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Environmental Justice As an Essential Tool in Environmental Review Statutes — A New Look at Federal Policies and Civil Rights Protections and California's Recent Initiatives

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Abstract

Recent litigation by the California Attorney General has sparked renewed interest in the role of environmental justice under federal and state project environmental review laws. Some say that inserting environmental justice into environmental review marks a "radical expansion" of the role of social justice in environmental review. Environmental justice is now a well-established federal legal doctrine addressing communities disproportionately exposed to environmental hazards as a result of their social or economic demographics. The doctrine is supported by President Clinton's executive order, along with agency guidelines and regulations under the National Environmental Policy Act ("NEPA"), which govern federal project environmental review. Using the environmental justice doctrine as a tool during project environmental review assures careful analysis of local or

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regional impacts on communities burdened by adverse social and economic conditions. Federal civil rights laws also support the doctrine, notwithstanding recent U.S. Supreme Court civil rights decisions restricting access to justice and consideration of race in employment testing. California has followed the federal lead and has been a leading state in adopting environmental justice statutes and policies. Thus, it is no surprise that the Attorney General of California has sought to employ environmental justice during the environmental review process.

California's civil rights laws are stronger than federal civil rights protections, and the state has endorsed environmental justice, both generally and specifically, in its global warming regulatory regime. These legal requirements support incorporating environmental justice when applying the California Environmental Quality Act ("CEQA"), which is largely modeled on NEPA. Environmental justice assures that the physical impacts are properly understood in the socioeconomic context, and that cumulative impacts, possible mitigation, and alternatives are properly assessed. Recent California case law questioning CEQA's application to projects situated near hazards does not impact the fundamental role of environmental justice in environmental review. The Attorney General is properly concerned with projects that add to the burdens of vulnerable low-income communities or communities of color.

I. Introduction

The California Attorney General's recent litigation involving transportation planning and air pollutants (including global warming emissions) affecting minority communities has sparked renewed interest in the relationship between environmental review laws and the doctrine of environmental justice. Environmental justice addresses disproportionate environmental impacts on communities of color, low-income communities, and other demographics that have historically faced discrimination. California Attorney General Kamala D. Harris has actually intervened in two cases challenging projects or programs for their failure to analyze disproportionate impacts on minority communities.[1] Some say the Attorney General's actions mark a "radical expansion" of the role of social justice in environmental review.[2]

1. CEQA *Litigation and Settlements*, STATE OF CALIFORNIA DEPARTMENT OF JUSTICE, OFFICE OF THE ATTORNEY GENERAL, http://oag.ca.gov/environment/ceqa/litigation-settlements (last visited June 8, 2012).

2. *See* Peter Hsiao, David Gold, Miles Imwalle & Jennifer Jeffers, *Environmental Justice as Environmental Impact: The Intersection of Environmental Justice, Climate Change, and the California Environmental Quality Act*, BLOOMBERG BNA WORLD CLIMATE CHANGE REPORT, March 12, 2012, at 2.

This article contends that the environmental justice doctrine does not merely belong in project environmental review; rather it is *essential* to ensure that environmental review fully captures the disproportionate effects of environmental impacts on communities of color and low-income communities. The Attorney General's interest in environmental justice is a return to well-founded principles of federal environmental analysis and civil rights protection. As California is one of the state leaders in the adoption of environmental justice policies, the Attorney General's actions provide an opportunity to evaluate the current vibrancy of legal environmental justice doctrines in connection with project environmental review.

Federal law supports environmental justice analysis in the review of projects seeking approval under the National Environmental Policy Act ("NEPA"). The California Environmental Quality Act ("CEQA") also provides ample authority for the use of environmental justice doctrines during environmental review. Environmental justice groups have often cited environmental justice concerns in regulatory proceedings involving the review of projects on both the federal and state level.[3]

To be sure, there are federal and state court decisions, as well as applicable regulations, that eschew social factors in certain circumstances during environmental review. A line of California cases also seems to question whether existing environmental hazards are even relevant to projects that bring people into those conditions. And it is true that the current United States Supreme Court majority seems more hostile than ever toward attempts to address racial discrimination through the law. This article suggests, however, that none of these cases should be construed to mean that environmental justice is inappropriately brought into project environmental review.

This article asserts that government agencies, community activists, and others who are concerned with social justice should not hesitate to assert that environmental review laws must address environmental justice.

3. E.*g.*, In re: Shell Gulf of Mexico, Inc. & Shell Offshore, Inc., 2010 EPA App. LEXIS 49 at *111 (EAB 2010); Chemical Waste Management, Inc., 6 E.A.DD. 66 (1995); In re: Puerto Rico Electric Power Authority, 6 E.A.D. 253 (EAB 1995). The author for many years directed the Environmental Law and Justice Clinic at Golden Gate University School of Law where Title VI and, more broadly, environmental justice issues were frequently asserted. *See* Alan Ramo, H*unters Point*: E*nergy Development Meets* E*nvironmental Justice*, 5 ENVT'L L. NEWS 28 (Spring 1996) *available at* http://digitalcommons.law.ggu.edu/pubs/128/ (discussing the California Energy Commission's first evidentiary hearings on environmental justice); Clifford Rechtschaffen, F*ighting Back Against a Power Plant*: S*ome Lessons From the Legal and* O*rganizing* E*fforts of the* B*ayview-Hunters Point Community*, 14 HASTINGS W.-NW. J. ENVT'L L. & POL'Y 537 (Winter 2008).

Section II analyzes the roots of the federal environmental justice doctrine and its current requirements in light of recent federal civil rights cases. Section III discusses California's environmental justice requirements. Section IV applies these California environmental justice requirements specifically to CEQA. Section V then reviews the California Attorney General's litigation based upon these legal principles. Section VI concludes that a proper understanding of environmental justice should be a key part of project environmental review.

II. Federal Environmental Justice Requirements

A. The Roots of the Federal Environmental Justice Doctrine

The doctrine of environmental justice originated in 1981 from a protest led by civil rights activist Reverend Benjamin Chavis against the siting of a polychlorinated biphenyl ("PCB") hazardous waste site in a community of color in North Carolina, during which Chavis first coined the term "environmental racism."[4] The protest spurred the Washington DC Congressional delegate, Walter Fauntroy, to ask the United States General Accounting Office to examine toxic waste sites located in the Southeast United States.[5] This resulted in a report that showed that the sites were disproportionately located near poor African-American communities.[6] Finally, in 1992, the United States Environmental Protection Agency ("U.S. EPA") investigated and affirmed in its "Reducing Risk in All Communities" report that the siting of waste sites was indeed related to race.[7] Other landmark studies reinforced the finding that race was an important demographic predictor of exposure to hazardous sites, not merely a random phenomenon, and that race was a more important factor than income.[8] With

4. Dollie Burwell & Luke W. Cole, *Environmental Justice Comes Full Circle: Warren County Before and After*, 1 GOLDEN GATE U. ENVTL. L.J. 9, 24 (2007).

5. *Id.* at 26.

6. U.S. GENERAL ACCOUNTING OFFICE, GAO/RCED-83-168, SITING of HAZARDOUS WASTE LANDFILLS AND THEIR CORRELATION WITH RACIAL AND ECONOMIC STATUS OF SURROUNDING COMMUNITIES, (U.S. Government Printing Office, 1983); *see* Burwell & Cole, *supra* note 4, at 36-38.

7. U.S. ENVIRONMENTAL PROTECTION AGENCY, EPA 230-R-92-008, REDUCING RISK FOR ALL COMMUNITIES (1992).

8. UNITED CHURCH OF CHRIST, COMMISSION FOR RACIAL JUSTICE, TOXIC WASTES AND RACE IN THE UNITED STATES: A NATIONAL REPORT ON THE RACIAL AND SOCIO-ECONOMIC CHARACTERISTICS OF COMMUNITIES WITH HAZARDOUS WASTE SITES (1987). The study, using data on location of hazardous waste sites and demographic data based upon zip codes, found that the percentage of minority residents in communities containing these waste sites was twice as

the aid of experts such as Robert Bullard,[9] an activist movement asserting the right of low income communities and communities of color to be free of disproportionate risks from environmental hazards began to grow.[10]

That same year, Congressman John Lewis and then Senator Al Gore introduced the Environmental Justice Act of 1992, the first legislative attempt to codify the demands of the movement.[11] The proposed law required identification of "environmental high impact areas" (counties with the most toxic hot spots) with a moratorium on additional siting of toxic facilities until the areas were deemed to have met certain health standards. In 1994, President Clinton issued an executive order and a presidential memorandum that established environmental justice as a doctrine binding federal agencies in their administration of federal laws.[12]

Implementing agencies began to issue various policy documents explaining how they would apply the law. The Environmental Protection Agency ("EPA") issued its own guidelines on how to integrate environmental

great as the percentage of minority residents in zip codes without such facilities (24% versus 12%), and that the proportion of racial minorities in communities containing two facilities or major landfills was three times greater (38%). *See* Lena Williams, *Race Bias Found in Location of Toxic Dumps*, N.Y. TIMES, Apr. 16, 1987, at A20; Bunay Bryant & Paul Mohai, *Environmental Racism: Reviewing the Evidence*, RACE AND THE INCIDENCE OF ENVIRONMENTAL HAZARDS: A TIME FOR DISCOURSE 163, 164, 169 (Bunay Bryant & Paul Mohai eds., 1992); BENJAMIN A. GOLDMAN ET AL., TOXIC WASTES AND RACE REVISITED: AN UPDATE OF THE 1987 REPORT ON THE RACIAL AND SOCIOECONOMIC CHARACTERISTICS OF COMMUNITIES WITH HAZARDOUS WASTE SITES 13-18 (1994). For more recent data, *see* ROBERT D. BULLARD, PAUL MOHAI, ROBIN SAHA & BEVERLY WRIGHT, TOXIC WASTES AND RACE AT TWENTY: WHY RACE STILL MATTERS AFTER ALL OF THESE YEARS, 1978-2007 (2007); MANUEL PASTOR, JR., RACHEL MORELLO-FROSCH, AND JAMES SADD, STILL TOXIC AFTER ALL THESE YEARS: AIR QUALITY AND ENVIRONMENTAL JUSTICE IN THE SAN FRANCISCO BAY AREA (2007).

9. *See* Robert D. Bullard, *Environmental Justice: A New Framework for Action*, ENVTL. L. NEWS, Spring 1996, at 16.

