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Centering Environmental Justice in California: Attempts and Opportunities in CEQA

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ABSTRACT

Environmental justice communities and advocates have used the California Environmental Quality Act ("CEQA") as a necessary tool to incorporate their concerns into agency decision-making. However, environmental justice is neither mentioned in the statutory language of CEQA, nor was it intended as a fundamental purpose of CEQA as an environmental review statute. Thus, in order to understand where CEQA reform would be most successful in serving communities that are disproportionately impacted by environmental burdens, CEQA's history must be evaluated with comprehensive principles of environmental justice. As such, this paper explores why and how environmental justice principles can and should be implemented into CEQA.

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I. INTRODUCTION

While the environmental justice movement has been around for decades, the more recent Black Lives Matter movement[1] has illuminated the stark dichotomy between those who benefit from environmental laws and those who are systematically neglected. Because of this, the environmental field is currently reexamining the role that environmental laws play in contributing to environmental racism and perpetuating white supremacy.[2] As the environmental field undergoes this reshaping, it is clear that the environmental movement must be compatible with racial justice.

This paper focuses on the importance of environmental justice principles in California Environmental Quality Act ("CEQA"). Part II of this paper begins with a general discussion about the history of the environmental justice movement. Part III discusses state and federal environmental justice requirements. Part IV provides a general discussion of CEQA. Part V explores successful uses of CEQA in achieving meaningful accountability for environmental justice communities. Part VI discusses CEQA's shortcomings in achieving environmental justice. Part VII explores various was to think about CEQA reform. Lastly, part VIII provides potential opportunities and suggestions regarding how CEQA can address environmental justice.

II. ROOTS OF ENVIRONMENTAL JUSTICE IN ENVIRONMENTAL LAW

Environmental justice lacks one universally accepted definition. Generally, however, environmental justice "encompasses the ideas that minority and low-income individuals, communities, and populations 'should not be disproportionately exposed to environmental hazards,' should have equal access to green space, and 'should share fully in making the decisions that affect their environment.'"[3] In this way, environmental justice

1. *See* Larry Buchanan et al., *Black Lives Matter May Be the Largest Movement in U.S. History*, N.Y. TIMES (July 3, 2020), https://www.nytimes.com/interactive/2020/07/03/us/george-floyd-protests-crowd-size.html; *see also* BLACK LIVES MATTER, https://perma.cc/AU8P-KWT2.

2. *See, e.g.*, Michael Brune, *Pulling Down Our Monuments*, SIERRA CLUB (June 20, 2021), https://perma.cc/AEG8-K8KN.

3. Sarah Fox*, Environmental Gentrification,* 90 U. COLO. L. REV. 803, 853 (2019) (quoting Michael Gerrardo & Sheila R. Foster*, Preface to the First Edition* of THE LAW OF ENVIRONMENTAL JUSTICE: THEORIES AND PROCEDURES TO ADDRESS DISPROPORTIONATE RISKS, at xxxiii (Michael B. Gerrard & Sheila R. Foster eds., 2d ed. 2008)); *see also* Winifred Curran & Trina Hamilton, *Just Green Enough: Contesting Environmental Gentrification in Greenpoint, Brooklyn*, 17 LOCAL ENV'T 1027, 1031 (2012).

"encompasses conversations about who is exposed to environmental 'bads,' as well as who gets to enjoy environmental 'goods.'"[4]

One of the environmental justice movement's earliest leaders is Dr. Robert Bullard, who is considered by many to be the "father of environmental justice."[5] Dr. Bullard's earlier work began in the late 1970's and involved studying the siting of garbage dumps in Black neighborhoods, where he identified systematic patterns of injustice.[6] The data from his study showed that 100 percent of all the city-owned landfills in Houston, Texas were in Black neighborhoods, even though only twenty-five percent of the population of Houston was Black.[7] This study also showed that six out of eight city-owned incinerators and three out of four of the privately-owned landfills in Houston were located in predominantly Black neighborhoods.[8] Since Houston does not have zoning ordinances,[9] Dr. Bullard explained, "it meant that [those] were decisions made by individuals in government,"[10] which sparked his dedication to environmental justice. Since then, Dr. Bullard has published over seventy articles and eighteen books documenting environmental discrimination.[11]

The first formal recognition of environmental justice as a problem in the United States was in 1981 during a civil rights protest against the siting of a hazardous waste site in a small Black community in Warren County, North Carolina.[12] This hazardous waste site was designated to accept polychlorinated biphenyl ("PCB")-contaminated soil that came from illegal dumps of toxic waste along roadways.[13] The protest brought widespread attention and resulted in a report by the United States General Accounting Office that analyzed toxic waste sites located in the Southeast United

4. Fox, *supra* note 3, at 853 *(*citing KENNETH A. GOULD & TAMMY L. LEWIS*,* GREEN GENTRIFICATION: URBAN SUSTAINABILITY AND THE STRUGGLE FOR ENVIRONMENTAL JUSTICE 25–26 (Julian Agyeman et al. eds., 1st ed. 2017)).

5. Gregory Dicum, *Meet Robert Bullard, the Father of Environmental Justice*, GRIST (Mar. 15, 2006), https://perma.cc/KP5G-P3QQ.

6. *Id*.

7. *Id.*

8. *Id.*

9. *See Planning & Development, Development Regulations*, CITY OF HOUS., https://perma.cc/RT9L-DRQU ("The City of Houston does not have zoning, but development is governed by ordinance codes that address how property can be subdivided.").

10. Dicum, *supra* note 5.

11. For a complete list of Dr. Bullard's environmental justice work, see *Curriculum Vitae*, DR. ROBERT BULLARD FATHER OF ENVIRONMENTAL JUSTICE, https://perma.cc/Q4KH-7W9H.

12. *Environmental Justice History*, OFF. OF LEGACY MGMT., https://perma.cc/EQ9V-C24Q.

13. *Id.*

States,[14] which showed that hazardous waste sites were disproportionately located near low income Black communities.[15]

Although the Warren County protests did not prevent the hazardous PCB disposal facility, it led to the national recognition and emergence of the environmental justice movement.[16] The term "environmental racism" was created during this time, which is attributed to the leader of the Warren County protest, civil rights activist and former Executive Director for the United Church of Christ Commission for Racial Justice, Dr. Benjamin Chavis.[17] Notably, Dr. Chavis stated:

> Racism is the intentional or unintentional use of power to isolate, separate and exploit others. This use of power is based on a belief in superior racial origin, identity or supposed racial characteristics. Racism confers certain privileges on and defends the dominant group, which in turn sustains and perpetuates racism. Both consciously and unconsciously, racism is enforced and maintained by the legal, cultural, religious, educational, economic, political, environmental and military institutions of societies. Racism is more than just a personal attitude; it is the institutionalized form of that attitude.[18]

Other landmark studies reinforced the existence of environmental racism,[19] notably that race was "an important demographic predictor of exposure to hazardous sites, not merely a random phenomenon, and that race

14. Dollie Burwell & Luke W. Cole, *Environmental Justice Comes Full Circle: Warren County Before and After*, 1 GOLDEN GATE U. ENV'T L. J. 9, 36-37 (2007).

15. U.S. GEN. ACCT. OFF., SITING OF HAZARDOUS WASTE LANDFILLS AND THEIR CORRELATION WITH RACIAL AND ECONOMIC STATUS OF SURROUNDING COMMUNITIES, GAO/RCED-83-168 (1983).

16. *Environmental Justice History*, *supra* note 12. This protest was the first time that people of color organized around environmental injustices. Rather, this specific protest "brought environmental disparities into broader public view and catalyzed the development of the environmental justice movement as a movement rather than isolated struggles."; Alice Kaswan, *Environmental Justice and Environmental Law*, 24 FORDHAM ENV'T L. REV. 149, 150 n.3 (2013).

17. BENJAMIN F. CHAVIS JR., TOXIC WASTES AND RACE IN THE UNITED STATES: A NATIONAL REPORT ON RACIAL AND SOCIO-ECONOMIC CHARACTERISTICS OF COMMUNITIES WITH HAZARDOUS WASTE SITES (1987) [hereinafter REPORT ON RACIAL AND SOCIO-ECONOMIC CHARACTERISTICS].

