISORY COUNCIL (NEJAC), A REGULATORY STRATEGY FOR SITING AND OPERATING WASTE TRANSFER STATIONS (March 2000). NEJAC is a federal-appointed advisory committee to U.S. EPA on environmental justice issues, and its report is at <<http://es.epa.gov/oeca/main/ej/nejac/wts/wts.pdf>> (visited Feb. 21, 2001).

<sup>214</sup> See U.S. EPA Office of Civil Rights Title VI complaint summary at <<http://www.epa.gov/civilrights/docs/t6csnov2000.pdf>> (visited Feb. 21, 2001).

<sup>215</sup> The Waste Board's vision and mission statement is available at <<http://>

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However, subsequent action by the U.S. EPA Office of Civil Rights crystalized one issue for the Waste Board and may force it to confront a permitting issue posed by the proposed Title VI administrative direction. In June 2000, the U.S. EPA Office of Civil Rights promulgated two draft guidances for federal assistance recipients administering environmental permitting programs.<sup>216</sup> In August 28, 2000 written comments submitted through Cal EPA in response to the draft federal guidances, the Waste Board conceded it is subject to the non-discrimination provisions of Title VI, but it questioned the effect of the federal statute on its permitting authority.<sup>217</sup> The

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[www.ciwmb.ca.gov/boardinfo/mission.htm](http://www.ciwmb.ca.gov/boardinfo/mission.htm) (visited Feb. 21, 2001). This vision and mission statement has not been revised, to date, during the Davis administration.

<sup>216</sup> DRAFT TITLE VI GUIDANCE FOR EPA ASSISTANCE RECIPIENTS ADMINISTERING ENVIRONMENTAL PERMITTING PROGRAMS; DRAFT REVISED GUIDANCE FOR INVESTIGATING TITLE VI ADMINISTRATIVE COMPLAINTS CHALLENGING PERMITS 65 Fed. Reg. 39650 (2000).

<sup>217</sup> See Waste Board's Meeting Agenda for Nov. 14-15, 2000 Meeting, AGENDA ITEM NO. 25 (hereinafter AGENDA), Attachment 1 at 8-9, at <<http://www.ciwmb.ca.gov/agendas/mtdocs/2000/11/00004663.pdf>> (visited Feb. 21, 2001). The text of the Waste Board's response in the August 28, 2000 letter to U.S. EPA is as follows:

1. The guidance states that once a discrimination complaint is filed, as part of a preliminary finding of noncompliance, US EPA 'expects to assess whether the adverse disparate impact results from factors within the recipient's authority to consider as defined by applicable laws and regulations.' In California, the issuance of a solid waste facility permit is a coordinated process between the LEA [local enforcement agency] and [the Waste Board]. The LEA obtains a permit application from the facility and develops a draft permit. [The Waste Board]'s role is to review the draft permit and concur or object to the permit. However, the governing statutes set forth only very limited grounds under which [the Waste Board] may object, i.e., whether the facility will operate in accordance with state minimum operating standards and financial assurance requirements, or whether the project is in compliance with the California Environmental Quality Act (CEQA) from the limited perspective of a 'responsible agency.' The LEA then issues the permit. Based on the aforementioned assessment process US EPA intends to follow, [the Waste Board]'s limited authority to object to a permit, which does not include authority to either object based on disparate effects of the facility on surrounding population or object based on inadequate public participation activities, suggests its permit decision would necessarily be immune to Title VI complaints.

2. In the response to comments on the previous draft guidance (regarding claims that local zoning/siting decisions are most often the determining factor in where a facility will be located), US EPA states its view that because issuance of a permit is the necessary act that allows the operation of a source in a given location, a state permitting authority has an independent obligation to comply with Title VI, a direct result of its accepting Federal assistance.

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Waste Board asserted that it was uncertain whether U.S. EPA was of the view that the Waste Board is required to deny waste disposal permits on environmental justice grounds. The Waste Board argued that it has no authority under state law to object to permits based on disparate effects of the facility on any surrounding minority population or based on inadequate public participation activities.<sup>218</sup> The Waste Board maintained it was unclear whether U.S. EPA believed that the Waste Board would nonetheless have an independent obligation to avert discrimination under Title VI.<sup>219</sup>

The Waste Board staff consistently raised this point concerning its authority. At the September 14, 2000, legislative oversight hearing on implementation of SB 115, the Waste Board's executive officer and chief counsel repeated the assertion that the Waste Board does not have statutory authority to object to landfill permits on environmental justice grounds.<sup>220</sup> The staff report concerning environmental justice prepared for the November 2000 Waste Board meeting also reiterates this point.<sup>221</sup> The U.S. EPA guidance process is still pending, with final promulgation scheduled for February 2001. In connection with the issuances of the draft guidances, the U.S. EPA Office of Civil Rights may respond to the questions raised by the Waste Board and give further federal direction as to the Waste Board's Title VI responsibilities.

Apart from its Title VI responsibilities, the Waste Board members themselves recently have begun to examine the scope of their authority to carry out the environmental justice mandate. Item Number 25 on the Waste Board's agenda for the November 14-15, 2000 meeting was a discussion of current environmental justice activities and legislation relating to the Waste Board's programs.<sup>222</sup> The inquiry was prompted

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'[R]ecipients are responsible for ensuring that the activities authorized by their environmental permits do not have discriminatory effects, regardless of whether the recipient selects the site or location of permitted sources.' In light of comment #1, it is not clear whether US EPA believes this obligation to comply would override an entity's lack of statutory authority to use Title VI grounds in a permit objection or denial.