10. An excellent history of the Environmental Justice movement is provided in LUKE W. COLE, SHEILA R. FOSTER, FROM THE GROUND UP: ENVIRONMENTAL RACISM AND THE RISE OF THE ENVIRONMENTAL JUSTICE MOVEMENT, NEW YORK UNIVERSITY PRESS (2000).

11. H.R. 5326, 102d Cong. (2d Sess. 1992); S. 2806, 102d Cong. (2d Sess. 1992); *see* Bradford C. Mank, *Environmental Justice and Discriminatory Siting: Risk-Based Representation and Equitable Compensation*, 56 OHIO ST. L.J. 329, 353 (1995).

12. Exec. Order No. 12,898, 59 Fed. Reg. 7629 (Feb. 16, 1994); *Memorandum on Environmental Justice*, 30 WEEKLY COMP. PRES. DOC 279 (Feb. 11, 1994).

justice into NEPA.[13] The EPA also provided a definition of environmental justice for regulatory purposes, which focused on the concept of "fair treatment":

> Environmental Justice is the fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies . . . . Fair treatment means that no group of people should bear a disproportionate share of the negative environmental consequences resulting from industrial, governmental and commercial operations or policies[.] Meaningful involvement means that: (1) people have an opportunity to participate in decisions about activities that may affect their environment and/or health; (2) the public's contribution can influence the regulatory agency's decision; (3) their concerns will be considered in the decision making process; and (4) the decision makers seek out and facilitate the involvement of those potentially affected[.][14]

President Clinton's Cover Memorandum for Executive Order 12898 made clear that Title VI of the federal Civil Rights Act of 1964 and NEPA would be integral to the discussion of environmental injustice:

> In accordance with Title VI of the Civil Rights Act of 1964, each Federal agency shall ensure that all programs or activities receiving Federal financial assistance that affect human health or the environment do not directly, or through contractual or other arrangements, use criteria, methods, or practices that discriminate on the basis of race, color, or national origin.[15]

Executive Order 12898 required agencies to incorporate environmental justice analysis into NEPA's existing requirements – requirements such as environmental assessments, environmental impact statements, and records of decision.[16]

13. U.S. EPA, FINAL GUIDANCE FOR INCORPORATING ENVIRONMENTAL JUSTICE CONCERNS IN EPA'S NEPA COMPLIANCE ANALYSES (1998).

14. U.S. EPA, *Environmental Justice: Basic Information*, http://www.epa.gov/environmentaljustice/basics/index.html (last visited June 8, 2012).

15. *See Memorandum on Environmental Justice*, *supra* note 12.

16. *Id.*

Title VI prohibits state agencies receiving federal financial assistance from discriminating on the basis of race, color, or national origin.[17] Consequently, government agencies, including the EPA, developed regulations prohibiting discrimination, for example, in the siting of projects and the use of any criteria or methods in administering its program which "have the effect" of subjecting individuals to discrimination on the grounds of race, color, national origin, or sex.[18] This is the so-called disparate impacts test.[19]

These regulations are normally interpreted to prohibit disparate impact unless a funding recipient can show a legitimate governmental purpose for the disparate impact and the complainant is unable to show a less discriminatory alternative for achieving that legitimate purpose.[20] Title VI provides that federal agencies must adopt regulatory procedures to allow for private administrative complaints[21] alleging violations of these regulations against federal funding recipients to be adjudged by the federal agencies, with the ultimate remedy being a loss of federal funding.[22]

Federal authority to address civil rights and environmental justice derives from Congress's authority to ban unconstitutional discrimination. The Fourteenth Amendment to the United States Constitution specifically prohibits states from denying "to any person within its jurisdiction the equal protection of the laws."[23] Further, the Constitution provides explicit authority for Congress "to enforce, by appropriate legislation, the provisions of [the Amendment]."[24] Thus, the Fourteenth Amendment gives Congress broad powers of enforcement.[25] These powers include "the authority both to remedy and to deter violation of rights guaranteed [by the Fourteenth

17. 42 U.S.C. § 2000d (2012).

18. E.*g.*, 40 C.F.R. § 7.35(b)-(c) (2012).

19. I*d*.

20. Georgia State Conference of Branches of NAACP v. Georgia, 775 F.2d 1403, 14 (11th Cir. 1985)

21. For an example of a recent Title VI administrative complaint, *see* Alan Ramo, N*ew Civil Rights Complaint Attacks California's Greenhouse Gas Cap & Trade Program as Racially Discriminatory*, (June 12, 2012), http://ggucuel.org/new-civil-rights-complaint-attacks-california%E2%80%99s-greenhouse-gas-cap-trade-program-as-racially-discriminatory/6-8-12-cse-v-carb-title-vi-complaint-3.

22. 42 U.S.C. § 2000d-1 (2012).

23. U.S. CONST. amend. XIV, § 1.

24. U.S. CONST. amend. XIV, § 5.

25. Miss. Univ. for Women v. Hogan, 458 U.S. 718, 732 (1982).

Amendment] by prohibiting a somewhat broader swath of conduct, including that which is not itself forbidden by the Amendment's text."[26]

The exercise of presidential leadership and the new doctrine of environmental justice led federal agencies to begin thinking about how to incorporate environmental justice into environmental review. The Council on Environmental Quality ("CEQ") and, ultimately, the EPA were the key players in developing these policies because of their principal oversight role in implementing NEPA.

B. Federal Environmental Justice Law and NEPA

Many federal environmental justice battles arise out of regulatory proceedings for permits or the preparation of environmental impact statements and reports.[27] CEQ is charged with developing regulations to control how federal agencies implement NEPA.[28] In 1997, CEQ published new guidance for how federal agencies should address environmental justice.[29] This guidance became the model for federal agencies to use in addressing environmental justice.[30]

The EPA has broad authority to comment on any agency's environmental review documents.[31] It followed CEQ with its own guidelines on environmental justice in which it presented a number of examples of how environmental justice may be brought into the project environmental review process.[32] The guidelines recognize that, due to unique cultural or

26. Tennessee v. Lane, 541 U.S. 509, 518 (2004) (*citing* Kimel v. Florida Bd. of Regents, 528 U.S. 62, 81 (2000)).

27. S*ee* In re: Louisiana Energy Services, L.P. (Claiborne Enrichment Center), 47 N.R.C. 77 (1998).

28. Exec. Order No. 11,514, 35 Fed. Reg. 4247 (Mar. 5, 1970).

29. COUNCIL ON ENVIRONMENTAL QUALITY, EXECUTIVE OFFICE OF THE PRESIDENT, ENVIRONMENTAL JUSTICE, GUIDANCE UNDER THE NATIONAL ENVIRONMENTAL POLICY ACT (Dec. 10, 1997).

30. E.*g.*, U.S. N.R.C., ENVIRONMENTAL REVIEW GUIDANCE FOR LICENSING ACTIONS ASSOCIATED WITH NMSS PROGRAMS (Aug. 22, 2003) & U.S. NRC, PROCEDURAL GUIDANCE FOR PREPARING ENVIRONMENTAL ASSESSMENTS AND CONSIDERING ENVIRONMENTAL ISSUES (May 24, 2004), *discussed in* U.S. NRC, POLICY STATEMENT ON THE TREATMENT OF ENVIRONMENTAL JUSTICE MATTERS IN NRC REGULATORY AND LICENSING ACTIONS, 69 Fed. Reg. 52,040, 52,041 (Aug. 24, 2004).

31. 42 U.S.C. § 7609(a) (2012).

32. S*ee* U.S. EPA, OFFICE OF FEDERAL ACTIVITIES, FINAL GUIDANCE FOR INCORPORATING ENVIRONMENTAL JUSTICE CONCERNS IN EPA'S NEPA COMPLIANCE ANALYSES (Apr. 1998).

socioeconomic challenges facing minority or low-income communities, some cumulative impacts or resource utilization may not be apparent during a typical scoping or screening of a project. As the EPA guidance states:

> This includes subsistence living situations (*e.g.*, subsistence fishing, hunting, gathering, farming), diet, and other differential patterns of consumption of natural resources. If a community is reliant on consumption of natural resources, such as subsistence fishing, an additional exposure pathway may be associated with the community that is not relevant to the population at large. Similarly, dietary practices within a community or ethnic group, such as a diet low in certain vitamins and minerals, may increase risk factors for that group.[33]

Due to historical zoning practices and an imbalance of power resulting from poverty and racism, minority and low-income communities may face multiple exposures to toxic hazards with few resources to mitigate these exposures. The guidance recognizes the importance of these factors when addressing cumulative impacts:

> This includes such issues as whether affordable or free quality health care is available and, whether any cultural barriers exist to seeking health care. Many low-income and/or minority communities lack adequate levels and quality of health care, often due to lack of resources or lack of access to health care facilities . . . .
>
> Other indirect effects which a low-income or minority population, due to economic disadvantage, may not be able to avoid, that will have a synergistic effect with other risk factors (e.g., vehicle pollution, lead-based paint poisoning, existence of abandoned toxic sites, dilapidated housing stock).[34]

Thus, the guidance calls for demographic analysis at the beginning of project review. If vulnerable subpopulations will be exposed, "this should trigger both an enhanced outreach effort to assure that low-income and minority populations are engaged in public participation and analysis designed to identify and assess the impacts. Also, a positive response to this question should increase the team's sensitivity to the potential for cumulative impacts."[35]

33. I*d*. at Section 2.3, Exhibit 3.
34. I*d*.
35. I*d*. at Section 3.2.1.

In theory, this approach is merely assuring a more thorough environmental analysis. The guidance seems to denote, however, that typical everyday analysis might overlook many of these factors. Thus, demographic analysis is necessary to ensure that a more proper effort with an appropriate level of sensitivity is conducted in order to root out what should be determined, under conventional environmental review analysis, to be significant impacts. The guidance states that their intent is to "heighten awareness of EPA staff in addressing environmental justice issues within NEPA analyses and considering the full potential for disproportionately high and adverse human health or environmental effects on minority populations and low-income populations. . . ."[36]

The EPA has yet to finalize the specifics of what a demographic analysis entails. Its draft guidance, explaining how states should conduct a demographic analysis, remains no more than a draft more than twelve years after work on it began. But the basics are clear in that states must:

(1) Identify the potentially impacted populations and determine their race, ethnicity, and/or nationality;

(2) Compare the impacts on that population to other populations that might have been affected by an alternative to the project;

(3) Examine other sources of impacts to determine if there are additive, cumulative or synergistic impacts as a result of other projects and their social and economic settings;

(4) Determine whether alone, or together with other impacts, the project is having significantly adverse impacts on the subpopulation and whether there are reasonable, less discriminatory, alternatives or potential means of mitigation.[37]

Considering environmental justice during the environmental review process enhances discussion over what defines a "significant impact," as well as the range of alternatives and mitigation methods. "Significance" is a key factor in any environmental review. If an impact is significant and is not mitigated, a full-blown Environmental Impact Statement ("EIS") is required. Federal regulations call the alternatives analysis in an EIS the heart of environmental review.[38] In other words, failure to identify a significant impact that could have been identified through proper environmental justice analysis would be a violation of NEPA and a potential civil rights violation, as would the failure to consider a mitigation of that impact or an

36. *Id*. at Section 1.0.