18. *Id.* at ix-x. *See also* Richard J. Lazarus, *Environmental Racism! That's What It Is*, 2000 U. ILL. L. REV. 255, 259 (2000) (discussing Dr. Chavis's statement on environmental racism and its impact on environmental legal scholarship).

19. *See, e.g.*, U.S. ENV'T PROT. AGENCY, REDUCING RISK FOR ALL COMMUNITIES, EPA 230-R-92-008 (1992) (affirming that the siting of waste sites was related to race).

was a more important factor than income."[20] However, it is important to make clear that the environmental justice movement rose to prominence not just due to academic studies, statements of leaders, and laws, but also because of grassroots organized in communities that have been activated and inspired by environmental justice leaders, and whose members used these studies in service of their goals. Resistance within communities "emerged in response to practices, policies, and conditions that residents judged to be unjust, unfair, and illegal."[21] Examples of these conditions encompassed:

> (1) unequal enforcement of environmental, civil rights, and public health laws; (2) differential exposure of some populations to harmful chemicals, pesticides, and other toxins in the home, school, neighborhood, and workplace; (3) faulty assumptions in calculating, assessing, and managing risks; (4) discriminatory zoning and land use practices; and (5) exclusionary practices that prevent some individuals and groups from participation in decision making or limit the extent of their participation.[22]

As Dr. Bullard and Glenn Johnson stated in their article, *Environmental Justice: Grassroots Activism and Its Impact on Public Policy Decision*, the environmental justice movement was not created "within government, academia, or largely White, middle-class, nationally based environmental and conservation groups."[23] The energy and force behind environmental justice derived "from grassroots activists, communities of color, and their 'bottom-up' leadership approach."[24] Specifically, "grassroots groups organized themselves, educated themselves, and empowered themselves to make fundamental change in the way environmental protection is administered in their communities."[25]

It is also important to take into account that environmental justice is not a phenomenon that is unique to the United States. The First National

20. Alan Ramo, *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*, 19 HASTINGS W.N.W. J. ENV'T L. & POL'Y 41, 44 (2013). *See also* REPORT ON RACIAL AND SOCIO-ECONOMIC CHARACTERISTICS, *supra* note 17 (concluding that race was the most significant factor in siting hazardous waste facilities, and that three out of every five Black and Latinx people live in a community with toxic waste sites).

21. Glenn S. Johnson & Robert D. Bullard, *Environmental Justice: Grassroots Activism and Its Impact on Public Policy Decision Making*, 56 J. SOC. ISSUES 555, 558 (2000).

22. *Id.* at 557–58.

23. *Id.* at 560.

24. *Id.*

25. *Id.*

People of Color Environmental Leadership Summit held in October 1991 is recognized as "the most important single event in the [environmental justice] movement's history" and "was attended by over 650 grassroots and national leaders from around the world."[26] The summit "demonstrated that it is possible to build a multiracial grassroots movement around environmental and economic justice."[27] There, summit delegates drafted and adopted seventeen principles of environmental justice.[28] These principles are served and implemented as the governing document for environmental justice around the world, including at the 1992 Earth Summit in Rio de Janeiro, where, for example, Spanish and Portuguese translations of the principles were used and circulated by environmental justice groups.[29]

III. ENVIRONMENTAL JUSTICE REQUIREMENTS IN THE LAW

The studies showing environmental injustices, grassroots organizing, and the emerging environmental justice movement acted as the impetus for federal and state environmental justice commitments. In the 1990's, various agencies, both state and federal, began issuing policies and legislation outlining how they would implement and achieve environmental justice in the law.

A. FEDERAL

The Environmental Justice Act of 1992 was introduced by then Senator Al Gore and Congressman John Lewis and required counties to identify "environmental high impact areas," banning additional siting of toxic facilities in high impact areas until they met certain health standards.[30] In 1994, President Clinton's Executive Order 12898, Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations, required the federal government to "make achieving environmental justice part of its mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minority populations and low-income populations . . . ."[31] This required agencies to "incorporate environmental justice analysis into [the National Environmental Policy Act's

26. Johnson & Bullard, *supra* note 21, at 556-57.

27. *Id*.

28. FIRST NATIONAL PEOPLE OF COLOR ENVIRONMENTAL JUSTICE LEADERSHIP SUMMIT, PRINCIPLES OF ENVIRONMENTAL JUSTICE (1996), https://perma.cc/2PE9-5WWX.

29. Johnson & Bullard, *supra* note 21, at 557.

30. Environmental Justice Act, H.R. 5326, 102d Cong. (1992); Environmental Justice Act, S. 2806, 102d Cong. (1992).

31. Exec. Order No. 12898, 59 Fed. Reg. 7629 (Feb. 11, 1994).

("NEPA")] existing requirements – requirements such as environmental assessments, environmental impact statements, and records of decision."[32] Along with Executive Order 12898, President Clinton issued a memorandum, stating:

> 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.[33]

In response, the United States Environmental Protection Agency ("U.S. EPA") developed regulations prohibiting discrimination when siting projects and the use of any methods or criteria that would "have the effect" of subjecting anyone to discrimination on the basis of race, color, national origin, or sex.[34] Similarly, the Council on Environmental Quality ("CEQ")[35] created guidance for how federal agencies can address environmental justice.[36] This guidance "became the model for federal agencies to use in addressing environmental justice."[37]

The U.S. EPA also created guidelines on environmental justice and provided examples of how environmental justice principles could be implemented in NEPA's environmental review process.[38] This document was

32. Ramo, *supra* note 20, at 46. *See also* Exec. Order No. 12898, *supra* note 31.

33. OFF. OF FED. REG., *Memorandum on Environmental Justice*, 30 WEEKLY COMPILATION OF PRESIDENTIAL DOCS. 279 (Feb. 11, 1994).

34. 40 U.S.C. § 2000d (2012).

35. NEPA established the CEQ in 1970 within the Executive Office of the President. "CEQ oversees Federal agency NEPA implementation and develops and recommends national policies to the President that promote the improvement of environmental quality and meet the Nation's goals. In addition, CEQ is assigned various duties and responsibilities under other statutes, Executive Orders, and Presidential Memoranda, including with regard to Federal ocean policy, Federal sustainability, and timely environmental review and permitting processes for infrastructure development, and other matters." *Council on Environmental Quality*, EXEC. OFF. OF THE PRESIDENT, https://perma.cc/4YAS-K2M3.

36. COUNCIL ON ENV'T QUALITY, EXEC. OFF. OF THE PRESIDENT, ENVIRONMENTAL JUSTICE: GUIDANCE UNDER THE NATIONAL ENVIRONMENTAL POLICY ACT (1997).

37. Ramo, *supra* note 20, at 48. *See, e.g.,* Policy Statement on the Treatment of Environmental Justice Matters in NRC Regulatory and Licensing Actions, 69 Fed. Reg. 5204 (Aug. 24, 2004) ("This final policy statement reaffirms that the [Nuclear Regulatory] Commission is committed to full compliance with the requirements of [NEPA] in all of its regulatory and licensing actions.").