<sup>218</sup> *See id.*

<sup>219</sup> *See id.*

<sup>220</sup> WHERE ARE WE? SENATE OVERSIGHT HEARING, *supra* note 39 at 8.

<sup>221</sup> *See* AGENDA, *supra* note 217, Agenda Item (staff report) at 5-6.

<sup>222</sup> *See* AGENDA, *supra* note 217.

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by the Waste Board members, and the staff report for the November 2000 meeting indicates this agenda item was specifically prepared to address questions posed by Board members.<sup>223</sup> The transcript of the November 2000 board meeting reveals that Waste Board members may wish to do more than simply coordinate with existing Cal EPA efforts; some members urged the Waste Board staff to pursue independent efforts.<sup>224</sup> This level of interest indicates a more active board than in the past.

David Roberti, a member of the Waste Board since 1998 and former President Pro Tem of the State Senate,<sup>225</sup> was the most persistent voice for action during the November 2000 hearing. First, he reiterated a request to obtain data and mapping to determine the location of facilities such as landfills and transfer stations.<sup>226</sup> He emphasized that it was necessary to quantify the extent of the problem and then to discuss solutions. He was disinclined to proceed with developing strategies in the abstract which potentially could turn the process into "bureaucratic pretzel twisting."<sup>227</sup> At the conclusion of the environmental justice agenda item, the board

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<sup>223</sup> See AGENDA, *supra* note 217, Agenda Item (staff report) at 1. The staff report describes the choices before the Waste Board as follows:

OPTIONS FOR THE BOARD

- The Board may direct staff to independently begin development of an environmental justice strategy, including review and proposed revision of policies, procedures, and regulations, in addition to working with Cal/EPA in developing an interagency environmental justice strategy as required in SB 89.
- The Board may direct staff to work solely within the Cal/EPA Working Group, rather than take action independent of this Group.
- The Board may direct staff to pursue legislative action to expand statutory authority to object to a permit based on environmental justice considerations.
- The Board may direct staff to pursue legislative action to require a socio-economic evaluation as part of a permit application.

<sup>224</sup> See AGENDA, *supra* note 217, Transcript (Nov. 15, 2000) of the Waste Board Meeting (hereinafter AGENDA TRANSCRIPT) at 207, 212-13, 216-17 (available upon request from the Waste Board). There was a countervailing outside pressure at this meeting. The only person commenting on this environmental justice agenda item was a representative from the California Refuse Removal Committee representing over 100 permitted solid waste facilities and transfer stations statewide. This representative urged the Board not to take independent action. See *id.* at 215-16.

<sup>225</sup> At <[http://www.ciwmb.ca.gov/BoardInfo/BoardMembers/Robert\\_i.htm](http://www.ciwmb.ca.gov/BoardInfo/BoardMembers/Robert_i.htm)> (visited Feb. 21, 2001).

<sup>226</sup> See AGENDA TRANSCRIPT, *supra* note 224 at 200-201.

<sup>227</sup> *Id.* at 205.



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chairperson confirmed that the Waste Board's staff should proceed with the data analysis to quantify the extent of the problem and to continue to work with Cal EPA in its efforts to address environmental justice concerns.<sup>228</sup>

In the November 2000 agenda materials, the staff explained its view that the Waste Board has no authority to consider an environmental justice claim in the context of review of a waste disposal permit as follows:

1. The statutory scheme under which solid waste facility permits are issued defines the Board's authority for objecting to solid waste facility permits. Although SB 115 broadly requires all Cal/EPA agencies to conduct their 'programs, policies, and activities that substantially affect human health or the environment in a manner that ensures the fair treatment of people of all races, cultures, and income levels, including minority populations and low-income populations of the state', the Board's governing statute limits the Board's ability to object to a solid waste facility permit to findings that the permit is not consistent with state minimum standards, or financial assurance requirements, or requirements for Integrated Waste Management Plan conformance and consistency.

Rules of statutory construction provide that a specific provision will prevail over a more general provision unless there is no conflict between the two provisions, and regardless of the order of enactment. The specific provision will be treated as an exception to the general provision. In this case the Legal Office believes there is a clear conflict between the two provisions and therefore the specific limitations on objecting to a permit do prevail.<sup>229</sup>

Although the Waste Board staff report does not furnish a statutory citation, the "specific provision" on which the argument rests is apparently California Public Resources Code section 44009. Subdivision (c) of that section provides that the Waste Board shall not object to the issuance of a solid waste

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<sup>228</sup> See *id.* at 205. However, as the California State Auditor subsequently stated, the Waste Board "did not establish timelines for accomplishing this task." CALIFORNIA STATE AUDITOR, CALIFORNIA INTEGRATED WASTE MANAGEMENT BOARD: LIMITED AUTHORITY AND WEAK OVERSIGHT DIMINISH ITS ABILITY TO PROTECT PUBLIC HEALTH AND THE ENVIRONMENT, No. 2000-109 (Dec. 2000) (hereinafter AUDITOR REPORT) at 16 available at <[http://www.bsa.ca.gov/bsa/pdfs/2000\\_109.pdf](http://www.bsa.ca.gov/bsa/pdfs/2000_109.pdf)> (visited Feb. 21, 2001).

<sup>229</sup> See AGENDA, *supra* note 217, Agenda Item (staff report) at 5-6.