37. *See* DRAFT TITLE VI GUIDANCE FOR EPA ASSISTANCE RECIPIENTS ADMINISTERING ENVIRONMENTAL PERMITTING PROGRAMS (DRAFT RECIPIENT GUIDANCE) AND DRAFT REVISED GUIDANCE FOR INVESTIGATING TITLE VI ADMINISTRATIVE COMPLAINTS CHALLENGING PERMITS (DRAFT REVISED INVESTIGATION GUIDANCE), 65 Fed. Reg. 39,650 (June 27, 2000).

38. 40 C.F.R. § 1502.14 (2012).

alternative that would avoid that impact. Thus, the EPA Guidance calls for more focused analyses when there are environmental justice concerns:

> Environmental justice concerns may lead to more focused analyses, identifying significant effects that may otherwise have been diluted by examination of a larger population or area. Environmental justice concerns should always trigger the serious evaluation of alternatives as well as mitigation options.[39]

"Significance" is a vague term that depends upon the impact's context and intensity under federal law. "Context . . . means that the significance of an action must be analyzed in several contexts such as society as a whole (human, national), the affected region, the affected interest, and the locality."[40] CEQ explains:

> Agency consideration of impacts on low-income populations, minority populations, or Indian tribes may lead to the identification of disproportionately high and adverse human health or environmental effects that are significant and that otherwise would be overlooked.[41]

Federal law requires that the alternatives analysis in an EIS should provide a reasonable range of choices to address potential impacts and achieve the project's purposes.[42] If the project raises environmental justice concerns, the Guidance makes clear that in order to be considered reasonable, a range of alternatives "should be drawn so as to allow an assessment of the disproportionate nature of the effects, as well as the magnitude of the effects, on the communities of concern."[43]

Mitigation is the final essential element of a federal environmental review analysis. It, too, must reflect environmental justice concerns: "In addition, for each alternative that may result in potential environmental justice concerns, mitigation measures aimed specifically at those impacts should be identified and analyzed."[44]

None of these requirements change NEPA's fundamental proscription on considering stand-alone economic or social impacts to be a basis for a

39. U.S. EPA, *supra* note 32, at Section 1.2.
40. 40 C.F.R. § 1508.27(a) (2012).
41. COUNCIL ON ENVIRONMENTAL QUALITY, *supra* note 29, at 10.
42. 40 C.F.R. § 1502.14(a) (2012).
43. U.S. EPA, *supra* note 32, at 3.2.5.
44. *Id*.

significant impact finding that requires further environmental analysis.[45] The Supreme Court settled that question years ago.[46] However, where those economic or social impacts are interrelated, they must be examined:

> When an environmental impact statement is prepared and economic or social and natural or physical environmental effects are interrelated, then the environmental impact statement will discuss all of these effects on the human environment.[47]

C. Recent Federal Civil Rights Cases and Title VI's Viability

While the above-described civil rights and environmental justice policies remain in place, recent decisions addressing Title VI, coming primarily out of the United States Supreme Court, must give one pause about the full force and effect of Title VI as a tool for environmental justice. However, none of these cases should affect the basic underlying doctrine of environmental justice and its use during environmental review.

The Supreme Court has significantly narrowed an individuals' ability to protect their civil rights. Specifically, in *Alexander v. Sandoval*[48] the Court rejected the right of individuals to enforce Title VI's administrative regulations in court, instead requiring individuals to address all complaints alleging disparate impacts directly to the agencies themselves under the statute's provisions for administrative complaint procedures, pursuant to 42 U.S.C. § 2000d-1 (§ 602). The Court also clarified that 42 U.S.C. § 2000d, the part of the Civil Rights Act of 1964 that bans discrimination by funding recipients, only bans intentional discrimination as it reaches no further than the Fourteenth Amendment's equal protection clause or the Fifth Amendment's due process clause. [49] On that basis, while according to

45. 40 C.F.R. § 1508.14 (2012) ("This means that economic or social effects are not intended by themselves to require preparation of an environmental impact statement.").

46. Metro. Edison Co. v. People Against Nuclear Energy, 460 U.S. 766, 778 (1983) ("If a harm does not have a sufficiently close connection to the physical environment, NEPA does not apply."). In an unpublished opinion, the Fourth Circuit refused to set aside a decision to not require an EIS merely upon a failure to consider disparate economic and social impacts "by themselves", after the Court found there was no Title VI violation. Goshen Rd. Envtl. Action Team v. United States Dep't of Agric., U.S. App. LEXIS 6135 (4th cir. 1999).

47. 40 C.F.R. § 1508.14 (1978); *see* Tongass Conservation Soc. v. Cheney, 924 F.2d 1137, 1142 (D.C. Cir. 1991).

48. 532 U.S. 275 (2001).

49. *Id*. at 280-281.

agency regulations individuals can still file administrative complaints to agencies based upon a showing of disparate impact, they can only enforce the statutory ban on discrimination under 42 U.S.C. § 2000d in court if they can show intentional discrimination.[50]

Other courts have further constrained any attempt to bootstrap administrative regulation enforcement in court through other civil rights laws such as 42 U.S.C. § 1983.[51] Plaintiffs have thus found it difficult to enforce Title VI in environmental justice cases.[52]

S*andoval* did not prohibit agencies from enforcing their disparate impact regulations themselves. Currently, the Supreme Court has "assumed" that administrative complaints alleging merely disparate impact are permissible under 40 U.S.C. § 2000d-1, pursuant to agency regulations.[53] Nor is there anything else in the decision that practically undermines the relationship between social and economic factors and physical impacts that would constrain a NEPA review.

In 2009, in R*icci v. Destefano*[54] in 2009, the Court raised the specter that it would outright prohibit the use of explicit racial factors. There, the City of New Haven used a test to promote firefighters that disparately impacted African Americans' results.[55] The City, faced with threats from Whites and Hispanics who were promoted, and from African Americans who were not, decided to throw out the test. [56] As expected, because of this decision, White and Hispanic firefighters sued.[57] The Supreme Court found that the City's action, based upon the disparate impact alone, constituted impermissible adverse disparate treatment towards Whites and Hispanics on the basis of race, in violation of Title VII of the Civil Rights Act of 1964.[58]

As Title VII is often seen as a model for Title VI's implementation,[59] for purposes of analyzing the role of environmental justice in environmental review it is important to clarify what the R*icci* Court did and what it did not do. It did not prohibit the consideration of race when addressing disparate

50. I*d*.

51. S. Camden Citizens in Action v. N.J. Dep't of Envtl. Prot., 274 F.3d 771 (2001).

52. I*d*.

53. Alexander v. Sandoval, *supra* note 48, at 281-282 (2001).

54. 557 U.S. 557 (2009).

55. I*d*. at 579.

56. I*d*. at 557.

57. I*d*.

58. 42 U.S.C.S. § 2000(e) *et seq*. (Title VII prohibits employment discrimination on the basis of race, color, religion, sex, or national origin).

59. Georgia State Conference of Branches of NAACP v. Georgia, 775 F.2d 1403, 1417 (11th Cir. 1985).

impact, nor did it declare unconstitutional a disparate impact test under the Fourteenth Amendment's equal protection clause. Rather, the Court issued a statutory interpretation of Title VII that explains how the disparate impact test would work under these circumstances. A showing of disparate impact is sufficient to establish a prima facie case of discrimination, unless rebutted by a business necessity and with no showing by a plaintiff of a less discriminatory alternative:

> Under the disparate-impact statute, a plaintiff establishes a prima facie violation by showing that an employer uses a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin. 42 U.S.C. § 2000e-2(k)(1)(A)(i). An employer may defend against liability by demonstrating that the practice is job related for the position in question and consistent with business necessity. Even if the employer meets that burden, however, a plaintiff may still succeed by showing that the employer refuses to adopt an available alternative employment practice that has less disparate impact and serves the employer's legitimate needs. 42 U.S.C.S. §§ 2000e-2(k)(1)(A)(ii), (C).[60]

This is the same test that was always thought to apply to Title VI disparate impact claims.[61] In this case, the Court simply made clear that the motivation to avoid liability under this provision is not sufficient, as a matter of law, to justify an action based upon race unless the City fails the entire disparate impact test:

> Whatever the City's ultimate aim—however well intentioned or benevolent it might have seemed—the City made its employment decision because of race. The City rejected the test results solely because the higher scoring candidates were white. The question is not whether that conduct was discriminatory but whether the City had a lawful justification for its race-based action.[62]

The City did not fail due to its consideration of race, but, rather, its failure to develop a "strong-basis-in-evidence" showing that racial disparities were not related to a legitimate governmental function or that there was a less discriminatory alternative:

60. Ricci v. Destefano, *supra* note 54, at 578.

61. Bradford C. Mank, *Proving an Environmental Justice Case: Determining An Appropriate Comparison Population*, 20 VA. ENVTL. L.J. 365, 388 (2001).

62. Ricci v. Destefano, *supra* note 54, at 579-80.

> Congress has imposed liability on employers for unintentional discrimination in order to rid the workplace of "practices that are fair in form, but discriminatory in operation." G*riggs*, *supra*, at 431, 91 S. Ct. 849, 28 L. Ed. 2d 158. But it has also prohibited employers from taking adverse employment actions "because of" race. § 2000e-2(a)(1). Applying the strong-basis-in-evidence standard to Title VII gives effect to both the disparate-treatment and disparate-impact provisions, allowing violations of one in the name of compliance with the other only in certain, narrow circumstances. The standard leaves ample room for employers' voluntary compliance efforts, which are essential to the statutory scheme and to Congress's efforts to eradicate workplace discrimination. S*ee* F*irefighters*, 478 U.S. at 515, 106 S. Ct. 3063, 92 L. Ed. 2d 405. And the standard appropriately constrains employers' discretion in making race-based decisions: It limits that discretion to cases in which there is a strong basis in evidence of disparate-impact liability, but it is not so restrictive that it allows employers to act only when there is a provable, actual violation.[63]

Thus, federal law, through Title VI, survives these decisions and remains an important tool for environmental justice. Race or other demographic considerations may be considered if necessary to carry out the legitimate governmental purpose to avoid significant adverse environmental impacts to vulnerable populations. Further, if those impacts are identified, and not justified by a *separate* legitimate governmental purpose where there are no less discriminatory alternatives, then these impacts must be addressed or the action causing those impacts prohibited. Title VI, in concert with environmental review under NEPA, should allow environmental justice to be addressed with its focus on adverse physical impacts, alternatives analysis, and mitigation.