38. *See* U.S. ENV'T PROT. AGENCY, OFF. OF FED. ACTIVITIES, FINAL GUIDANCE FOR INCORPORATING ENVIRONMENTAL JUSTICE CONCERNS IN EPA'S NEPA COMPLIANCE ANALYSES (1998) [hereinafter GUIDANCE FOR INCORPORATING EJ].

created with the intention 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. . . ."[39] It stated that "NEPA analyses must consider the cumulative effects on a community by addressing the full range of consequences of a proposed action as well as other environmental stresses which may be affecting the community."[40] Notably, the U.S. EPA guidance called for demographic analyses during project review when it provided this example:

> [W]hen considering a project that will have a permitted discharge to the surrounding surface waters, it may be of concern to populations who rely on subsistence living patterns (i.e., fishing) and already receive public water through lead service lines; the cumulative effects associated with both the discharge and the lead service lines must be taken into account. In such cases, mitigation measures need to be developed and analyzed to reduce an adverse cumulative effect. In addition, minority populations and low-income populations are often located in areas or environments that may already suffer from prior degradation. EPA analysts need to place special emphasis on other sources of environmental stress within the region, including those that have historically existed, those that currently exist, and those that are projected for the future.[41]

Although economic or social impacts cannot be the sole basis for a NEPA review or a significant impact,[42] when an environmental impact statement shows that "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."[43]

While these environmental justice initiatives were an important step toward achieving meaningful accountability for communities experiencing environmental racism, in *Alexander v. Sandoval*, the Supreme Court of the United States significantly narrowed an individual's ability to bring federal

39. GUIDANCE FOR INCORPORATING EJ, *supra* note 38, at § 1.0.
40. *Id.* at § 2.2.2.
41. GUIDANCE FOR INCORPORATING EJ, *supra* note 38.
42. *See* 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.").
43. 40 C.F.R. § 1508.14 (2005).

civil rights causes of action to address environmental justice.[44] In *Sandoval*, the Court rejected an individual's right to enforce Title VI of the Civil Rights Act of 1964's ("Title VI") administrative regulations in court.[45] Instead, the Court required individuals to address all disparate impact complaints directly to the responsible agency under Title VI's provisions for administrative complaint procedures.[46] The Court also interpreted that 42 U.S.C. § 2000d, the section of the Civil Rights Act that bans discrimination by funding recipients, to ban only intentional discrimination.[47] This meant that under agency regulations, individuals could still file administrative complaints showing disparate impacts, but statutory bans on discrimination could be enforced only by a showing of intentional discrimination.[48]

Taken together, the Civil Rights Act of 1964, along with the federal government's implementation through executive orders, memoranda, regulations, and guidance principles, are examples of how the federal government is willing and able to respond to demands for change. However, the effectiveness of those efforts in achieving environmental justice, along with their viability, has been severely limited by the Supreme Court, and as a result, plaintiffs have "found it difficult to enforce Title VI in environmental justice cases."[49]

B. CALIFORNIA

California's definition of environmental justice is "the fair treatment and meaningful involvement of people of all races, cultures, incomes, and national origins with respect to the development, adoption, implementation, and enforcement of environmental laws, regulations, and policies."[50] While California has made many attempts to introduce environmental justice laws, the lack of remedial statutes or direct environmental justice provisions in siting and permitting in California is significant. Nonetheless,

44. Alexander v. Sandoval, 532 U.S. 275 (2001). *See also* Ramo, *supra* note 20, at 52–56 (discussing recent federal civil rights cases and Title VI's viability).

45. Sandoval, 532 U.S. at 287–88.

46. Sandoval, 532 U.S. at 289.

47. *Id.* at 280–81 (This "reaches no further than the Fourteenth Amendment's equal protection clause or the Fifth Amendment's due process clause."). Ramo, *supra* note 20, at 52.

48. Sandoval, 532 U.S. at 287–88 (Third Circuit has further constrained an individual's ability to seek administrative regulation enforcement through a cause of action pursuant to other civil rights laws, such as 42 U.S.C. § 1983.). *See, e.g.*, S. Camden Citizens in Action v. N.J. Dep't of Env't Prot., 274 F.3d 771 (3d Cir. 2001).

49. Ramo, *supra* note 20, at 53.

50. CAL. GOV. CODE § 65040.12(e). *See also*, *Environmental Justice*, U.S. ENV'T PROT. AGENCY, https://perma.cc/Z8V8-XEQT (The federal definition of 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.").

California is still one of the leading states in adopting environmental justice initiatives.

i. Attempts To Adopt Environmental Justice

As discussed in more detail below, there were five environmental justice bills adopted by the California Legislature prior to 1999, all of which were vetoed by then-Governor Pete Wilson.[51] Another attempt to bring environmental justice into CEQA was introduced in 2020, but it died in committee. Each of these attempts is discussed below.

In March 1991, AB 937 passed both the State Senate and Assembly and would have required any developer of a potentially high-impact project to submit project site demographic information, such as race and income census data, as part of its permit application.[52] An application could not be approved if demographic information was not submitted for hazardous waste incinerators and similar projects.[53] Governor Pete Wilson vetoed AB 937 in June 1991, stating in his veto message that waste facilities were "necessary to the quality of life in California and must be developed."[54]

In February 1992, AB 3024, a bill similar to AB 937, was introduced.[55] While still focusing on high-impact project permitting applications, the major difference between AB 3024 and AB 937 was that AB 3024 stated that a separate site demographics statement was not required if that information was included in another public document filed with the permit application, such as an Environmental Impact Report ("EIR").[56] Governor Wilson's veto message for AB 3024 in September 1992 stated:

> This bill would impose an unnecessary burden upon the applicants for potentially high-impacted development projects. Existing law allows an interested party to provide any information on the demographics pertaining to

51. Ellen M. Peter, *Implementing Environmental Justice: The New Agenda for California State Agencies*, 31 GOLDEN GATE U. L. REV. 529, 547–48 (2001). For a discussion of these efforts, see Caroline Farrell, *SB 115: California's Response to Environmental Justice – Process Over Substance*, 1 GOLDEN GATE U. ENV'T L.J. 113, 116–19 (2007).

52. Peter, *supra* note 51, at 543; Cal. Legis. Assemb. B. 937, Reg. Sess. 1991–92 (1991).

53. Peter, *supra* note 51, at 543; Cal. Legis. Assemb. B. 937, Reg. Sess. 1991–92 (1991).

54. Peter, *supra* note 51, at 544; Cal. Legis. Assemb. B. 937 Reg. Sess. 1991–92 (1992); *Hearing on AB 937 Before the Cal. Senate Comm. on Local Government Staff Analysis*, 1992 Leg. Reg. Sess. 1991–92.

55. Peter, *supra* note 51, at 544; Cal. Legis. Assemb. B. 3024 Reg. Sess. 1991–92 (1992).

56. Peter, *supra* note 51, at 544; Cal. Legis. Assemb. B. 3024 Reg. Sess. 1991–92 (1992).

> proposed site. In addition, the appointed or elected officials who consider such projects at the local level are generally aware of the constituency within the affected area. Where questions arise, the local agencies already have the authority to request any information, including local demographics.[57]

In February 1997, SB 451 was introduced and implemented long-range planning mechanisms for siting future waste facilities.[58] SB 451 used land use elements of city and county general plans, rather than a project-by-project approach, such as those proposed in AB 937 and AB 3024, by requiring cities and counties to identify uses handling hazardous materials to "avoid concentrating these uses in close proximity to school or residential communities and to provide for the fair treatment of people, regardless of race, culture, or income level."[59] If no hazardous waste facility was planned to be sited near schools, homes, or generally in the area, cities and counties were exempt from these new requirements, and even then, these requirements were not triggered until the next scheduled revision of the land use element.[60] Governor Wilson vetoed SB 451 in September 1997.[61]

In 1997, the California Legislature passed SB 1113, which would have required the Office of Planning and Research ("OPR") to recommend proposed changes to the CEQA Guidelines that "provide for the identification and mitigation by public agencies of disproportionately high and adverse environmental effects of projects on minority populations and low-income populations."[62] SB 1113 also would have required OPR to "identify communities and populations affected by disproportionately high and adverse environmental effects of projects" by reviewing its databases of environmental documents submitted to the State Clearinghouse.[63] In addition, the bill would have instructed OPR to rely on President Clinton's Executive Order 12898 in meeting these requirements.[64] As discussed *infra*, CEQA requires a lead agency to identify and measure environmental impacts and mitigate those impacts to the extent feasible when preparing environmental documents.[65] With that in mind, SB 1113 "had some substantive undertones