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permit by a local agency unless it makes a finding of inconsistency “with state minimum standards adopted pursuant to Section 43020” or a list of other statutory provisions.<sup>230</sup> The staff’s legal conclusion is that, notwithstanding the more recent enactment of state environmental justice legislation, this limiting provision presently precludes the Waste Board from conducting its permit review activity “in a manner that ensures the fair treatment of people of all races, cultures, and income levels, including minority populations and low-income populations of the state.”<sup>231</sup>

The reasoning of the staff implicitly acknowledges a “conflict” between the broad environmental justice duties delegated to Cal EPA and its six entities under California Public Resources Code section 72000 with the permitting provision of the Waste Board’s statute in section 44009. The question is whether the recent enactment of section 72000 expands the grounds for the Waste Board to object to a permit. One way to frame the issue is whether this environmental justice legislative expansion would be an implied amendment or repeal of section 44009. The general rule is that an implied amendment or repeal of a statute is disfavored.<sup>232</sup> However, the resolution of such a question turns on a judgment concerning the nature of the apparent conflict, the policies advanced by the conflicting rules and the determination whether the more recently enacted rule is so inconsistent with its predecessor that it ought to be read as overturning the earlier rule.<sup>233</sup> Without a doubt, the recent environmental justice legislation and the existing Waste Board’s legislation must be construed to determine if there is an inconsistency. However, the question is a complex one, and it is not decided by a wooden principle that a specific provision always prevails over a more general provision.

Regardless of whether the legal conclusion of the Waste Board’s staff concerning section 44009 is ultimately deemed correct, the Waste Board may nonetheless be able to foster environmental justice in waste facility siting. First, the legal

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<sup>230</sup> CAL. PUB. RES. CODE § 44009(c) (West Supp. 2001).

<sup>231</sup> CAL. GOV’T CODE § 65040.12(c) (California’s definition of environmental justice).

<sup>232</sup> See 1A SUTHERLAND STATUTORY CONSTRUCTION §§ 22.13, 23.09-23.10 (1993).

<sup>233</sup> See *id.*

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reasoning concerning the specific and the general statutory provisions does not address whether the federal Title VI statute imposes an independent environmental justice requirement. Such a requirement could apply notwithstanding the perceived lack of state statutory authority to object to a permit.<sup>234</sup> Moreover, the Waste Board could examine planning measures to increase the attention given to environmental justice early in the siting process so there is no later conflict with any permit approval requirements by the Waste Board.

A concrete environmental justice problem was revealed in a December 2000 California State Auditor report on the Waste Board's oversight of solid waste landfills.<sup>235</sup> This report, prepared at the request of the Legislature's Joint Legislative Audit Committee, concluded that "it appears that California's transfer stations may be disproportionately located in low-income areas."<sup>236</sup> Transfer stations not only increase noise, odor, litter and traffic, but they can increase poor air quality and disease-spreading pests, such as rodents and roaches.<sup>237</sup> The California State Auditor recognized there were federal and state environmental justice statutes prohibiting discrimination and stated:

However, [the board] cannot object to the permit if it believes that . . . a permit could disproportionately impact a low-income or minority community. Consequently, the board is limited in its ability to protect public health and safety and the environment, and in its ability to ensure that its permit decisions are in compliance with state and federal laws prohibiting environmental programs from discriminating against those communities.<sup>238</sup>

The State Auditor's report does not supply legal analysis, and it seems that it simply accepted the Waste Board staff's legal analysis to reach this conclusion.

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<sup>234</sup> See *infra* notes 262 through 265 and accompanying text, V B., (U.S. EPA Office of Civil Rights' position concerning a state agency's ability to deny a permit).

<sup>235</sup> See AUDITOR REPORT, *supra* note 228 at 14.

<sup>236</sup> *Id.* Transfer stations are facilities where municipal waste is unloaded from collection vehicles, temporarily stored, and then reloaded onto larger transport vehicles for shipment to landfills. See *id.*

<sup>237</sup> See *id.* at 16.

<sup>238</sup> See *id.* at 12.

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Assuming for the sake of discussion that the conclusion of the State Auditor and the view of the Waste Board's staff concerning the limitation of section 44009 is correct, there may be other avenues which the Waste Board could explore to overcome the perceived limitations and to comply with the environmental justice policy embodied in section 72000. Perhaps the Waste Board could interject environmental justice considerations into the permit review process by promulgating additional state minimum standards under its existing authority<sup>239</sup> which then, by reference, become part of the permit approval criteria.<sup>240</sup> Also, since the Waste Board is charged to promote environmentally safe land disposal, the Waste Board might be able to enact minimum standards under California Public Resources Code section 43020 to address what the State Auditor discerned as "limited . . . ability to protect public health and safety and the environment."<sup>241</sup>

The claim of administrative impotence to address an environmental justice claim has been raised in the federal administrative forum.<sup>242</sup> The claim of lack of authority is often surmounted by a more refined look at the health and environmental impacts in light of any unusual vulnerability of the minority and low-income communities or the cumulative disproportionate burdens they bear.<sup>243</sup>

Alternatively, the Waste Board might be able to address the problem of environmental injustice through the integrated waste management planning program. In its 1989 revision, the Legislature declared that "the responsibility for solid waste management is a shared responsibility between the state and local governments" and that the state "shall oversee the design and implementation of local integrated waste management plans."<sup>244</sup> Each county is required to submit to Waste Board a countywide integrated waste management plan<sup>245</sup> which includes a countywide siting element for waste facili-

<sup>239</sup> See CAL. PUB. RES. CODE § 43020 (West 1996).

<sup>240</sup> See CAL. PUB. RES. CODE § 44009(a)(2) (West Supp. 2001).