There is reason for concern about the direction that the United States Supreme Court is taking. Justice Scalia, one vote in the majority, warned:

I join the Court's opinion in full, but write separately to observe that its resolution of this dispute merely postpones the evil day on which the Court will have to confront the question: Whether, or to what extent, are the disparate-impact provisions of Title VII of the Civil Rights Act of 1964 consistent with the Constitution's guarantee of equal protection?"[64]

Yet until that day comes, federal law continues to support the use of racial and other demographic considerations to ensure environmental

63. I*d*. at 583.

64. I*d*. at 594.

justice during environmental review. The analysis just has to be thorough and properly done.

Thus, under NEPA, environmental justice affects every stage of environmental review, from initial screening to the decision to require a full EIS, and the actual contents of that EIS. Environmental justice, as the interlinking of social and economic justice with physical environmental impacts, is not merely an artificial grafting of social justice onto federal environmental review policies. It is an essential tool for ensuring thorough environmental review under challenging social circumstances consistent with civil rights protections. CEQA, said by many state courts to be modeled after NEPA, essentially requires the same analysis, as discussed below.

III. California Environmental Justice Requirements

California is a leading state in adopting the doctrine of environmental justice. The California legislature explicitly adopted an environmental justice statute that requires the California Environmental Protection Agency ("Cal/EPA") to "[c]onduct its 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."[65] This definition of environmental justice is very similar to the federal EPA's definition.[66] Further, the Governor's Office of Planning and Research is required to coordinate and consult with all of the state agencies' environmental justice programs.[67] Following the lines of Clinton's Executive Order, the legislation calls upon the agencies overseen by Cal/EPA to include strategies to address environmental justice in their missions and action plans.[68]

Further, California has created its own state equivalent of Title VI, and then made it even broader while avoiding the pitfalls of *Sandoval*. California outlaws discrimination based upon race, national origin, ethnic group identification, religion, age, sex, sexual orientation, color, genetic information, and disability by the state or its agencies or any program

65. CAL. PUB. RES. CODE § 71110(a) (Deering 2012).

66. *See* U.S. EPA, *Environmental Justice*, http://www.epa.gov/environmentaljustice/ (last visited Oct. 5, 2012) ("Environmental Justice is the fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies.").

67. CAL. GOV'T CODE § 65040.12 (Deering 2012).

68. CAL. PUB. RES. CODE § 71111 *et seq*. (Deering 2012).

funded by the state.[69] Administrative remedies do not preclude a private right of action to enforce the statute, or the regulations implementing the statute, and California law allows actions seeking equitable relief.[70] The regulations implementing the statute explicitly endorse the disparate impact test prohibiting ". . .criteria or method of administration that (1) have the purpose or effect of subjecting a person to discrimination . . . ."[71] There is an explicit prohibition on discriminatory sitings that "have the purpose or effect of . . . subjecting them to discrimination . . . ."[72]

The impact of environmental justice has affected numerous other policies, particularly those involving air pollution and, more recently, climate change. A key environmental justice issue has been the problem of toxic hot spots, that is, regions of exposure to multiple sources of toxic chemicals primarily (although not exclusively) in urban core areas.[73] In response to demands from environmental organizations,[74] the California Legislature adopted the Air Toxics "Hot Spots" Information and Assessment Act.[75] The Legislature specifically commented on the problem of multiple facilities, located close together, releasing toxic airborne chemicals:

> These releases may create localized concentrations or air toxics "hot spots" where emissions from specific sources may expose individuals and population groups to elevated risks of adverse health effects, including, but not limited to, cancer and contribute to the cumulative health risks of emissions from other

69. CAL. GOV'T CODE § 11135 (Deering 2012).

70. *Id*. at § 11139 (Deering 2012); *see* Comm. Concerning Cmty. Improvement v. City of Modesto, 2004 U.S. Dist. LEXIS 31022 (E.D. Cal. Dec. 30, 2004).

71. 22 C.C.R. § 98101(i) (2012).

72. *Id*. at § 98101(j)(1) (2012).

73. Helen H. Kang, *Pursuing Environmental Justice: Obstacles and Opportunities - Lessons from the Field*, 31 Wash. U. J.L. & POL'Y 121, 123-125 (2009); Emily L. Dawson, *Lessons Learned from Flint, Michigan: Managing Multiple Source Pollution in Urban Communities*, 26 WM. & MARY ENVTL. L. & POL'Y REV. 367, 395-397 (Winter 2001); Robert R. Kuehn, *The Environmental Justice Implications of Quantitative Risk Assessment*, 1996 U. ILL. L. REV. 103, 118-120 (1996).

74. CAL. HEALTH & SAFETY CODE **§** 44301(a) (Deering 2012). In § 44301(a), the Legislature specifically declared it was responding to "recent publicity surrounding planned and unplanned releases of toxic chemicals into the atmosphere", noting "the public has become increasingly concerned about toxics in the air."

75. *Id*. at § 44301 *et seq*. (Deering 2012).

> sources in the area. In some cases where large populations may not be significantly affected by adverse health risks, individuals may be exposed to significant risks.[76]

The statute requires local air districts to keep toxics emissions inventories of sources of toxic air pollutants.[77] On the basis of the inventories, the local districts are required to focus upon the most severe facilities, complete a risk assessment, and, if the risks are deemed too great, acquire plans for reducing the risks to acceptable levels.[78]

The Legislature explicitly revisited environmental justice when developing the landmark California Global Warming Solutions Act of 2006, known as AB 32.[79] The Act set forth the ambitious goal of reducing California's greenhouse gas emissions to 1990 levels by 2020.[80] The Legislature gave its California Air Resources Board ("CARB") the flexibility to design a plan using "direct emission reduction measures, alternative compliance mechanisms, market-based compliance mechanisms, and potential monetary and nonmonetary incentives for sources and categories of sources . . . ."[81]

The potential (and now actual) use of market mechanisms causes real concern among environmental justice advocates. They have raised many questions, such as:

(1) Would market mechanisms concentrate emissions in urban neighborhoods causing hot spots?[82]

(2) Would minority communities share in the benefits of any program that auctions allowances in a trading program or would they share in the same reduction of co-pollutants as other communities if trading were allowed?[83] After all, the state's civil rights act speaks not only of

76. CAL. HEALTH & SAFETY CODE § 44301(d) (Deering 2012).

77. *Id*. at § 44340 *et seq*. (Deering 2012).

78. *Id*. at §§ 44360 *et seq*., 44390 *et seq*. (Deering 2012).

79. *Id*. at § 38500 *et seq*. (Deering 2012).

80. *Id*. at §§ 38550, 38561 (Deering 2012).

81. *Id*. at § 38561(b) (Deering 2012).

82. *See* Richard Toshiyuki Drury, et. al., *Pollution Trading and Environmental Injustice: Los Angeles' Failed Experiment in Air Quality Policy*, 9 DUKE ENVTL. L. & POL'Y F. 231 (Spring 1999); Alice Kaswan, *Climate Change, the Clean Air Act, and Industrial Pollution*, 30 UCLA J. ENVTL. L. & POL'Y 51, at n. 188 (2012).

83. *See* Luthien Niland, *Cal. Cap-And-Trade Auction Money: Where Should It Go?*, CENTER ON URBAN ENVIRONMENTAL LAW (Feb. 15, 2012), *available at* http://ggucuel.org/cal-cap-and-trade-auction-money-where-should-it-go.

"discrimination" but also of the denial of the "benefits" of a state program on the basis of race.[84]

The California Legislature acknowledged these concerns and reaffirmed environmental justice as an important doctrine in California environmental law. The Legislature required that CARB, when adopting regulations setting any emission limits and reduction measures, "[e]nsure that activities undertaken to comply with the regulations do not disproportionately impact low-income communities."[85] It further recognized the concern over toxic hot spots and required that the regulations "[e]nsure that activities undertaken pursuant to the regulations complement, and do not interfere with, efforts to achieve and maintain federal and state ambient air quality standards and to reduce toxic air contaminant emissions."[86]

The Legislature similarly incorporated civil rights doctrines, requiring that disadvantaged communities not be excluded from the benefits of state programs:

> The state board shall ensure that the greenhouse gas emission reduction rules, regulations, programs, mechanisms, and incentives under its jurisdiction, where applicable and to the extent feasible, direct public and private investment toward the most disadvantaged communities in California and provide an opportunity for small businesses, schools, affordable housing associations, and other community institutions to participate in and benefit from statewide efforts to reduce greenhouse gas emissions.[87]

The Legislature understood the environmental justice concerns about market mechanisms and, initially, there was open conflict over the use of trading between the Governor and the Legislature.[88] While it provided the Governor with the option of utilizing market mechanisms, the Legislature, in the very same provision, affirmed environmental justice principles:

84. CAL GOV'T CODE § 11135 (2012) ("No person . . . shall, on the basis of race . . . be unlawfully denied full and equal access to the benefits of . . . any program . . . .").

85. CAL. HEALTH & SAFETY CODE § 38562(b)(2) (Deering 2012).

86. *Id*. at § 38562(b)(4) (Deering 2012).

87. CAL. HEALTH & SAFETY CODE § 38565 (Deering 2012).

88. Mark Martin, *Governor, Lawmakers Differ on Greenhouse Gas Measure; Conflict Over How Industry Should Reduce Emissions*, SAN FRANCISCO CHRONICLE, Aug. 24, 2006, at A16.

(a) The state board may include in the regulations adopted pursuant to Section 38562 the use of market-based compliance mechanisms to comply with the regulations.

(b) Prior to the inclusion of any market-based compliance mechanism in the regulations, to the extent feasible and in furtherance of achieving the statewide greenhouse gas emissions limit, the state board shall do all of the following:

(1) Consider the potential for direct, indirect, and cumulative emission impacts from these mechanisms, including localized impacts in communities that are already adversely impacted by air pollution.