57. Peter, *supra* note 51, at 544 n. 74; 1991–92 CAL. ASSEMBLY J. REG. SESS. VOL. 6 at 10253 (Sept. 30, 1992).
58. Peter, *supra* note 51, at 545; S. 451 (Cal. 1997), https://perma.cc/8S3Q-QNRF.
59. Peter, *supra* note 51, at 545.
60. *Id.*
61. *Id*. at 546 n. 82.
62. S. 1113 (Cal. 1997), https://perma.cc/XC2L-DKCN.
63. *Id*.
64. *Id*.
65. *See infra*, CEQA Section IV.

to it" because "[b]y explicitly identifying environmental justice as an environmental impact needing mitigation, [it] gave impacted communities a substantive tool with which to advocate for their environmental health."[66] Governor Wilson vetoed SB 1113 in October 1997 and stated in his veto message:

> This bill would require changes to the [CEQA] guidelines which would enable public agencies to address environmental justice matters. This bill would also require the Office of Planning and Research to assist public agencies by identifying communities and populations disproportionately affected by high and adverse environmental effects. The state environmental laws do not provide separate, less stringent requirements, or lower standards in minority and low-income communities. Environmental laws are, and should remain, color-blind.
>
> The California Environmental Quality Act was not designed to be used as a tool for social movement. The California Environmental Quality Act is a cumbersome process and any changes made to it should be to streamline the current process, not add new requirements that will only negatively affect the economy and people of this state.[67]

In August 1998, the California Legislature passed AB 2237, which would have required the departments, offices, and boards of California Environmental Protection Agency ("Cal EPA"), the Resources Agency, and the Department of Health Services to "identify geographical areas with disproportionately high and adverse effects on human health and the environment."[68] These entities were also instructed to direct certain grants and loans to ameliorate some of these high and adverse effects.[69] In the last staff analysis in the California Legislature, AB 2237 was noted to be "race and income neutral and . . . did not require, but appeared to steer, the state agencies towards the goal of awarding loans and grants in a manner that is equitable and commensurate with the threats that communities face."[70] Governor Wilson vetoed AB 2237 in September 1998, and in his veto message, complained about the "[incorporation of] 'so-called 'environmental racism'

66. Farrell, *supra* note 51, at 118. (Although S. 1113 did not become law, it did contribute to the framework "for future environmental justice legislation in California. . . .").
67. Peter, *supra* note 51, at 547 n. 85. 1997–98 CAL. SENATE J. at 3248.
68. Peter, *supra* note 51, at 547.
69. *Id*. at 548.
70. *Id*.

or 'environmental justice' issues in their selection criteria for environmental loans and grants."[71]

More recently, in February 2020, SB 950 was introduced as another attempt to implement environmental justice in CEQA.[72] SB 950 stated that "CEQA should also. . . be amended to take greater account of environmental justice issues."[73] It also stated that "[i]t is the intent of the Legislature that all public agencies should give consideration to environmental justice by ensuring the fair treatment and meaningful involvement of people of all races, incomes, and national origins."[74] SB 950 asked OPR to revise the Guidelines to "promote environmental justice goals of fair treatment and meaningful involvement of people of all races, cultures, incomes, and national origins in the lead agency decision."[75] While most of this language was vague with regard to environmental justice, it was still an attempt to bring environmental justice to the forefront of CEQA reform. The bill died in committee in November 2020.[76]

In sum, environmental justice bills in California have taken many forms. We have seen attempts to use the demographics of project sites, to target environmental loans and grants, and to integrate environmental justice directly into the land use elements of general plans or CEQA impact assessments and mitigation. While all of these efforts failed, either by gubernatorial vetoes or insufficient votes, all of these efforts "present a menu of options for the future."[77]

ii. Adopting Environmental Justice

In 2002, California adopted an environmental justice statute that requires the 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."[78]

The California Legislature also created environmental justice requirements in AB 32, the California Global Warming Solutions Act of 2006,[79] though environmental justice advocates remain unsatisfied with those

71. Cal. Legis. Assemb. B. 2237 Reg. Sess. 1997–98 (1998), https://perma.cc/B2ZA-9FW3. *See also* Peter, *supra* note 51, at 548.

72. S. 950, § 1(f) (Cal. 2020), https://perma.cc/9J7C-YLKE.

73. S. 950, § 1(f) (Cal. 2020).

74. *Id*. at § 8(c).

75. *Id*. at § 14(a).

76. CAL. SENATE, SB-950 CALIFORNIA ENVIRONMENTAL QUALITY ACT: HOUSING AND USE (2020), https://perma.cc/2JQ5-U6SF

77. Peter, *supra* note 51, at 548.

78. CAL. PUB. RES. CODE § 71110(a) (2002).

79. CAL. HEALTH & SAF. CODE § 38500 et seq. (2006).

efforts.[80] AB 32 aimed to reduce greenhouse gas emissions to 1990 levels by 2020 and gave the California Air Resources Board ("CARB") flexibility when creating a plan using "direct emissions reduction measures, alternative compliance mechanisms, market-based compliance mechanisms, and potential monetary and nonmonetary incentives for sources and categories of sources. . . ."[81] Many environmental justice advocates and communities from around the world, including the Environmental Justice Advisory Committee ("EJAC"), which was required to convene with CARB under AB 32, strongly opposed carbon trading, offset use, and the continued overreliance on fossil fuels.[82] Specifically, EJAC stated in its Declaration in Support of Carbon Pricing Reform in California that:

> [T]he California Cap and Trade system is inequitable and does not reflect the principles of environmental justice; and . . . that we will oppose at every turn all efforts to extend the California Cap and Trade system in California beyond 2020; and . . . that our demands for real changes in the way we make and use energy will not be silenced by promises of money or token adjustments to the fundamentally flawed trading and offsets approach[; and] that it supports a carbon tax, used in combination with direct emissions reductions, as a policy to replace the revenue generating component of Cap and Trade and to benefit environmental justice communities, support clean energy development, fund a just workforce transition to clean energy, invest in communities' capacity and infrastructure to adapt to climate change, and return a substantial portion to the public so that Californians, especially low-income residents, receive financial support during the transition to a clean energy economy.[83]

In response, CARB was required to "[e]nsure that activities undertaken to comply with the regulations do not disproportionately impact low-income communities."[84] Specifically in the context of toxic hot spots, the California Legislature required that regulations "[e]nsure that activities undertaken pursuant to the regulations complement, and do not interfere with,

80. *See, e.g.*, Morning Edition, *Environmental Groups Say California's Climate Program Has Not Helped Them*, KPCC (Feb. 24, 2017), https://perma.cc/9SCL-3SMM.

81. CAL. HEALTH & SAF. CODE § 38561 (2018).

82. *California's Environmental Justice Advisory Committee Opposes Carbon Trading*, REDD (Mar. 2, 2017), https://perma.cc/RA2V-RLTH [hereinafter *EJAC Opposes Carbon Trading*].

83. *Id*.

84. CAL HEALTH & SAF. CODE § 38562(b)(2) (2019).

efforts to achieve and maintain federal and state ambient air quality standards and to reduce toxic air contaminant emissions."[85] These attempts to implement environmental justice into cap-and-trade, however, continue to be counterintuitive and ineffective for many environmental justice communities and advocates.[86]

Lastly, in 2016, Senate Bill ("SB") 1000 passed, implementing environmental justice elements into city and county General Plans.[87] This bill was passed "[i]n recognition that the planning profession has power to influence health and equity outcomes across communities. . . ."[88] SB 1000 requires environmental justice elements to identify both "objectives and policies to reduce the unique or compounded health risks in disadvantaged communities," and "objectives and policies that prioritize improvements and programs that address the needs of disadvantaged communities."[89] A disadvantaged community is defined as (1) an area identified by Cal EPA[90] or (2) a low-income area "that is disproportionately affected by environmental pollution and other hazards that can lead to negative health effects, exposure, or environmental degradation."[91] A "low-income area" has "household incomes at or below 80 percent of the statewide median income . . ."[92] or is an area designated by the Department of Housing and Community Development.[93] SB 1000 also aims to improve public participation by identifying "objectives and policies to promote civic engagement in the public decision-making process."[94] It does this by integrating environmental justice principles into the planning process by requiring cities and counties to "adopt or review the environmental justice element, or the environmental justice goals, policies, and objectives in other elements [of their General Plan]" if they revise or adopt two or more elements

85. CAL HEALTH & SAF. CODE § 38562(b)(4) (2019).

86. *See* Emily Guerin, *Is California Climate Law Worsening Pollution in Communities of Color?*, KPCC (Feb. 2, 2017), https://perma.cc/E4SS-SC2W (explaining how environmental justice advocates say California's cap-and-trade program "hasn't actually worked as designed" and that one study found that "the first two years and cap and trade was in effect, industry emissions increased in places like Wilmington.") (citing Lara J. Cushing, et. al., *A Preliminary Environmental Equity Assessment of California's Cap-and-Trade Program* (Sept. 2016), https://perma.cc/XV2W-NPCQ).