<sup>241</sup> See CAL. PUB. RES. CODE § 40051(a)(3) (West 1996); AUDITOR REPORT, *supra* note 228 at 1.

<sup>242</sup> See, e.g., Lazarus et al., *supra* note 51 at 657-58.

<sup>243</sup> See *id.* at 652-53, 676-677.

<sup>244</sup> CAL. PUB. RES. CODE § 40001(a) (West Supp. 2001).

<sup>245</sup> See CAL. PUB. RES. CODE § 41750 (West 1996).

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ties.<sup>246</sup> The Board has related responsibilities: (1) develop a model countywide siting element and integrated waste management plan<sup>247</sup> and (2) review and approve the actual plans when submitted to the Waste Board by the counties.<sup>248</sup>

Presently, the Waste Board's regulations include Planning Guidelines and Procedures for Preparing and Revising Countywide Integrated Waste Management Plans.<sup>249</sup> Adopted in 1994, this Waste Board guidance provides for the formulation of a siting element, including a specific requirement to "describe the criteria to be used in the siting process for each facility."<sup>250</sup>

The Waste Board might be able to infuse environmental justice precepts into the siting planning process by construing or by amending the criteria in its present regulation, "Environmental Considerations, Environmental Impacts, Socioeconomic Considerations," to include an examination of environ-

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<sup>246</sup> See CAL. PUB. RES. CODE § 41750(e) (West 1996). This siting element must meet specific statutory requirements. CAL. PUB. RES. CODE §§ 41700-04 (West 1996).

<sup>247</sup> See CAL. PUB. RES. CODE § 40912(a) (West Supp. 2001)

<sup>248</sup> See CAL. PUB. RES. CODE § 41790 (West 1996). Under this statute, the Waste Board's review is to determine if the countywide integrated waste management plan complies with a specific article of the California Public Resources Code [commencing at § 40050]. Environmental justice is not specifically listed in the statutes in this article, but there is broad statutory direction to the Waste Board to improve regulation of existing solid waste landfills, to improve permitting procedures for these facilities and "to specify the responsibilities of local governments to develop and implement integrated waste management programs." CAL. PUB. RES. CODE § 40052 (West 1996).

<sup>249</sup> CAL. CODE REGS. tit.14, div. 7, ch. 9 §§ 18700-18813 (2000).

<sup>250</sup> CAL. CODE REGS. tit. 14, § 18756 (2000) provides, in part:

(a) To establish a new solid waste disposal facility or to expand an existing solid waste disposal facility, the county and regional agency shall describe the criteria to be used in the siting process for each facility. The criteria shall include, but not be limited to, a description of the major categories of Environmental Considerations, Environmental Impacts, Socioeconomic Considerations, Legal Considerations, and additional criteria as developed by the county, cities, regional agency and member agencies. The following are examples of criteria that may be considered within those major categories: . . . .

(3) Socioeconomic considerations (for example: transportation including local and regional transportation systems, highways and major roadway corridors, rail transportation and corridors, land use including regional and local land uses such as military use, mineral extraction, agriculture, recreation/tourism, compatibility with existing and future land uses, consistency with county general plan(s) and future post-closure uses, economic factors including estimates of development costs and operational costs, etc.);

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mental injustice. If environmental justice were addressed at the plan approval stage, problems at the permit approval stage could be averted.

The Waste Board members themselves are recently focusing on environmental justice issues. Their discussion and direction to Waste Board staff may result in a reexamination of current Waste Board authority under Title VI, under their permitting statutes and, for the future, under their planning statutes.

#### VI. THE ROAD AHEAD: INCORPORATING ENVIRONMENTAL JUSTICE INTO THE PROGRAMS, POLICIES AND ACTIVITIES OF CALIFORNIA'S STATE AGENCIES

Senator Richard Alarcon chairs the Senate Select Committee on Environmental Justice. His comments at the September 14, 2000, legislative oversight hearing both highlight some of the issues and opportunities currently facing California state agencies and emphasize the Legislature's ongoing interest in environmental justice.<sup>251</sup> In his introductory remarks, Senator Alarcon noted that the "new law requires only a small number of actions, [and] it also provides the state a lot of leeway to ensure that environmental justice becomes a reality."<sup>252</sup>

There are several means available to state administrative agencies to achieve this goal. Since environmental justice is premised on fairness to low-income and minority communities, location is a central concern. A principal means of developing information and avoiding injustice is by integrating environmental justice considerations into the city and county general planning process. State administrative agencies should also consider environmental justice review in the particular permitting and planning processes within their authority. A key tool to avoid environmental injustice is to demand information from project proponents on demographics and on the peculiar or cumulative risks to low-income and minority communities of proposed projects during the CEQA review.

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<sup>251</sup> See WHERE ARE WE? SENATE OVERSIGHT HEARING, *supra* note 39 at 1, 9.

<sup>252</sup> *Id.* at 1.