(2) Design any market-based compliance mechanism to prevent any increase in the emissions of toxic air contaminants or criteria air pollutants.[89]

Recently, a California Court of Appeal implicitly affirmed the importance of environmental justice analysis in the application of the state's global warming laws. In rejecting a challenge by an environmental justice organization to a plan for implementing the laws, the court stated, "public health and environmental justice were factors considered in connection with each of the 11 measures analyzed for the agriculture sector."[90] Further, CARB conducted a case study in the largely Hispanic Wilmington area of Los Angeles to evaluate the potential environmental justice impacts of its greenhouse gas reduction program:

> Indeed, another of [plaintiffs'] criticisms is that ARB "made no attempt to analyze potential disproportionate public health impacts to communities living closest to the facilities eligible to participate in the cap and trade system." However, Wilmington, the community chosen to assess local air quality impacts, the plan points out, "includes a diverse range of stationary and mobile emission sources, including the ports of Los Angeles and Long Beach, railyards, major transportation corridors, refineries, power plants, and other industrial and commercial operations."[91]

Finally, the Legislature demonstrated its understanding that environmental justice is not only a norm, a legal doctrine, and an insight addressing environmental hazards to low-income communities and communities of color, but also a process mandate. It explicitly included environmental justice groups in the decision-making process. The Act[92]

89. CAL. HEALTH & SAFETY CODE § 38570 (Deering 2012).

90. Association of Irritated Residents v. California Air Resources Board, 206 Cal. App. 4th 1487, 1505 (2012).

91. *Id*. at 39.

92. California Global Warming Solutions Act of 2006.

creates an Environmental Justice Advisory Committee, and the Committee is specifically to be incorporated into the process, which will lead to a scoping plan to design the program.[93]

IV. California Environmental Justice Requirements' Role in CEQA Review

As discussed above, longstanding federal statutes and policies require incorporation of environmental justice into environmental review at the federal level. Further, federal civil rights laws require all state and local agencies that receive federal assistance to incorporate the essential elements of environmental justice into their programs. These requirements, together with California's statutory policies of incorporating environmental justice into its environmental programs, lead to the conclusion that it should be largely uncontroversial that environmental justice should be an essential part of any analysis under CEQA. Yet, when California Attorney General Kamala M. Harris in January 2012 intervened in a CEQA challenge explicitly attacking a project's failure to thoroughly analyze environmental justice issues, at least one set of commentators questioned whether this "would mark a radical expansion in the role played by CEQA from environmental protection to social justice."[94]

CEQA was originally drafted as a state version of NEPA, and California courts consider NEPA cases to offer persuasive authority except where statutory authority or case law require different conclusions.[95] Given that California already has parallel but more stringent civil rights laws, and that it has taken bolder action by codifying environmental justice protections as state policy, it is hard to understand how incorporating environmental justice into CEQA analysis can be considered a radical expansion of CEQA, especially in light of the federal government's incorporation of environmental justice concerns into NEPA.

Like NEPA, CEQA provides for an initial study to determine whether there are potential significant environmental impacts that require a full environmental review, or exceptions or possible mitigation that can eliminate the need for a full Environmental Impact Report ("EIR") and instead allow for a negative declaration, or a mitigated negative declaration—the equivalent of the federal finding of No Significant Impact.[96] Similar to a federal EIS, if a full EIR is conducted then the alternatives must

93. CAL. HEALTH & SAFETY CODE § 38591 (Deering 2012).

94. Peter Hsiao et al., *supra* note 2, at 2.

95. Wildlife Alive v. Chickering, 18 CA. 3d 190, 201 (1976).

96. CAL. PUB. RES. CODE § 21080(c) (Deering 2012); CAL. CODE REGS. tit. 14 (hereinafter "CEQA Guidelines"), §§ 15002(k2), 15063 (2012).

be reviewed, significant impacts identified, and proposed mitigation of those significant impacts must be discussed.[97]

A California EIR, like the federal EIS, is intended to be "an informational document which will inform public agency decision makers and the public generally of the significant environmental effect of a project, identify possible ways to minimize the significant effects, and describe reasonable alternatives to the project."[98] As the California Supreme Court put it: "Its purpose is to inform the public and its responsible officials of the environmental consequences of their decisions *before* they are made. Thus, the EIR 'protects not only the environment but also informed self-government.' "[99]

However, in an important departure from NEPA, CEQA is not merely information-forcing. It requires that mitigation measures be deployed to reduce impacts to insignificance when feasible. CEQA specifically prohibits a project from being approved if it has significant impacts:

> The Legislature finds and declares that it is the policy of the state that public agencies should not approve projects as proposed if there are feasible alternatives or feasible mitigation measures available which would substantially lessen the significant environmental effects of such projects . . . .[100]

"Feasible" is defined in CEQA as "capable of being accomplished in a successful manner within a reasonable period of time, taking into account economic, environmental, *social*, and technological factors."[101]

The California Legislature foresaw that there may be circumstances under which projects with unavoidable significant impacts (that is, those where there is no available feasible means of mitigation) may need to move forward: "The Legislature further finds and declares that in the event specific economic, social, or other conditions make infeasible such project alternatives or such mitigation measures, individual projects may be approved in spite of one or more significant effects thereof."[102] However, the

97. CEQA Guidelines § 15121(a).

98. CEQA Guidelines § 15121(a); *compare* 40 CFR § 1502.1.

99. Citizens of Goleta Valley v. Board of Supervisors, 52 Cal.3d 553, 564 (1990), *quoting* Laurel Heights Improvement Assn. v. Regents of University of California, 47 Cal.3d 376, 392 (1988) (emphasis in original).

100. CAL. PUB. RES. CODE § 21002 (Deering 2012); S*ee* Mountain Lion Foundation v. Fish & Game Comm., 16 Cal.4th 105, 134 (1997).

101. CAL. PUB. RES. CODE § 21061.1 (Deering 2012) (emphasis added).

102. I*d*. at § 21002 (Deering 2012).

Legislature required a new set of specific findings that address a broad array of factors, including social concerns, in a final cost-benefit analysis:

> [N]o public agency shall approve or carry out a project for which an environmental impact report has been certified which identifies one or more significant effects on the environment that would occur if the project is approved or carried out unless both of the following occur:
>
> (a) The public agency makes one or more of the following findings with respect to each significant effect:
>
> . . . (3) Specific economic, legal, *social*, technological, or other considerations, including considerations for the provision of employment opportunities for highly trained workers, make infeasible the mitigation measures or alternatives identified in the environmental
> impact report.
>
> (b) With respect to significant effects which were subject to a finding under paragraph (3) of subdivision (a), the public agency finds that specific overriding economic, legal, *social*, technological, or other benefits of the project outweigh the significant effects on the environment.[103]

Only if an agency issues a statement of overriding considerations, with supporting findings and substantial evidence, may it approve a project with significant impacts, and even then it must reasonably find that the benefits of the project outweigh its costs or impacts.[104]

Thus, while some have stated correctly that CEQA does not mention "environmental justice,"[105] social factors play an important, and explicit, part of the CEQA review process. The Legislature stated the intent of CEQA is in part to "[c]reate and maintain conditions under which man and nature can exist in productive harmony to fulfill the social and economic requirements of present and future generations."[106]

It is true that isolated social and economic impacts are not "significant" impacts in the context of CEQA, just as they are not

103. *Id*. at § 21081 (Deering 2012) (emphasis added).

104. CEQA Guidelines §§ 15021(d), 15093(b).

105. Peter Hsiao et al., *supra* note 2, at 2.

106. CAL. PUB. RES. CODE § 21001(e) (Deering 2012).

"significant" under NEPA.[107] However, the main thrust of environmental justice is to recognize the relationship between social and economic factors, on the one hand, and environmental impacts on the other hand. This relationship, consistent with CEQA's intent, is clearly covered under CEQA.

The statute and its implementing regulations, the CEQA Guidelines,[108] make this coverage explicit. CEQA states: "Substantial evidence is not . . . evidence of social or economic impacts that do not contribute to, or are not caused by, physical impacts on the environment.[109] This provision only excludes social and economic factors unrelated to physical impacts on the environment.

The CEQA Guidelines go on to say that economic or social impacts that are related to physical impacts must be addressed:

> 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.[110]

The CEQA Guidelines further affirm the importance of social and economic factors in determining significance, either as part of a causal chain or as an exacerbating factor that makes a physical impact significant:

> (a) Economic or social effects of a project shall not be treated as significant effects on the environment. An EIR may trace a chain of cause and effect from a proposed decision on a project through anticipated economic or social changes resulting from the project to physical changes caused in turn by the economic or social changes. The intermediate economic or social changes

107. CEQA Guidelines § 15064(e).

108. The guidelines are proposed by the California Office of Planning and Research and adopted by the California Resources Agency and codified in the California Code of Regulations under Title 14 pursuant to CAL. PUB. RES. CODE § 21083 (Deering 2012).

109. *Id*. at § 2180(e) (Deering 2012); *see Id*. at § 2108.2 (Deering 2012).

110. CEQA Guidelines § 15064(e).

> need not be analyzed in any detail greater than necessary to trace the chain of cause and effect. The focus of the analysis shall be on the physical changes.
>
> (b) Economic or social effects of a project may be used to determine the significance of physical changes caused by the project. For example, if the construction of a new freeway or rail line divides 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. As an additional example, if the construction of a road and the resulting increase in noise in an area disturbed existing religious practices in the area, the disturbance of the religious practices could be used to determine that the construction and use of the road and the resulting noise would be significant effects on the environment. The religious practices would need to be analyzed only to the extent to show that the increase in traffic and noise would conflict with the religious practices. Where an EIR uses economic or social effects to determine that a physical change is significant, the EIR shall explain the reason for determining that the effect is significant.[111]

Thus, one California appellate court looking at a project that would cause overcrowding in schools – and in turn the construction of a new school – held that the physical impact due to social overcrowding was significant.[112] By contrast, another appellate court held that a project that would cause some overcrowding in a school but would not lead to the construction of a new school did not cause a significant impact.[113] Thus, when social impacts relate to physical impacts, they are well within CEQA's purview.

In spite of these explicit requirements to analyze the relationship between socioeconomic factors and physical impacts, there is a developing line of California cases that mark an important exception. These cases essentially stand for the proposition that it is CEQA's role to determine a project's impacts on the environment, not the environment's impact upon a project. Thus, a new school to be placed near freeways with a large amount

111. *Id.* at § 15131.