87. CAL. GOV. CODE § 65302(h) (2021).

88. OFFICE OF PLANNING AND RESEARCH, GENERAL PLAN GUIDELINES, 4.8 ENVIRONMENTAL JUSTICE ELEMENT at 2, https://perma.cc/5JH7-DQ55.

89. CAL. GOV. CODE §§ 65302(h)(1)(A) & (h)(1)(C) (2019).

90. CAL HEALTH & SAF. CODE § 39711. For a map of these designated areas, see OFFICE OF ENVIRONMENTAL HEALTH HAZARD ASSESSMENT, SB 353 DISADVANTAGED COMMUNITIES, https://perma.cc/SDP8-T9S6.

91. CAL. GOV. CODE § 65302(h)(4)(A) (2021).

92. *Id.* at § 65302(h)(4)(C) (2021).

93. CAL HEALTH & SAF. CODE § 50093 (2013).

94. CAL. GOV. CODE § 65302(h)(1)(B) (2019).

concurrently.[95] In addition, the California Attorney General's Office is working to enforce SB 1000 through its Environmental Justice Bureau,[96] which "recently notified several communities about deficiencies in their proposed Environmental Justice Elements."[97]

In sum, while California has implemented environmental justice principles into some laws, including a statute specifically dedicated to environmental justice, some of California's more recent efforts, such as cap-and-trade and carbon offsets, still allow pollution in environmental justice communities to continue in California. For these communities, which are concentrated in areas with landfills, oil refineries, rail yards, and other polluting facilities, California's efforts still lack remedial measures and effective environmental justice provisions.[98]

C. NEW JERSEY

The most recent and innovative environmental justice breakthrough in the United States is New Jersey's Environmental Justice Law ("NJ S232"). Signed into law in September 2020, NJ S232 is the first state law in the United States mandating that new permits or permit renewal for various polluting facilities be denied following the determination that the facility would disproportionately impact "overburdened" communities.[99] Under NJ S232, an "overburdened community" is any census tract where "(1) at least 35 percent of the households qualify as low-income households; (2) at least 40 percent of the residents identify as minority or as members of a State recognized tribal community; or (3) at least 40 percent of the households have limited English proficiency."[100] The department may grant a permit that imposes conditions on the construction and operation of a

95. CAL. GOV. CODE § 65302(h)(2) (2019). It is important to note, however, that there is no specific timeframe in which a General Plan must be updated. According to the Office of Planning and Research ("OPR"), "the planning period has traditionally been fifteen to twenty years." General plans are required to be updated "periodically." OFF. OF PLAN. AND RSCH., GENERAL PLAN GUIDELINES, 2017 UPDATE – FAQ, https://perma.cc/GWB3-25C9 ("Some cities and counties update their general plans as often as every five years, while others update in portions over time. The housing element is the only portion of the general plan that is on a mandated update schedule - four, five, or eight years, as listed by the Housing and Community Development agency."). *See also* S. 1070 (proposed February 18, 2020 and would shorten timeline to adopt an environmental justice element and tighten requirements for cities and counties to take specific actions to achieve environmental justice).

96. CAL. DEPT. OF JUST., ATTORNEY GENERAL BECERRA ESTABLISHES BUREAU OF ENVIRONMENTAL JUSTICE (Feb. 22, 2018), https://perma.cc/4P3A-4AJC.

97. Steve Sanders, *Time for California Communities to Step Up on Environmental Justice*, CAL MATTERS (July 3, 2020), https://perma.cc/457G-R68G.

98. *How California's Cap and Trade Market Undermines Environmental Justice*, REDD (May 8, 2017), https://perma.cc/J69D-8945.

99. S. 232 (N.J. 2020), https://perma.cc/3C5B-RX32.

100. *Id*.

facility to protect public health, except where a new or expanded facility "will serve a compelling public interest in the community where it is to be located."[101] This "community" component to NJ S232 is one of the law's most compelling mandates that sets it apart from other environmental justice initiatives. By requiring a compelling public interest for the specific impacted community, rather than the public at large, NJ S232 aims to distribute potential environmental and economic impacts proportionately.

As such, New Jersey's environmental justice breakthrough may set the stage for a new wave of environmental justice initiatives. Some activists have stated that they are hoping NJ S232 will "lead to more, similar state-level legislation, especially in light of rollbacks to federal regulations under President Donald Trump . . . ."[102] After signing the bill, New Jersey Governor, Phil Murphy, stated, "[w]e are dispelling the myth that you can have either economic development or environmental justice, but not both. Starting today, we are restoring balance."[103]

IV. CEQA

As conveyed above, with the exception of New Jersey, state and federal laws have been fairly ineffective at providing remedies for environmental injustice. Like most environmental laws, since its enactment in 1970, CEQA does not explicitly address environmental justice.

CEQA establishes a commitment to the "maintenance of a quality environment for the people of [California] now and in the future. . . ."[104] Its purpose, as stated by former Attorney General of California, Bill Lockyer, is "to foster transparency and integrity in public decision-making while forcing consideration of the full scope of the impacts development activities have on our natural and human environments."[105] In other words, CEQA provides transparency, environmental protection, and public accountability with regard to new projects and plans that have the potential to impact the environment. To accomplish this, CEQA requires public agencies to prevent and mitigate environmental damage from proposed projects and planning initiatives.[106] This requirement is also intended to promote

101. S. 232 (N.J. 2020), https://perma.cc/3C5B-RX32.

102. Arlene Karidis, *The Impact of New Jersey's New Environmental Justice Law*, WASTE 360 (Oct. 14, 2020), https://perma.cc/SJT3-VZEQ.

103. *Id*.

104. CAL. PUB. RES. CODE § 21000(a) (1979).

105. EVERYDAY HEROES PROTECT THE AIR WE BREATHE, THE WATER WE DRINK, AND THE NATURAL AREAS WE PRIZE: THIRTY-FIVE YEARS OF THE CALIFORNIA ENVIRONMENTAL QUALITY ACT 3 (Barbara Barrigan-Parilla ed., 2005) [hereinafter 35 YEARS OF CEQA].

106. *See* CAL. PUB. RES. CODE § 21000(g) (1979).

public participation, which helps create a record that is sufficient to allow informed decision-making.[107]

In practice, CEQA requires an initial study of a proposed project to determine the level of potential environmental impacts, whether mitigation can reduce any significant environmental impacts to a less-than-significant level, and whether an EIR will be required.[108] As the California Supreme Court stated in *Citizens of Goleta Valley v. Board of Supervisors*, "[CEQA's] 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.'"[109] For a project or plan to have a significant effect on the environment, there needs to be a "substantial, or potentially substantial, adverse change in the environment."[110] If there are significant impacts that can be sufficiently reduced to a less-than-significant level through mitigation, then a Mitigated Negative Declaration is warranted, and if there is no impact on the environment, then a Negative Declaration is warranted[111] – analogous to a Finding of No Significant Impact under NEPA. Likewise, similar to an Environmental Impact Statement under NEPA, CEQA requires EIRs to include project alternatives, disclosure of significant impacts, and proposed mitigation for all significant impacts.[112]

Under CEQA, a project also has a significant effect on the environment if "possible effects of a project are individually limited but cumulatively considerable."[113] For an impact to be cumulatively considerable, "the incremental effects of a project are considerable when viewed in connection with the effects of past projects, the effects of other current projects, and the effects of probable future projects."[114] As one court explained:

> 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

107. Laurel Heights Improvement Ass'n v. Regents of Univ. of Cal., 764 P.2d 278, 291 (1988).

108. CAL. CODE REGS. tit. 14, § 15002(k2) (2019) [hereinafter "CEQA Guidelines"].

109. Citizens of Goleta Valley v. Board of Supervisors of Santa Barbara County, 52 Cal. 3d 553, 564 (1990) (quoting Laurel Heights Improvement Ass'n v. Regents of U. of Cal., 47 Cal. 3d 376, 392 (1988)).