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A. ENVIRONMENTAL JUSTICE CONCERNS SHOULD BE CONSIDERED DURING THE GENERAL PLANNING PROCESS

One pivotal planning tool is the local general plans which each city and county must adopt.<sup>253</sup> Since the general plan is the “constitution” governing development within each local jurisdiction,<sup>254</sup> the introduction of environmental justice at this stage would have widespread effects from residential to industrial developments.<sup>255</sup>

The consideration of environmental justice concerns in general plans is not a new suggestion. As discussed earlier in this article, in 1997, Senator Diane Watson proposed this view in SB 451, but the bill was vetoed by then-Governor Wilson.<sup>256</sup> Subsequently, the business community suggested during the 1999 debate on SB 115, the first-adopted environmental justice legislation in California, that environmental justice concerns should be raised prospectively in future land use planning.<sup>257</sup> More recently, this suggestion was echoed by Senator Richard Alarcon in the September 14, 2000 legislative oversight hearing.<sup>258</sup>

Local governmental entities are authorized to address in the general plan “any other subjects which, in the judgment of the legislative body, relate to the physical development of the county or city.”<sup>259</sup> California state agencies could offer information, suggestions and leadership to local agencies for the incorporation of environmental justice into general plans. One venue for this discussion is with the OPR general plan guidelines.<sup>260</sup> The latest issue of the OPR General Plan Guidelines was released in November 1998 during the Wilson adminis-

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<sup>253</sup> See CAL. GOV'T CODE §§ 65300, 65302 (West 1997).

<sup>254</sup> See *Leshar Communications, Inc. v. City of Walnut Creek*, 52 Cal.3d 531, 540 (1990).

<sup>255</sup> See, e.g., CAL. GOV'T CODE § 66473.5 (West 1997). (For example, a local agency is required to disapprove a tentative map for a proposed subdivision unless it is consistent with the general plan.)

<sup>256</sup> See *supra* notes 76 through 82 and accompanying text in III A. Historical Legislative Antecedents.

<sup>257</sup> See *supra* note 114 and accompanying text.

<sup>258</sup> WHERE ARE WE? SENATE OVERSIGHT HEARING, *supra* note 39 at 2.

<sup>259</sup> CAL. GOV'T CODE § 65303 (West 1997).

<sup>260</sup> CAL. GOV'T CODE § 65040.2(a) (West 1997).

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tration.<sup>261</sup> Although these general plan guidelines fill almost two hundred fifty pages, environmental justice is not mentioned, even in the multi-page glossary of general plan terms. It would appear that the next amendment of these general plan guidelines would provide a useful forum for the discussion of environmental justice.

#### B. WITHIN THEIR AUTHORITY, CALIFORNIA STATE AGENCIES SHOULD CONSIDER ENVIRONMENTAL JUSTICE CONCERNS DURING PERMITTING AND PLANNING

One fundamental issue is the extent that California state agencies may incorporate environmental justice into their existing review and approval of permits. In its June 2000 draft Title VI guidances, the U.S. EPA Office of Civil Rights makes no exception for a state agency which is only approving a permit authorized by local land use zoning. Under U.S. EPA's interpretation, the facts that a proposed project conforms with local land use zoning and that the state agency does not control the location of the project are not material. The state permit approval is a separate act which must meet Title VI requirements.<sup>262</sup> As mentioned earlier in this article, the Waste

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<sup>261</sup> STATE OF CAL. GOVERNOR'S OFFICE OF PLANNING AND RESEARCH, GENERAL PLAN GUIDELINES (Nov. 1998) at <<http://ceres.ca.gov/planning/genplan/gpg.pdf>> (visited Feb. 21, 2001).

<sup>262</sup> See *supra* note 38. Simultaneously with the issuance of the two U.S. EPA draft guidances, the U.S. EPA Office of Civil Rights also released an explanatory document, Summary of Key Stakeholder Issues Concerning EPA Title VI Guidance, 65 Fed. Reg. 39650 (June 27, 2000). One of the U.S. EPA comments relevant to this permitting discussion is as follows:

Some have argued that the issuance of environmental permits does not 'cause' discriminatory effects [footnote omitted]. Instead, they claim that local zoning decisions or siting decisions determine the location of the sources and the distribution of any impacts resulting from the permitted activities. However, in order to operate, the source's owners must both comply with local zoning requirements *and* obtain the appropriate environmental permit.

In the Title VI context, the issuance of a permit is the necessary act that allows the operation of a source in a given location that could give rise to the adverse disparate effects on individuals. Therefore, a state permitting authority has an independent obligation to comply with Title VI, which is a direct result of its accepting federal assistance and giving its assurance to comply with Title VI. In accordance with 40 CFR 7.35(b), recipients [state permitting agencies] are responsible for ensuring that the activities authorized by their environmental permits do not have discriminatory effects, regardless of whether



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Board's staff posed a question to U.S. EPA about the interplay of its state statutes and its Title VI obligations, but, to date, there has been no response.

Commentators have suggested that an in-depth review of the various environmental statutes would provide various legal means to include environmental justice review in existing permitting situations.<sup>263</sup> This approach is also reflected in a December 1, 2000 memorandum from the U.S. EPA General Counsel.<sup>264</sup> This long-awaited memorandum, requested by U.S. EPA's federal advisory group, the National Environmental Justice Advisory Committee, outlines specific provisions in various federal environmental statutes which allow, and may require, states and local agencies to consider environmental justice during permitting.<sup>265</sup>

Civil rights statutes are considered remedial and are interpreted broadly to effectuate their underlying purposes.<sup>266</sup> The Civil Rights Act of 1964 contains a statute which specifically provides that it is not preempting state law, but the statutory caveat is that a state law that is "inconsistent with any of the purposes of this Act" is invalid.<sup>267</sup> Thus, the under-

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the recipient selects the site or location of permitted sources. Accordingly, if the recipient did not issue the permit, altered the permit, or required mitigation measures, certain impacts that are the result of the operation of the source could be avoided. The recipient's operation of its permitting program is independent of the local government zoning activities. *Id.* at 115.