112. El Dorado Union High Sch. Dist. v. City of Placerville, 144 Cal. App. 3d 123 (1983).

113. Goleta Union School Dist. v. Regents of University of California, 37 Cal. App. 4th 1025 (1995).

of air emissions,[114] or a zoning change allowing for residential development near a source of odors,[115] or placement of a residential facility for young male drug and alcohol users near a contaminated site[116] do not cause a significant impact, even though they may attract people to these potentially dangerous sites. However, this exception should not be exaggerated to swallow up the fundamental rule.

In the most recent case along these lines, *Ballona Wetlands Land Trust v. City of Los Angeles*,[117] the Ballona Wetlands Land Trust and Ballona Ecosystem Education Project challenged an environmental review of the second phase of a new coastal master plan of a mixed retail/residential community. The new community was not an environmental justice minority community nor one associated with a concentration of toxic air emissions. The principle objection was that the project, located about two miles from the coast, might be inundated as a result of climate change that is anticipated to cause sea levels to rise.[118]

The court understood this argument as another example of a project allegedly putting people in harm's way. It found this was not a consideration under CEQA, holding that "[t]he purpose of an EIR is to identify the significant effects of a project on the environment, not the significant effects of the environment on the project."[119] The court specifically limited CEQA Guideline section 15126.2, which states that an "EIR should evaluate any potentially significant impacts of locating development in other areas susceptible to hazardous conditions . . . ."[120] The court made the extent of its disapproval clear, however, in a footnote: "Guidelines section 15126.2, subdivision (a) is consistent with CEQA only to the extent that such impacts constitute impacts on the environment caused by the development rather than impacts on the project caused by the environment."[121]

114. City of Long Beach v. Los Angeles Unified School Dist., 176 Cal. App. 4th 889, 905 (2009).

115. South Orange County Wastewater Authority v. City of Dana Point, 196 Cal. App. 4th 1604, 1614-18 (2011).

116. Baird v. County of Contra Costa, 32 Cal. App. 4th 1464, 1468 (1995).

117. Ballona Wetlands Land Trust v. City of Los Angeles, 201 Cal. App. 4th 455 (2011).

118. *Id*. at 472.

119. *Id*. at 473.

120. *Id*. at 474.

121. *Id*. at 474, n. 9. *Ballona* is a significant impact case and should not be read as dismissing the need for an EIR to describe the setting of a project. Indeed the *Ballona* court noted that the respondent City had after

These cases involve problems that are very different from the problems of clustering projects that contribute to toxic hot spots and perpetuate the problem of disproportionate impacts for low-income communities or communities of color, or the complete failure to analyze the impacts of a new project on a vulnerable subpopulation that is already present near a site. The heart of the environmental justice movement has not been an attempt to keep housing or people out of low-income communities or communities of color, which may be beset by disproportionate high risks from toxics and other environmental threats, but rather to restore existing communities to a healthy environment. As stated in the "Principles of Environmental Justice," one of the founding documents of the environmental justice movement, "[e]nvironmental justice affirms the need for urban and rural ecological policies to clean up and rebuild our cities and rural areas in balance with nature, honoring the cultural integrity of all our communities, and providing fair access for all to the full range of resources."[122]

In theory, B*allona* and its line of cases can be seen as limiting certain environmental justice considerations under CEQA, to the extent that challenges are made to zoning, programs, or projects that seek to channel minorities into minority communities that are exposed to disproportionate risks, thus perpetuating or exacerbating segregation and environmental racism. Yet, to the extent that those decisions would be discriminating or denying protected subpopulations the benefits of governmental programs, they would be more appropriately addressed by state and federal civil rights claims in any event.[123] Meanwhile, these cases in no way affect the

criticism of the draft EIR provided a description of potential inundation from rising seas due to climate change. 201 Cal. App. 4th at 476. An EIR may still have to incorporate changes to a site resulting from climate change to set an adequate baseline for evaluating impacts. S*ee* Neighbors for Smart Rail v. Exposition Metro Line Construction Authority, 204 Cal. App. 4th 1480, 1491 (2012); Communities for a Better Environment v. City of Richmond, 184 Cal. App. 4th 70, 82 (2010) (stating "a complete description of a project has to address not only the immediate environmental consequences of going forward with the project, but also all 'reasonably foreseeable consequence[s] of the initial project.' ").

122. ENVIRONMENTAL JUSTICE RESOURCE CENTER, P*rinciples of* E*nvironmental* J*ustice*, *available at* http://www.ejrc.cau.edu/princej.html (adopted on Oct. 27, 1991, in Washington D.C. at the People of Color Environmental Leadership Summit).

123. E.*g.*, Title VIII of the Civil Rights Act of 1968, 42 U.S.C. § 3601 (outlawing discrimination in sale or rental of housing and other related practices).

predominant problem of environmental injustice which channels or sites noxious projects into minority communities.

There are numerous cases affirming CEQA's role in analyzing cumulative impacts as described below which may be applied to projects that create and expand toxic hot spots. A lead agency is required under CEQA to assess whether a proposed project's cumulative effect requires an EIR.[124] A project is deemed to have a significant effect on the environment if the "possible effects of a project are individually limited but cumulatively considerable.[125] As one court put it:

> Cumulative impact analysis is necessary because the full environmental impact of a proposed project cannot be gauged in a vacuum. One of the most important environmental lessons that has been learned is that environmental damage often occurs incrementally from a variety of small sources. These sources appear insignificant when considered individually, but assume threatening dimensions when considered collectively with other sources with which they interact.[126]

This court's description of cumulative impact analysis describes the essence of what has been a chief concern of environmental justice activists about toxic hot spots. In an urban area, individual sources may comply with federal and state clean air laws, but their cumulative impact may cause significant impacts. Evaluating that possibility fits exactly within CEQA's concept of cumulative impacts, and has for many years.

Kings County Farm Bureau v. City of Hanford[127] is a foundational case addressing the problem of air pollutant hot spots. The court quotes a law review article by Dan Selmi that aptly describes this potential environmental justice issue:

> One of the most important environmental lessons evident from past experience is that environmental damage often occurs incrementally from a variety of small sources. These sources appear insignificant, assuming threatening dimensions only when considered in light of the other sources with which they interact. Perhaps the best example is air pollution, where

124. CAL. PUB. RES. CODE § 21083(b) (Deering 2012); CEQA Guidelines § 15064(i)(1).

125. CAL. PUB. RES. CODE § 21083(b) (Deering 2012).

126. Communities for a Better Environment v. California Resources Agency, 103 Cal. App. 4th 98, 114 (2002).

127. 221 Cal. App. 3d 692 (1990).

> thousands of relatively small sources of pollution cause a serious environmental health problem.
>
> CEQA has responded to this problem of incremental environmental degradation by requiring analysis of cumulative impacts. Because of the critical nature of this concern, courts have been receptive to claims that environmental documents paid insufficient attention to cumulative impacts. For example, in *San Franciscans for Reasonable Growth*, [*San Franciscans for Reasonable Growth* v. *City and County of San Francisco* (1984) 151 Cal.App.3d 61] the court stated that absent meaningful cumulative analysis, there would never be any awareness or control over the speed and manner of downtown development. Without that control, 'piecemeal development would inevitably cause havoc in virtually every aspect of the urban environment.'
>
> This judicial concern often is reinforced by the results of cumulative environmental analysis; the outcome may appear startling once the nature of the cumulative impact problem has been grasped.[128]

On the basis of these principles, the *Kings County Farm Bureau* court struck down an EIR for a power plant project that dismissed the significance of its ozone emissions because it was a small part of a much worse problem.

The decision in *Kings County Farm Bureau* has been followed in other cases. In *Los Angeles Unified School District v. City of Los Angeles*,[129] the court found that traffic noise from a project, while individually and incrementally insignificant, would be cumulatively significant when combined with existing sources of noise.[130] The court specifically found that the setting, a school, was an important consideration, providing another example of how social factors can affect a determination of significance.[131]

In *Bakersfield Citizens for Local Control v. City of Bakersfield*,[132] the court disapproved of an EIR's failure to discuss the development of two

128. Selmi, *The Judicial Development of the California Environmental Quality Act* 18 U.C. DAVIS L. REV. 197, 244, fn. omitted., (1984) (*quoted in* Kings County Farm Bureau v. City of Hanford, *supra* note 127, at 720-21).

129. Los Angeles Unified School Dist. v. City of Los Angeles, 58 Cal. App. 4th 1019 (1997).

130. *Id*. at 1025-26.

131. *Id*. at 1026; *see* CEQA Guidelines § 15064(b).

132. Bakersfield Citizens for Local Control v. City of Bakersfield, 124 Cal. App. 4th 1184 (2004).

competing shopping centers together with all past, present and reasonably anticipated future projects.[133]

A commonplace dismissal of environmental justice claims is that, given the deteriorated conditions in which minority and low-income communities often find themselves, these groups will not notice a project that simply adds to the undesirability of the community's environment. The B*akersfield* court was presented with a similar argument about the poor air quality in the San Joaquin Valley, and stated: "The magnitude of the current air quality problems in the San Joaquin Valley cannot be used to trivialize the cumulative contributions of the shopping centers and the scope of the analysis cannot be artificially limited to a restricted portion of the air basin."[134] The court gave an example of a question the EIR should answer, which has particular force in environmental justice cases: "Will combined traffic cause an increase in mobile emissions that adversely affects sensitive receptors?"

The B*akersfield* court also affirmed the line of California cases that approved CEQA Guidelines section 15064's recognition that an indirect effect that includes social and economic causes but culminates in physical impacts may be a significant impact that requires environmental analysis.[135] In reviewing a proposed Wal-Mart anchored shopping center, the court held: "[W]hen there is evidence suggesting that the economic and social effects caused by the proposed shopping center ultimately could result in urban decay or deterioration, then the lead agency is obligated to assess this indirect impact."[136]

The application of this urban decay case to environmental justice cases is clear. Where a project exacerbates the disparities between people of different race, income or other social factors contributing to physical impacts in the community, that is the kind of impact that must be analyzed under CEQA. This applies whether direct pollution impacts affect a vulnerable community exposed to other sources of pollution, or whether it causes an overall deterioration and decay in the physical attributes of a community.