110. CAL. PUB. RES. CODE § 21080.5 (2014).

111. *Id.* at § 210800 (2014).

112. CEQA Guidelines § 15121(a) (2019).

113. CAL. PUB. RES. CODE § 21083(b) (2005).

114. Association of Environmental Professionals, 2019 CEQA Statutes & Guidelines, at 327, https://perma.cc/8TKE-AXRZ [hereinafter 2019 Statutes & Guidelines].

> sources. These sources appear insignificant when considered individually, but assume threatening dimensions when considered collectively with other sources with which they interact.[115]

Lastly, CEQA is a "self-executing statute," meaning no single agency is responsible for its enforcement.[116] Rather, "public agencies are entrusted with CEQA compliance . . . [and its] provisions are enforced, as necessary, by the public through litigation and the threat of litigation."[117]

V. CEQA AS A TOOL FOR ENVIRONMENTAL JUSTICE COMMUNITIES

While CEQA has not been an effective remedy for environmental injustices and environmental racism, California environmental justice advocates universally see CEQA as an important tool.[118] As stated by the California Environmental Justice Alliance:

> CEQA protects the basic rights of disadvantaged or EJ communities in California. These rights include the right to clean air and water, the right to participate in local land use decisions, and the right to affordable housing and good schools free from pollution and other harms. A strong CEQA can protect highly impacted EJ communities from developments that produce environmental burdens – from refineries to warehouses to housing.[119]

Much of this is because CEQA provides individuals with public participation opportunities concerning projects that have the potential to impact their communities. Thus, this section examines a couple of CEQA victories for environmental justice communities.

115. Communities for a Better Env't v. Cal. Res. Agency, 103 Cal. App. 4th 98, 114 (2002).

116. CALIFORNIA SENATE OFFICE OF RESEARCH, POLICY MATTERS, CEQA: IMPACTS ON DELIVERING STATE HIGHWAY TRANSPORTATION PROJECTS 1 (Mar. 2018), https://perma.cc/2VAM-GMNL.

117. *Id.*

118. *See Protect CEQA to Advance Environmental Justice and Protect Housing*, CAL. ENV'L JUST. ALL., https://perma.cc/T5P7-HFNR [hereinafter *Protect CEQA*].

119. *Id*.

A. BAKERSFIELD CITIZENS FOR LOCAL CONTROL V. CITY OF BAKERSFIELD

In 2002, the City of Bakersfield approved of the development of two retail shopping centers located approximately 3.6 miles apart.[120] An EIR was prepared and certified for each shopping center, and Bakersfield Citizens for Local Control ("BCLC") filed two CEQA actions challenging the sufficiency of the EIRs and contested the project approvals and related land use entitlements.[121] In CEQA cases, the court's "only role . . . in reviewing an EIR is to ensure that the public and responsible officials are adequately informed 'of the environmental consequences of their decisions *before* they are made.'"[122] With that in mind, the court held that the EIRs were inadequate because they did not analyze the cumulative environmental impacts of other past, present, and reasonably foreseeable retail projects, and that neither EIR "meaningfully addressed comments stating that the two shopping centers will have cumulative adverse impacts."[123]

Frequently with environmental justice claims, there is a presumption that because of the already deteriorated conditions in which environmental justice communities reside, "a project that simply adds to the undesirability of the community's environment" will go unnoticed.[124] However, in this case, the court was presented with a similar argument with regard to San Joaquin Valley's poor air quality.[125] The court stated that, "[t]he 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."[126] When discussing the severity of cumulative adverse environmental impacts from the two shopping centers, the court presented examples of questions that the EIR should answer, one of which was, "[w]ill combined traffic cause an increase in mobile emissions that adversely affects sensitive receptors?"[127]

The court also discussed urban decay and the line of cases that recognized CEQA Guidelines 15064, which states that indirect effects, such as social and economic impacts, may be a significant impact requiring environmental analysis if it culminates in physical impacts to the

120. Bakersfield Citizens for Local Control v. City of Bakersfield, 124 Cal. App. 4th 1184, 1193 (2004).

121. *Id.* at 1195.

122. Berkeley Keep Jets Over the Bay Com. v. Bd. of Port Comm'rs, 91 Cal. App. 4th 1344, 1356 (2001).

123. City of Bakersfield, 124 Cal. App. 4th at 1218.

124. Ramo, *supra* note 20, at 69.

125. City of Bakersfield, 124 Cal. App. 4th at 1219 n.10.

126. *Id.*

127. *Id.* at 1218 n.9.

environment.[128] The court stated, on remand, that the EIR should consider the social and economic impacts of the projects, so long as they are demonstrated to be an indirect environmental effect.[129] Specifically, the court held, "when 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."[130]

This case is a relatively unique example of how environmental justice considerations, such as economic impacts, can be addressed in CEQA. This case is also an example of how courts have the ability to directly draw upon environmental justice concerns by asking pointed, specific questions while reviewing the adequacy of EIRs.

B. COMMUNITIES FOR A BETTER ENVIRONMENT V. BAY AREA AIR QUALITY MANAGEMENT DISTRICT

In 2008, the City of San Francisco agreed to allow Chevron Corporation to expand its local refinery, and as a result, the company began construction on a project that would have enabled Chevron to process low-quality crude oil.[131] The agreement also allowed Chevron to transport hydrogen to other oil refineries in the Bay Area.[132] This expansion had the potential to do two things. First, it would create heavier emissions and more pollutants in the air for the environmental justice community living nearby.[133] Second, it would create potential for more toxic releases of mercury and selenium, and more sulfur flare gas and greenhouse gas emissions.[134] In response, Communities for a Better Environment[135] and

128. City of Bakersfield, 124 Cal. App. 4th at 1205–06.

129. *Id.* at 1206.

130. *Id.* at 1207.

131. Communities for a Better Env't v. City of Richmond, 184 Cal. App. 4th 70, 77 (2010).

132. *Id.* at 79.

133. *Recent Victories*, COMMUNITIES FOR A BETTER ENV'T, https://perma.cc/27EH-D697 [hereinafter CBE, Recent Victories].

134. *Id.*

135. Founded in 1978, Communities for a Better Environment (CBE) is "one of the preeminent environmental justice organizations in the nation. The mission of CBE is to build people's power in California's communities of color and low-income communities to achieve environmental health and justice by preventing and reducing pollution and building green, healthy and sustainable communities and environments. CBE provides residents in heavily polluted urban communities in California with organizing skills, leadership training and legal, scientific and technical assistance, so that they can successfully confront threats to their health and well-being." *Mission & Vision*, COMMUNITIES FOR A BETTER ENV'T, https://perma.cc/79EQ-JRHM.

environmental justice allies[136] filed suit "to force full and proper environmental review and mitigation of the project's impacts" under CEQA.[137] The court held that the EIR was insufficient because the project description was inconsistent and vague as to whether heavy crude oil might be refined at the site, and the project improperly deferred greenhouse gas mitigation measures.[138] The injunction "not only forced Chevron to stop all project development, but it also required [Chevron] to dismantle construction it had already started."[139]

This case is an example of how CEQA can be a tool to hold lead agencies accountable for not meeting their burden of sufficient public disclosure of environmental impacts. This case also shows how CEQA can address environmental justice and achieve environmental justice goals, even if the claims are presented as traditional CEQA claims.