<sup>263</sup> See, e.g., Lazarus et al., *supra* note 51 at 655-677.

<sup>264</sup> See Memorandum from Gary S. Guzy, General Counsel, U.S. EPA, to U.S. EPA Assistant Administrators, EPA Statutory and Regulatory Authorities Under Which Environmental Justice Issues May Be Addressed in Permitting (Dec. 1, 2000).

<sup>265</sup> See *id.* For example, the General Counsel memorandum suggests that environmental justice concerns could be addressed in air quality permits under existing law. *Id.* at 11. The federal Clean Air Act provides that, for new permits issued in nonattainment areas, the siting analysis must consider alternative sites and production techniques to demonstrate that the benefits of the proposed air pollution source significantly outweigh the environmental and social costs imposed as a result of the location or construction. Clean Air Act § 173(a)(5)

<sup>266</sup> Cf. *Robertson v. Wegman*, 436 U.S. 584, 590 (1978).

<sup>267</sup> 42 U.S.C. § 2000h-4 (1994) provides:

Nothing contained in any title of this Act shall be construed as indicating an intent on the part of Congress to occupy the field in which any such title operates to the exclusion of State laws on the same subject matter, nor shall any provision of this Act be construed as invalidating any provision of State law unless such provision is inconsistent with any of the purposes of this Act, or any provision thereof.

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lying question is whether any particular California permitting requirement is inconsistent with Title VI requirements; if it is, case law in other contexts would suggest that the civil rights statutes would impose additional responsibilities.<sup>268</sup>

In addition to the potential federal imperative, California's state administrative agencies should consider whether they could, or possibly must, include environmental justice review in their permitting and planning review activities as a result of California's environmental justice statutes. These statutes manifest a public policy that governmental activities, that substantially affect human health or the environment, be conducted in a manner that ensures environmental justice. As related in the discussion of the Waste Board's progress in implementing the environmental justice mandate of California Public Resources Code section 72000, this effort may require a sophisticated and creative examination of the permitting or planning review statutes of each agency.

### C. CEQA'S ENVIRONMENTAL IMPACT REPORT PROCESS PROVIDES AN OPPORTUNITY FOR THE CONSIDERATION OF ENVIRONMENTAL JUSTICE CONCERNS

A standard, but sweeping, means to address environmental justice is provided under CEQA. Under CEQA, public agencies may consider socioeconomic effects of a proposed pro-

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<sup>268</sup> For example, in an employment setting, the U.S. Supreme Court considered a pregnancy disability complaint and held that the nondiscrimination provisions of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, were the federal floor, and state law could rise above, but could not drop below the federal requirements. *California Federal Savings & Loan Assn. v. Guerra*, 479 U.S. 272, 290-91 (1987). *See also generally* *Speciality Healthcare Management v. St. Mary Parish Hosp.* (5th Cir. 2000) 220 F.3d 650, 653-54 (discussion of civil rights cases in which plaintiffs were permitted to collect their attorneys' fees for the successful prosecution of a civil rights case, regardless of a state anti-seizure law, so as to effectuate the purposes of the civil rights statutes); *see also* *Sexson v. Servaas*, 33 F.3d 799, 802-02 (7th Cir. 1994) (in a voting rights case concerning state apportionment, the federal interest in the voting rights statutes "trumps the state interest, at least until the federal question is resolved.") Although the U.S. EPA Office of Civil Rights did not articulate this reasoning, this case law may be the basis for its position in the June 2000 draft guidances that the state agency's operation of its permitting program must itself satisfy Title VI regardless of the state's inability to control the underlying land use decisions. *See supra* note 262.

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ject in an environmental impact report.<sup>269</sup> CEQA defines the “environment” in terms of physical characteristics, such as the proposed project’s impacts on air quality.<sup>270</sup> A key determination for the project proponent and for the reviewing agency is whether environmental review is required and, if so, the method of scrutiny.<sup>271</sup> If a proposed project “may have a significant effect on the environment, an environmental impact report shall be prepared.”<sup>272</sup>

By statute, the Legislature has identified situations which would require a finding of a potential significant effect on the environment.<sup>273</sup> Thus, if there is either a potential of “substantial adverse effects on human beings either directly or indirectly”<sup>274</sup> or if the “possible effects of a project are individually limited but cumulatively considerable” when viewed with the effects of past, other current or probable future projects,<sup>275</sup> an environmental impact report must be prepared. Since many environmental justice complaints revolve around human health concerns when there is a proposal to locate or expand a source of pollution, such as a chemical plant, in a minority or low income communities already subjected to high levels of pollution from other sources, one or both of the conditions for the preparation of environmental impact report may be met.

In response to the Legislature’s directive,<sup>276</sup> the Resources Agency adopted a definition of “significant effect on the environment”<sup>277</sup> and offered guidance to lead agencies in making

<sup>269</sup> See CAL. CODE REGS. tit. 14, §15131 (2000).

<sup>270</sup> CAL. PUB. RES. CODE § 21060.5 (West 1996).

<sup>271</sup> MICHAEL H. REMY, ET AL. GUIDE TO THE CALIFORNIA ENVIRONMENTAL QUALITY ACT (CEQA) (hereinafter GUIDE) (10th ed. 1999) at 4-5, 80-86, 206-07 (some projects are exempt from environmental review, and other projects are scrutinized by a review of a negative declaration or of an environmental impact report); see also CAL. PUB. RES. CODE § 21080(c) (West Supp. 2001); see also Laurel Heights Improvement Ass’n v. Regents of the Univ. of California, 47 Cal.3d 376, 391-92 (1988).