CEQA, as an information-forcing environmental review statute, also provides process protections that are critical to environmental justice. According to the CEQA Guidelines:

> EIRs and negative declarations should be prepared as early as feasible in the planning process to enable environmental considerations to influence project program and design and yet

133. I*d*. at 1218-19.

134. I*d*. at 1219.

135. I*d*. at 1205-1206.

136. I*d*. at 1207.

> late enough to provide meaningful information for environmental assessment.[137]

The Guidelines specifically recommend an early scoping process, and provides that "the Lead Agency may also consult directly with any person or organization it believes will be concerned with the environmental effects of the project."[138]

The CEQA statute provides that documents should be user-friendly for the public, and environmental justice advocates have successfully argued that the documents should be printed in the primary language of the population affected.[139] The statute requires: "Documents prepared pursuant to this division be organized and written in a manner that will be meaningful and useful to decision makers and to the public."[140] The CEQA Guidelines require that "EIRs shall be written in plain language and may use appropriate graphics so that decision makers and the public can rapidly understand the documents."[141] And the documents should be timely:

> Information relevant to the significant effects of a project, alternatives, and mitigation measures which substantially reduce the effects shall be made available as soon as possible by lead agencies, other public agencies, and interested persons and organizations.[142]

CEQA's process requirements represent a powerful tool for environmental justice advocates:

> [N]oncompliance with the information disclosure provisions of this division which precludes relevant information from being presented to the public agency . . . may constitute a prejudicial abuse of discretion . . . regardless of whether a different outcome would have resulted if the public agency had complied with those provisions.[143]

137. CEQA Guidelines § 15004.

138. *Id*. at § 15083.

139. El Pueblo Para el Aire y Agua Limpio v. County of Kings, No. 366045, 22 ENVTL. L. REP. 20357 (Cal. Super. Ct., Sacramento County, Dec. 30, 1991).

140. CAL. PUB. RES. CODE § 21003(b) (Deering 2012).

141. CEQA Guidelines § 15140.

142. CAL. PUB. RES. CODE § 21003.1(b) (Deering 2012).

143. *Id*. at § 21005(a) (Deering 2012).

For example, the failure to abide by these process requirements temporarily halted California's global warming trading regime. In *Association of Irritated Residents v. California Air Resources Board*,[144] the plaintiffs successfully argued that CARB, the lead agency for California's climate change program, failed to adequately analyze alternatives to its Cap-And-Trade strategy, and it jumped the gun by approving the plan before the staff completed their responses to comments on their CEQA environmental analysis. The California Superior Court in San Francisco issued a writ requiring CARB to reconsider the plan, and to respond to comments. The court quoted the California Supreme Court's affirmation of the public process:

> The written response requirement ensures that members of the Commission will fully consider the information necessary to render decisions that intelligently take into account the environmental consequences . . . . It also promotes the policy of citizen input underlying CEQA . . . . When the written responses are prepared and issued after a decision has been made, however, the purpose served by such a requirement cannot be achieved."[145]

CARB eventually redid its alternatives analysis, considered responses to old and new comments before making its decision, and has now begun the implementation of its plan, albeit delayed a year.[146]

It is therefore incorrect to say that "social justice" is separate from CEQA, that CEQA does not consider social factors, or that environmental justice has no place in the CEQA context. Environmental justice represents an insight into the relationship between social and economic factors on the one hand, and actual environmental impacts on people and their communities on the other. Environmental justice encapsulates this link between people and the way they treat each other and their environment. Thus, consideration of race and broader demographics of a potentially

144. Associated of Irritated Residents et al. v. California Air Resources Board et al., No. CPF-09-509562, (Cal. Super. Ct. San Francisco County, March 18, 2011), *available at* http://ggucuel.org/update-sf-court-affirms-tentative-ceqa-ruling-on-ab-32.

145. Mountain Lion Foundation v. Fish & Game Comm., 16 Cal. 4th 105, 133 (1997).

146. *See* Alan Ramo, *Update*: SF *Court Affirms Tentative* CEQA *Ruling on* AB 32, GOLDEN GATE UNIVERSITY SCHOOL OF LAW CENTER ON URBAN ENVIRONMENTAL LAW BLOG (MAR. 23, 2011), http://ggucuel.org/update-sf-court-affirms-tentative-ceqa-ruling-on-ab-32 (blog for discussion of the progress of the case and the judge's decision).

impacted community is crucial to a proper, thorough, and sensitive environmental review.

V. The California Attorney General's Intervention in Environmental Justice Cases

It is this regulatory backdrop, that CEQA is directly related to environmental justice, which allows for a proper analysis of the California Attorney General's assertion regarding the State's environmental justice concerns. State law provides that the "Attorney General shall be permitted to intervene in any judicial or administrative proceeding in which facts are alleged concerning pollution or adverse environmental effects which could affect the public generally."[147] The Attorney General is required to be informed of any case being brought under CEQA.[148]

Given this authority, in September 2011, the California Attorney General first intervened through a challenge by the Center for Community Action and Environmental Justice to an industrial development next to a primarily Hispanic and low-income residential community in Riverside County, California. The Attorney General alleged that the project's addition of 1,500 diesel truck trips per day would exacerbate "disproportionate impacts on the people living . . . near the Project area, who already suffer from substantial exposure to toxic air contaminants."[149]

In an even more intriguing case, in January 2012, the Attorney General petitioned to intervene in the case of *Cleveland National Forest Foundation and Center for Biologic Diversity v. San Diego Association of Governments, et al.*[150] The case is a challenge to San Diego County's most recent Regional Transportation Plan ("RTP") adopted pursuant to the federal Clean Air Act and state law

147. CAL. GOV'T CODE § 12606 (Deering 2012).

148. CAL. CIV. PROC. CODE § 388 (Deering 2012); CAL. PUB. RES. CODE § 21167.7 (Deering 2012).

149. People's Compl. in Intervention and Pet. for Writ of Mandate at 4, para. 12, Center for Community Action and Environmental Justice v. County of Riverside et al., Cal. Superior Court of Riverside County, No. RIC 1112063 (Sept. 6, 2011), *available at* oag.ca.gov/environment/ceqa/litigation-settlements/.

150. People of the State of California's Pet. for Writ of Mandate in Intervention (hereinafter "People's Pet."), Cleveland National Forest Foundation and Center for Biologic Diversity v. San Diego Association of Governments, et al. Cal. Superior Court of San Diego County, No. 37-2011-00101593-CU-TT-CTL (Jan. 20, 2012), *available at* oag.ca.gov/environment/ceqa/litigation-settlements.

provisions for funding transportation related projects.[151] Interestingly, this plan was the first in California to include a section addressing California's SB 375, the Sustainable Communities and Climate Protection Act of 2008.[152] As its name implies, the Act requires metropolitan planning organizations to develop regional greenhouse gas emission reduction targets for passenger vehicles and to develop a Sustainable Community Strategy ("SCS") for attaining these targets through integrated land use, housing and transportation planning. The Act further requires the strategy is to be incorporated into the federally enforceable Regional Transportation Plan ("RTP") and subsequently forming the Regional Transportation Plan/Sustainable Communities Strategy ("RTP/SCS").

In a nutshell, the Attorney General and the plaintiffs argued that the Plan emphasizes traditional freeway projects more than it should, and fails to direct sufficient funding to projects such as mass transit that would reduce air pollution.[153] This, in turn, impacts air quality in several communities already bearing disproportionate air pollution impacts and interfering with California's goal of reducing greenhouse gases:

> [T]he People challenge the EIR's adequacy as to the environmental harm that may result from the project's emphasis on freeway and highway expansion and extension, to the detriment of public transportation and air quality, its adequacy and accuracy in analyzing and disclosing the air quality impacts of the RTP/SCS, especially the impacts on communities that are already overburdened by pollution, and the project's failure to achieve long-term and sustainable reductions/in greenhouse gas emissions.[154]

Peter Hsaio and his co-authors argue, "the attorney general has taken an aggressive position that EJ impacts must be addressed under CEQA."[155] They point out that CEQA does not use the words "environmental justice," that no court has required a disparate impacts analysis under CEQA, and that environmental documents generally do not provide that analysis.[156]

As discussed above, however, the elements underlying environmental justice analysis have long been included under CEQA case law, statute, and

151. 42 U.S.C. § 7506(c); CAL. GOV'T CODE §§ 66508-66518 (Deering 2012).

152. CAL. GOV'T CODE § 14522.1 *et seq.*, § 65080(b)(2) (Deering 2012).

153. People's Pet., *supra* note 150, at p. 7, para. 18.

154. I*d*.

155. Hsaio et al, *supra* note 2, at 3.

156. I*d*.

guidelines, as well as NEPA (CEQA's regulatory model). Further, there is nothing shocking about allegations challenging freeway oriented transportation programs that disfavor mass transit, as similar cases have been brought before.[157] Indeed, previous federal cases have alleged that transportation agencies' funding had violated civil rights laws by discriminating against urban core bus transit.[158]

Hsiao and his co-authors also fail to note that the issue in the San Diego case[159] is not whether there should be a Title VI environmental justice or disparate impact analysis. San Diego did such analysis, but allegedly stopped at the point where it would connect that analysis with air pollution from mobile sources using expanded freeways.

All that seems to be new is the California Attorney General's *explicit argument* that the failure to analyze such potential disparate impacts on vulnerable subpopulations raises CEQA concerns:

> [The FEIR] [d]oes not perform an adequate analysis to determine whether the health impacts of exposure to increased particulate matter emissions will be more severe for low-income or minority communities that already suffer from disproportionate health burdens from existing levels of localized air pollution.[160]

The complaint refers to "the adverse effect of the project on the environment experienced by communities that already are overburdened by pollution . . . ."[161] It notes that San Diego has the seventh worst ozone problem in the nation.[162] It specifies that particulate air pollution creates a risk of 480 excess cases of cancer per million (San Diego's population is 3.2 million), and that much of the particulates are from car and truck traffic on the region's freeways and highways.[163] And, not surprisingly, it alleges that the Final EIR ("FEIR") failed to focus upon how "the most vulnerable people

157. E.*g*., Citizens for a Better Environment v. Deukmejian, 1990 U.S. Dist. LEXIS 17976; 34 ERC (BNA) 1592 (N.D. Cal. 1990) ("Plaintiffs assert that 'freeway happy' MTC continues to ignore the mandate of the Clean Air Act in its relentless pursuit of highway expansion as the primary solution to problems of congestion and pollution.").

158. Darensburg v. Metro. Transp. Comm'n, 636 F.3d 511 (9th Cir. 2011); Labor/Community Strategy Ctr. v. L.A. County Metro. Transp. Auth., 263 F.3d 1041 (9th Cir. 2001).