Thus, as shown in this section, CEQA provides leverage for environmental justice communities to obtain mitigation and benefits out of projects. CEQA is an important tool to advance environmental justice and "protect the rights of communities disproportionately impacted by pollution and poverty in [California]."[140]

VI. CEQA'S SHORTCOMINGS WITH ENVIRONMENTAL JUSTICE

As discussed above, environmental justice advocates view CEQA as a necessary tool to hold lead agencies accountable for impacts to environmental justice communities. However, CEQA has not always lived up to its commitment to the "maintenance of a quality environment for the people of [California] now and in the future,"[141] and in some cases, has been used counterproductively.[142] This section discusses some of CEQA's shortcomings for environmental justice communities.

Former California State Legislator Byron Sher stated that "[l]ike many provisions in the Bill of Rights . . . CEQA does not guarantee a specific outcome; instead, it guarantees processes and procedures, and

136. The definition of allyship varies. For some, allyship means "building a relationship of love and trust with another; for others, it means intentionally putting one's self in harm's way so that another person remains safe. Each type of alliance has its own parameters, responsibilities, and degree of risk." Frances E. Kendall, How to Be an Ally if You Are a Person with Privilege, https://perma.cc/Z6HX-KTLF. For more descriptions of ally behavior, see *Mission & Vision*, *supra* note 135.

137. CBE, *Recent Victories*, *supra* note 133.

138. City of Richmond, 184 Cal. App. 4th at 80–97.

139. CBE, *Recent Victories*, *supra* note 133.

140. *Protect CEQA*, *supra* note 118.

141. CAL. PUB. RES. CODE. § 21000(a) (1979).

142. *See infra*, CEQA Section VI.

empowers the individual person to enforce them."[143] The principles of environmental justice, however, demand specific outcomes of equity, fairness, and safety. For example, the third and eighth Environmental Justice Principles state:

> Environmental Justice mandates the right to ethical, balanced and responsible uses of land and renewable resources in the interest of a sustainable planet for humans and other living things . . .
> Environmental Justice demands the cessation of the production of all toxins, hazardous wastes, and radioactive materials, and that all past and current producers be held strictly accountable to the people for detoxification and the containment at the point of production.[144]

The reality is that CEQA, as an environmental review document, was not designed to protect communities against social and economic impacts. Especially in the environmental review context, "[c]oncentrating on process rather than outcome does not ensure that Warren County is not repeated, it merely ensures that everyone has had the opportunity to participate in the process before the decision to dump PCBs in Warren County, Buttonwillow, Kettleman City or Westmorland is made again."[145]

With that in mind, one of the primary purposes of CEQA is to foster informed public participation.[146] Public participation not only helps identify and characterize environmental justice concerns, but it also "inject[s] critical local knowledge and inform[s] policies and programs to solve environmental justice problems."[147] However, agencies often forget that "cultivating and maintaining widespread and diverse public participation to prevent combat concentrated environmental risk requires significant agency commitment."[148] As discussed in Section II above, communities of color

143. 35 YEARS OF CEQA, *supra* note 105, at 163.

144. PRINCIPLES OF ENVIRONMENTAL JUSTICE, *supra* note 28.

145. Farrell, *supra* note 51, at 125.

146. *See* CEQA Guidelines § 15201 (2019) ("Public participation is an essential part of the CEQA process.").

147. DOROTHY M. DALEY & TONY G. REAMES, *Public Participation and Environmental Justice: Access to Federal Decision Making in* FAILED PROMISES: EVALUATING THE FEDERAL GOVERNMENT'S RESPONSE TO ENVIRONMENTAL JUSTICE, 143 (David K. Konisky ed., 2015). *See also* GUIDANCE FOR INCORPORATING EJ, *supra* note 38, at 23 ("The potential for indirect impacts to affect a community is best understood when the analytical team is thoroughly familiar with the local community. It is important that the . . . analyst gain a full understanding of potential cultural impacts to the community. This is best accomplished through direct communication using effective public participation and consultation.").

148. DALEY & REAMES, *supra* note 147, at 144.

already endure disproportionately high environmental burdens, due in large part to the fact that lower income people "often live in areas with polluted air, unsafe traffic conditions[,] . . . environmental stressors like noise[, and] they lack access to recreation opportunities, healthy food options, and safe homes."[149] These are the same communities tasked with speaking out about environmental impacts to their neighborhoods, sometimes using environmental documents that are not offered in their native language,[150] and often are "not informed of proposed projects until it is too late to engage."[151] Even when communities are given ample notice, "public hearings often aren't accessible in the language the community speaks or held at a time and place that working families can attend."[152] According to Mark Wolfe, a San Francisco attorney specializing in CEQA cases, in order for environmental justice communities to be aware of projects taking place in their neighborhoods, they "need an active group of citizens who are paying attention . . . with the time and resources to be involved in these things."[153] In this way, public participation through CEQA is exclusive to those who have the expendable time, energy, and means to attend public meetings and comment on respective environmental documents.

Litigation is also a costly, sometimes infeasible or unsuccessful, means to seek environmental justice through CEQA. While CEQA creates leverage for communities to obtain mitigation and benefits out of projects through litigation, the largest, most influential, and well-funded environmental organizations do not have a history of centering environmental justice issues in their cases.[154] In fact, "[t]he environmental justice movement, which is typically community-based and more often driven by people of color, is frequently an afterthought among large green organizations and the foundations who fund them."[155] Darryl Fears,[156] a Washington Post environmental reporter who has written about the lack of diversity among Big

149. Sam Tepperman-Gelfant, *Include Low-Income Communities at the CEQA Reform Table*, PUBLIC ADVOCATES (Mar. 29, 2013), https://perma.cc/2BLT-2HKU [hereinafter *CEQA Reform Table*].

150. *See* SB 950 (bill that did not become law, proposing revisions to CEQA's Guidelines "for the translation into non-English languages of notices and other documents").

151. California Environmental Justice Alliance, *Placing Environmental Justice and Civil Rights at the Heart of Land Use Decision-Making* at 20 (March 2020), https://perma.cc/K5WL-D6P9 ("[L]ocal residents were not notified of the project. Instead, they were alerted to the project through a local news story.").

152. Tepperman-Gelfant, *supra* note 149.

153. Alastair Bland, *Some See CEQA as a NIMBY Tool. But Environmentalists Want Landmark Law Strengthened*, KQED (May 15, 2019), https://perma.cc/MRJ8-VQQC.

154. *See* Adam Wernick, *Green Groups Grapple with a History of Racism and Exclusion*, WORLD (Aug. 11, 2020), https://perma.cc/ZE9W-WLT8.

155. *Id*.

156. Profile of Darryl Fears, WASH. POST, https://perma.cc/8VQU-WPZB.

Green organizations for years, recently stated in an interview that Big Green organizations:

> [D]o the work to protect the environment, they do try to serve their mission as best they can. But at the same time, these groups have felt that they haven't really reached out to Black and brown communities the way they should for at least a decade, and in the decade since acknowledging that, they've done very little.[157]

With that in mind, even if every environmental organization began centering environmental justice in their CEQA work, it is not certain that the larger, whiter organizations that have historically ignored environmental justice communities would be the best advocates for these communities' needs, since representation would likely require trust and community engagement, in addition to personal and cultural attention. It is important to point out, however, that some larger organizations have played an important and crucial role in using their resources for environmental justice. Earthjustice, for example, created its Community Partnerships Program, which "works hand-in-hand with frontline communities fighting for a safe, just, and healthy environment."[158] Earthjustice's Community Partnerships Program is an example of how larger organizations can be effective environmental justice allies by using their resources to play a complementary role to grassroots groups.