<sup>272</sup> CAL. PUB. RES. CODE § 21082.2(d) (West 1996).

<sup>273</sup> CAL. PUB. RES. CODE § 21083 (West 1996).

<sup>274</sup> CAL. PUB. RES. CODE § 21083(a) (West 1996).

<sup>275</sup> CAL. PUB. RES. CODE § 21083(b) (West 1996).

<sup>276</sup> See CAL. PUB. RES. CODE § 21083 (West 1996).

<sup>277</sup> CAL. CODE REGS. tit. 14, §15382 (2000) provides:

“Significant effect on the environment” means a substantial, or potentially substantial, adverse change in any of the physical conditions within the area affected by the project including land, air, water, minerals, flora, fauna, ambient

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the significance determination which triggers the preparation of an environmental impact report.<sup>278</sup> One element in this analysis is whether the direct or indirect physical change resulting from a proposed project may cause significant adverse economic or social effects on people.<sup>279</sup>

When there is a potential significant effect and an environmental impact report must be prepared, the discussion should include demographic, economic and social impact information.<sup>280</sup> The environmental impact report "shall also analyze any significant environmental effects the project might cause by bringing development and people into the area affected."<sup>281</sup> Bringing a new hazardous waste incinerator to an existing residential community, for example, must be analyzed under this CEQA regulation.<sup>282</sup>

Once an environmental impact report is required, a reviewing agency must consider the social and economic impacts

noise, and objects of historic or aesthetic significance. An economic or social change by itself shall not be considered a significant effect on the environment. A social or economic change related to a physical change may be considered in determining whether the physical change is significant.

<sup>278</sup> See CAL. CODE REGS. tit. 14, §15064-65 (2000).

<sup>279</sup> CAL. CODE REGS. tit. 14, §15064(e) (2000) provides:

Economic and social changes resulting from a project shall not be treated as significant effects on the environment. Economic or social changes may be used, however, to determine that a physical change shall be regarded as a significant effect on the environment. Where a physical change is caused by economic or social effects of a project, the physical change may be regarded as a significant effect in the same manner as any other physical change resulting from the project. Alternatively, economic and social effects of a physical change may be used to determine that the physical change is a significant effect on the environment. *If the physical change causes adverse economic or social effects on people, those adverse effects may be used as a factor in determining whether the physical change is significant. For example, if a project would cause overcrowding of a public facility and the overcrowding causes an adverse effect on people, the overcrowding would be regarded as a significant effect.* [emphasis added].

<sup>280</sup> CAL. CODE REGS. tit. 14, §15126.2(a) (2000) provides, in part:

The discussion should include relevant specifics of the area . . . and changes induced in population distribution, population concentration, the human use of the land (including commercial and residential development), health and safety problems caused by the physical changes . . . .

<sup>281</sup> CAL. CODE REGS. tit. 14, §15126.2(a) (2000).

<sup>282</sup> CAL. CODE REGS. tit. 14, §15126.2(a) (2000); see also CAL. PUB. RES. CODE § 21151.1 (West Supp. 2001).

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of the proposed physical change to the environment.<sup>283</sup> “Economic or social effects of a project may be used to determine the significance of physical changes caused by the project.”<sup>284</sup> Failure to analyze social and economic impacts in the environmental review process can invalidate the project’s compliance with CEQA.<sup>285</sup>

An example in the regulation of the relationship between physical change and economic and social effects is the construction of the new freeway or rail line that would divide an existing community: “the construction would be the physical change, but the social effect on the community would be the basis for determining that the effect would be significant.”<sup>286</sup> Environmental review, either in the environmental impact report or presented in some other form, is required to analyze this potential impact.<sup>287</sup> If the existing community is predominantly low-income or minority, an environmental justice analysis would also be appropriate to determine if there is a disproportionate impact from the construction of this proposed new freeway.

This example of construction of a new freeway, and its attendant increase in air pollution, is also an example of a potential cumulative impact<sup>288</sup> of a project. If these potential cu-

<sup>283</sup> See CAL. CODE REGS. tit. 14, § 15131 (2000).

<sup>284</sup> CAL. CODE REGS. tit. 14, § 15131(b) (2000).

<sup>285</sup> See *Christward Ministry v. Superior Court*, 184 Cal. App. 3d 180, 196-97 (1986) (general plan amendment after adoption of a negative declaration was invalid as there was evidence that the waste-to-energy facility next to a religious retreat would disturb its religious practices); compare *Citizens for Quality Growth v. City of Mt. Shasta*, 198 Cal. App. 3d 433, 445-46 (1988) (failure to consider in an environmental impact report the potential business closure and physical deterioration of downtown before approval of a proposed suburban rezoning for commercial development) with *Goleta Union School District v. Regents of the University of California*, 37 Cal. App. 4th 1025, 1031-33 (1995) (classroom overcrowding, per se, is not a significant effect if there is no physical change, such as construction of new classrooms or a new expanded bus schedule).

<sup>286</sup> CAL. CODE REGS. tit. 14, § 15131(b) (2000).

<sup>287</sup> CAL. CODE REGS. tit. 14, § 15131(b) (2000).

<sup>288</sup> CAL. CODE REGS. tit. 14, § 15355 (2000) provides:

“Cumulative impacts” refer to two or more individual effects which, when considered together, are considerable or which compound or increase other environmental impacts.

(a) The individual effects may be changes resulting from a single project or a number of separate projects.