159. People's Pet., *supra* note 150.

160. I*d*. at para. 22(d).

161. I*d*. at para. 1.

162. I*d*.

163. I*d*. at para. 2.

in the region will be affected (e.g., those living directly adjacent to freeways and highways), or how residents' risk of developing cancer will increase based on emissions from the RTP/SCS's freeway and highway projects."[164]

The complaint refers to and incorporates the Attorney General's comments submitted during the review process as described below. These comments are more explicit with regard to San Diego's alleged failure to address the problem of disproportionate impacts to vulnerable subpopulations:

> The harm from these pollutants is not necessarily distributed equally throughout the region, but may be more concentrated in communities immediately adjacent to large-scale industrial and commercial development and major transportation corridors, and may more particularly affect certain segments of the population. As discussed below, our review of the DEIR indicates that SANDAG has set too low a bar for determining whether the air quality impacts of its RTP/SCS are significant, and further, has failed to analyze the impacts of projected increases in pollution on communities are sensitive or already overburdened with pollution, in violation of CEQA.[165]

The Attorney General's comments are consistent with the classic definition of a community vulnerable to environmental justice. The Attorney General's comments cite to the *Kings County Farm Bureau* case, quoting that "[t]he significance of an activity depends upon the setting."[166]

Ironically, as noted in the Attorney General's comments, San Diego included a chapter in its Draft EIR ("DEIR"), and eventually its FEIR, entitled "Social Equity: Title VI and Environmental Justice."[167] The chapter appears to document a very thorough environmental justice process. However, as the Attorney General spotted when commenting upon the DEIR, it has a "lack of any discussion of the impacts of the increased air pollution that will result from carrying out the RTP/SCS on communities already severely impacted by air pollution."[168] Instead, it focuses strictly upon providing "an equitable level of transportation services for all populations."[169]

164. *Id*. at para. 4.

165. *Id*. at Exhibit I, p. 2.

166. *Id*., *quoting* Kings County Farm Bureau v. City of Hanford, *supra* at note 127, at 718.

167. SAN DIEGO ASSOCIATION OF GOVERNMENTS, 2050 REGIONAL TRANSPORTATION PLAN, Ch. 4 (Oct. 28, 2011).

168. People's Pet., *supra* note 150, Exhibit I, p. 4

169. 2050 REGIONAL TRANSPORTATION PLAN, *supra* note 167, at 4-4.

Providing equal access to transportation is indeed a worthwhile environmental justice goal. The chapter appears to document a thorough demographic analysis of what it calls a majority minority county, and the relationship of subpopulations to access for housing, jobs, services and recreation. Yet the entire section on public health is focused upon encouraging access to transportation to address mobility issues for the disabled and elderly, and obesity. There is no discussion of air pollution in relation to overburdened communities in the public health section.[170]

The Attorney General's comments correctly spell out what a CEQA analysis requires to properly address environmental justice:

> CEQA requires that the significance of environmental impacts be considered in context. (Kings County Farm Bureau, supra, 221 Cal.App.3d at 718) Such context may appropriately include (1) whether the region includes communities or subpopulations that may be particularly sensitive to increases in pollution; and (2) whether such communities or groups are already at or near their capacity to bear any additional pollution burden.[171]

The Attorney General's complaint is silent as to what may make communities overburdened, and how social factors may be involved. But the incorporated comments clearly demonstrate how the essence of environmental justice's concerns with demographic factors relate to physical significant impacts upon people:

> "[A] number of studies have reported increased sensitivity to pollution, for communities with low income levels, low education levels, and other biological and social factors. This combination of multiple pollutants and increased sensitivity in these communities can result in a higher cumulative pollution impact." (Office of Environmental Health Hazard Assessment, C*umulative* I*mpacts*: B*uilding a Scientific* F*oundation* (Dec. 2010), Exec. Summary at p. ix.). [Available at http://oehha.ca.gov/ej/cipa123110.html] Research in other parts of California has shown that disadvantaged and minority communities are often exposed to unhealthful air more frequently and at higher levels than other

170. I*d*. at 4-63. The author is not intending to comment upon the entire document or its legal sufficiency but it is striking that the Environmental Justice section failed to explicitly address freeway auto and truck pollution issues.

171. People's Pet., *supra* note 150, Exhibit I, p. 4.

> groups. [footnote omitted] Identifying these communities is an essential part of describing the relevant CEQA setting.[172]

Why does race matter? Is this merely an appeal to social justice? The Attorney General correctly points out that race, income, and other social factors may show that lurking in communities demarcated by these social factors are multiple and hidden sources of pollution or other factors that make additional pollution more significant with regard to public health. Presumably, this can be attributed to historical or current social and economic dynamics in our society. This concern is well supported by available data, as previously described, and it is now formally recognized in state government and academia. Recently, California's Office of Health Hazard Assessment released guidelines for addressing cumulative impacts in the context of related social conditions:

> Cal/EPA's screening methodology . . . starts with an understanding of which individuals, or groups of people, may be more sensitive to additional exposures. By considering social factors such as educational level, economic factors such as income level, and other factors, Cal/EPA can develop a more complete picture of the cumulative impacts on communities.[173]

The University of California at Davis recently used this approach to analyze a low-income community in Fresno, California.[174]

This approach to CEQA is nothing more than what CEQA already addresses in requiring an adequate analysis of the environmental setting, an essential topic of all EIRs.[175] As the Third District Court of Appeal has explained, "[b]efore the impacts of a project can be assessed and mitigation

172. People's Pet., *supra* note 150, Exhibit I at 4. For a summary of the attorney general's position on CEQA and environmental justice, *see* CALIFORNIA ATTORNEY GENERAL, ENVIRONMENAL JUSTICE AT THE LOCAL AND REGIONAL LEVEL, LEGAL BACKGROUND (JULY 10, 2012), *available at* http://oag.ca.gov/sites/all/files/pdfs/environment/ej_fact_sheet.pdf (last visited Oct. 7, 2012).

173. OFFICE OF ENVTL. HEALTH HAZARD ASSESSMENT, CUMULATIVE IMPACTS: BUILDING A SCIENTIFIC FOUNDATION (Dec. 2010), *available at* http://oehha.ca.gov/ej/pdf/CIReport123110.pdf.

174. UC DAVIS, CTR. FOR REG'L CHANGE, LAND OF RISK, LAND OF OPPORTUNITY, CUMULATIVE ENVIRONMENTAL VULNERABILITIES IN CALIFORNIA'S SAN JOAQUIN VALLEY (Nov. 2011), *available at* http://regionalchange.ucdavis.edu/publications/Report_Land_of_Risk_Land_of_Opportunity.pdf.

175. CEQA Guidelines § 15125(a).

measures considered, an EIR must describe the existing environment. It is only against this baseline that any significant environmental effects can be determined."[176] Thus, a failure to identify all present pollutants and other stresses impacting a community would prevent an adequate measurement of the significance of additional sources of pollution.

The Attorney General's comments extend this analysis to the greenhouse gases that are released by automobiles and trucks. The comments do not merely argue in favor of social justice, they point out the relationship between social factors and the implications of the physical effects of the proposed project:

> The burdens of climate change will not be shared equally. Future climate scenarios are expected to disproportionately affect, for example, the urban poor, the elderly and children, traditional societies, agricultural workers and rural populations.[177]

This argument is consistent with other studies establishing that the effects of climate change could potentially cause disparate impacts to low-income communities in the United States.[178]

Whether the Attorney General is right about the specific facts of this case depends upon what the record will show, and is subsequently beyond the reach of this article.[179] The point to emphasize is that the Attorney General's arguments, on their face, are well within CEQA authority and are consistent with the federal approach to environmental justice and environmental project review. The issue is not whether social injustice is a

176. County of Amador v. El Dorado County Water Agency, 76 Cal. App. 4th 931, 952 (1999).

177. People's Pet., *supra* note 150, at Ex. I, p. 7 (*citing* CALIFORNIA'S OFFICE OF ENVIRONMENTAL HEALTH HAZARD ASSESSMENT, INDICATORS OF CLIMATE CHANGE IN CALIFORNIA: ENVIRONMENTAL JUSTICE IMPACTS (Dec. 2010) at p. 2., *available at* http://oehha.ca.gov/multimedia/epic/epic123110.html).

178. E.*g*. MANUEL PASTOR, RACHEL MORELLO FROSCH, JAMES SADD & JUSTIN SCOGGINS, MINDING THE CLIMATE GAP, USC Program for Environmental and Regional Equity (2010), *available at* http://dornsife.usc.edu/pere/documents/mindingthegap.pdf; RACHEL MORELLO FROSCH, MANUEL PASTOR, JIM SADD, AND SETH SHONKOFF, THE CLIMATE GAP: INEQUALITIES IN HOW CLIMATE CHANGE HURTS AMERICANS AND HOW TO CLOSE THE GAP, USC PROGRAM FOR ENVIRONMENTAL AND REGIONAL EQUITY (2009), *available at* http://dornsife.usc.edu/pere/publications/ClimateGapReport_full_report_web.pdf.

179. The California Attorney General was allowed to intervene and, as of Oct. 8, 2012 the case is still pending. STATE OF CALIFORNIA DEPARTMENT OF JUSTICE, OFFICE OF THE ATTORNEY GENERAL, http://oag.ca.gov/environment/ceqa/litigation-settlements (last visited Oct. 8, 2012).

matter for CEQA review. The Attorney General correctly points out that if this project increases air pollutants, including particulates and greenhouse gases, then the significance of those impacts on human beings are best understood by understanding the demographics of the population and the constellation of other sources or stresses that may make those populations particularly vulnerable.[180] The failure to do this analysis, if true, would according to the analysis of this article violate CEQA requirements for properly analyzing the impacts from the project.

VI. Conclusion

Environmental justice is now an established doctrine of federal administrative law that has survived multiple presidential administrations. It is rooted in federal constitutional and statutory civil rights protections. It allows for a more in-depth and sensitive application of NEPA to more fully capture the potential adverse significant impacts, alternatives, and mitigation methods that would protect communities of color, low-income communities, and other communities whose social demographics lead to increased exposure to pollutants and serious disparate impacts.

California has been a leader among the states in applying this doctrine to state law as a matter of policy and administrative practice. Not surprisingly, the California Attorney General is seeking to apply this law in the State's environmental review processes. Even though critics may consider this application to be a radical social justice experiment, the Attorney General is acting well within state law and the federal approach in articulating the importance of environmental justice concerns when implementing CEQA.

180. *See*, *supra* note 176, 177.