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mulative impacts are considerable, the lead agency is required to find that a project may have a significant effect on the environment and is required to prepare an environmental impact report.<sup>289</sup>

There is considerable case law under CEQA analyzing the adequacy of the environmental review of cumulative impacts.<sup>290</sup> One dispute arises in a situation when the existing conditions already exceed the recommended standard. If a proposed project adds any adverse impact, the issue is whether, necessarily, there is a significant cumulative impact.<sup>291</sup> With respect to cumulative air quality impacts, one court rejected the ratio approach, which analyzed the relative increase of pollutants in an already impacted area, and required an analysis of whether the increase was significant.<sup>292</sup> A similar result was reached by another court with respect to increased noise impacts.<sup>293</sup> Many environmental justice complaints arise in situations where a new or expanded polluting project is proposed for an area already adversely impacted. The cumulative impact analysis will provide a tool to analyze any increased impacts on the community.

In addition, at the time mitigation measures are to be considered, social and economic impacts must be considered

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(b) The cumulative impact from several projects is the change in the environment which results from the incremental impact of the project when added to other closely related past, present, and reasonably foreseeable probable future projects. Cumulative impacts can result from individually minor but collectively significant projects taking place over a period of time.

<sup>289</sup> See CAL. CODE REGS. tit. 14, § 15065 (2000). The discussion of cumulative impacts in an environmental impact report must meet specific requirements. See CAL. CODE REGS. tit. 14, § 15130 (2000).

<sup>290</sup> REMY, ET AL. GUIDE *supra* note 271 at 472-80.

<sup>291</sup> See *id.* at 476-77. Commentators sometimes referred to the dispute as the "one molecule rule," and some argue that any emissions of nonattainment pollutants in a nonattainment area necessarily creates a significant cumulative impact. See *id.* (although explaining the dispute, these authors do not subscribe to the rule).

<sup>292</sup> See *Kings County Farm Bureau v. City of Hanford*, 221 Cal. App. 3d 692 (1990).

<sup>293</sup> See *Los Angeles Unified School Dist. v. City of Los Angeles*, 58 Cal. App. 4th 1019, 1024-26 (1997) (the existing noise level was 72.1 dBA, the proposed project would increase traffic noise 2.8 to 3.3 dBA at the nearby schools and the Department of Health recommended maximum was 70 dBA; the court rejected the city's contention that the increase was only a marginal impact and required additional analysis of the cumulative impacts).

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under CEQA.<sup>294</sup> If there are mitigation measures which could potentially reduce the significance of impact, this information must be presented in some manner to the lead agency.<sup>295</sup>

Some agencies consider social and economic factors in their environmental review process as a matter of general practice. As previously discussed, the California Energy Commission both in its prior regulations and in its recent emergency regulations specifically required the collection of social, economic and demographic information in its environmental review of the siting of new or expanded power plants.<sup>296</sup>

Depending on the project, a lead agency may be required to consider the economic and social impacts of a proposed project in order to properly evaluate whether the impacts are significant, whether there are cumulative impacts and whether additional mitigation measures are required. There is no barrier to considering environmental justice considerations during the CEQA process and, in some situations, in order to properly consider the significance of an effect, cumulative impacts and mitigation measures, CEQA requires the consideration of environmental justice concerns during the CEQA process.<sup>297</sup> As part of its coordinating role, OPR may choose to

<sup>294</sup> CAL. CODE REGS. tit., 14, §15131 (2000) provides, in part:

Economic or social information may be included in an EIR or may be presented in whatever form the agency desires.

(c) Economic, social, and particularly housing factors shall be considered by public agencies together with technological and environmental factors in deciding whether changes in a project are feasible to reduce or avoid the significant effects on the environment identified in the EIR. If information on these factors is not contained in the EIR, the information must be added to the record in some other manner to allow the agency to consider the factors in reaching a decision on the project.

<sup>295</sup> See CAL. CODE REGS. tit. 14, §15131(c) (2000).

<sup>296</sup> The California Energy Commission exercised its option to have a functional equivalent to the CEQA process, CAL. CODE REGS. tit. 14, §15024 (2000), and its siting regulations require the collection of this type of data. See *e.g.*, CAL. CODE REGS. tit. 20, § 2022 (b)(2) (2000).

<sup>297</sup> See CAL. PUB. RES. CODE § 21083 (a)-(b) (West 1996); see also CAL. CODE REGS. tit. 14, §§ 15065, 15131 (2000). In addition as discussed previously, the budget control language authorizing Cal EPA to hire its Assistant Secretary for Environmental Justice apparently requires, for the six Cal EPA entities, incorporation of environmental justice into their CEQA review process. See 2000 CAL. STATS. ch. 52, item 0555-002-0001(a).

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recommend<sup>298</sup> that all lead agencies affirmatively inquire about economic or social effects in the CEQA process as part of the mandate to ensure environmental justice.

CONCLUSION

In contrast to his predecessor, Governor Gray Davis has signed, not vetoed, environmental justice legislation. Now his administration must decide how to implement those statutory mandates.

It is certain that there are opportunities for California state agencies to incorporate environmental justice into planning, permitting and environmental review. Some state agencies, stimulated by different degrees of pressure from federal agency directives and from community-based complaints, have already acted; the result is a wide variation in the level of environmental justice activity. What remains to be seen is how the Davis administration will ultimately interpret and implement the Legislature's broad sweeping goal for the "fair treatment" of all people in the environmental arena.

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<sup>298</sup> See CAL. PUB. RES. CODE § 21083 (West 1996).