Additionally, CEQA has, in many cases, been weaponized by privileged communities to stop developments they disagree with from taking place in their neighborhoods.[159] The "Not in My Backyard" mentality, or "NIMBYism" is "the phenomenon in which residents of a [neighborhood] designate a new development (e.g., shelter, affordable housing, group home) or change in occupancy of an existing development as inappropriate or unwanted for their local area."[160] In light of this movement, some view CEQA as a "NIMBY tool" and believe that "litigious NIMBY resisters have hijacked CEQA and are now using it for myopic, neighborhood gains such as views and urban skylines."[161] This is because NIMBYs have historically impeded infill residential developments "under the auspices that

157. Wernick, *supra* note 154.
158. COMMUNITY PARTNERSHIPS PROGRAM, EARTHJUSTICE, https://perma.cc/N9UN-2PAV.
159. *See* Bland, *supra* note 153.
160. *NIMBY (Not in My Backyard)*, HOMELESS HUB, https://perma.cc/6TEL-5JKE.
161. Bland, *supra* note 153.

somehow it will harm the environment," even when "a project has clear benefits."[162]

In response, topics of CEQA reform frequently lead to the discussion of streamlining the environmental review process, which in most cases, would hurt environmental justice communities by undermining CEQA's citizen enforcement of environmental protections.[163] For example, in February 2020, AB 3279 was introduced, which would prioritize hearing CEQA cases over all other civil cases, such as civil rights and police misconduct cases.[164] In addition to the potential for delay and increased cost for those cases, AB 3279 would also only allow CEQA petitioners to prepare the CEQA administrative record if the lead agency requests it.[165] Under current law, community groups and non-profits prepare the administrative record for the court, which "usually results in a substantial decrease in costs for litigation."[166] As stated by some environmental attorneys, AB 3279 would effectively "end CEQA challenges to projects by community groups and nonprofits, and even put non-profits out of business."[167]

In sum, CEQA, like most environmental laws, does not explicitly address environmental justice, and because of its structure as an environmental review statute, it cannot be used to demand environmental justice outcomes. CEQA has also been used counterproductively as a means to achieve discriminatory ends, which has led to discussions about reform that would ultimately jeopardize environmental justice communities' use of CEQA.

VII. WAYS TO THINK ABOUT CEQA REFORM

As discussed throughout this paper, environmental justice principles and the intersection between racial justice and the environment are not apparent or acknowledged in CEQA's statutory language or Guidelines, and the California Legislature has never enacted legislation that would have CEQA address environmental justice. Thus, before we move forward with potential CEQA reform, it is important to keep in mind the various perspectives that discuss why we are facing this current dichotomy between civil rights laws and environmental law.

CEQA's text is similar to NEPA's in that "[e]conomic or social effects of a project shall not be treated as significant effects on the

162. Bland, *supra* note 153 (interview quoting Paul Gradeff).

163. Deirdre Des Jardins, *Systemic Racism and Implementation of Environmental Laws in California*, CAL. WATER RSCH. (June 8, 2020), https://perma.cc/YN9E-ZARR.

164. Cal. Legis. Assemb. B. 3279, Reg. Sess. 2019–20 (2020).

165. *Id*.

166. Des Jardins, *supra* note 163.

167. *Id*.

environment."[168] As discussed above in Section III, however, longstanding federal statutes and policies "require incorporation of environmental justice into environmental review at the federal level."[169] Professor Tseming Yang suggested that the law and policy in civil rights and environmental protection are generally based on two fundamentally different paradigms:

> Environmental protection relies in large part on a conception of environmental degradation identified by Garrett Hardin in his seminal article Tragedy of the Commons, well as by Rachel Carson in her book Silent Spring. In contrast, civil rights laws and cases have in large part responded to issues of discrimination which are implicit in the Supreme Court's opinion in *Brown v. Board of Education* . . . . Under . . . "the tragedy of the commons," the quintessential focus of environmental regulation is on actions by individuals that, while advantageous and beneficial to that particular individual, are harmful for the community overall. The result is that environmental regulation, like many other forms of government regulations, is primarily directed at protecting the collective from the irresponsible or selfish actions of individuals or small groups. That perspective is entirely reversed in anti-discrimination law. The underlying premise of *Brown v. Board of Education* is that prejudice and minority oppression requires the law to focus its protections on minority groups against the majority. Because it was necessary to protect African Americans against continuing discrimination and oppression by whites following the Civil War, the Fourteenth Amendment's Equal Protection Clause was specifically designed to be counter-majoritarian in character.[170]

Further, Professor Yang stated that, "[p]recisely because regulatory standards are intended to achieve the greatest good for the greatest number of people, such standards fail to take into account the special characteristics and vulnerabilities of minority populations and the poor."[171] This is fairly true with CEQA. In the context of economic and social impacts, the Guidelines vaguely mention how they may be discussed in the environmental review process:

168. CEQA Guidelines § 15131(a) (2019).

169. Ramo, *supra* note 20, at 61.

170. Tseming Yang, *Melding Civil Rights and Environmentalism: Finding Environmental Justice's Place in Environmental Regulation*, 26 HARV. ENV'T L. REV. 1, 14 (2002).

171. *Id*. at 15.

> 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.[172]

There are a couple of problems with this. First, although the Guidelines "are binding on all public agencies in California,"[173] the California Courts of Appeal have differed on the issue of whether the Guidelines "are regulatory mandates or only aids to interpreting CEQA," and the California Supreme Court has not decided the issue.[174] Second, even if the Guidelines were interpreted by a court as a regulatory mandate, its passive language with regard to economic and social impacts would not create much of a requirement at all. The California Supreme Court has made clear that whether a project has the potential to jeopardize people is not a consideration under CEQA.[175] In *Ballona Wetlands Land Trust v. City of Los Angeles*, for example, the court held 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."[176] This means that even if the language in the Guidelines addressing economic and social impacts were used by a lead agency, an impacted community would still be required to tie those economic and social impacts to a physical change in the environment, rather than the converse, analyzing how the project's physical change impacts a community economically or socially.

On the other hand, Alan Ramo asserted that it is "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."[177] One of the reasons Ramo argues this is due to the California Supreme Court

172. CEQA Guidelines § 15064(e) (2019).
173. *Id.* at § 15000 (2019).
174. Laurel Heights , 47 Cal. 3d 376, at 391.
175. *See* Ballona Wetlands Land Trust v. City of Los Angeles, 201 Cal. App. 4th 455, 472 (2011).
176. Ballona Wetlands Land Trust, 201 Cal. App. 4th at 473.
177. Ramo, *supra* note 20, at 72.

holding in *Wildlife Alive v. Chickering*.[178] In *Chickering*, the court held that California courts may allow NEPA cases to offer persuasive authority, except where statutory authority or case law requires different conclusions.[179] The persuasive environmental justice authority with NEPA, the fact that the federal government has implemented environmental justice into environmental review, California's already parallel, but more stringent, civil rights laws,[180] and California's bolder environmental justice protections as state policy, led Ramo to find it "hard to understand how incorporating environmental justice into CEQA analysis can be considered a radical expansion of CEQA."[181] Ramo also noted that:

> [F]ederal 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.[182]

There are many more perspectives with regard to where environmental justice fits into environmental law that are not discussed here.[183] However, in this section, we see two potential sides of a coin when viewing CEQA reform. Are environmental laws so fundamentally incompatible with civil rights laws that environmental justice is an unrealistic outcome for CEQA? Or are all these laws interconnected, and it is not necessarily CEQA, but how we use it, that has been unsuccessful at achieving environmental justice?

The likely case with CEQA is somewhere in the middle. The nature of environmental review undermines guaranteed outcomes for

178. Wildlife Alive v. Chickering, 18 Cal. 3d 190, 201 (1976).

179. *Id*.

180. California created a state equivalent of Title VI of the Civil Rights Act of 1964 ("Title VI"). Title VI, 42 U.S.C. § 2000d et seq. Title VI prohibits discrimination on the basis of race, color, and national origin in programs and activities receiving federal financial assistance. California's version is broader in that it prohibits discrimination on the basis of "sex, race, color, religion, ancestry, national origin, ethnic group identification, age, mental disability, physical disability, medical condition, genetic information, marital status, or sexual orientation" by the state or its agencies or any program funded by the state. CAL. GOV. CODE § 11135 (2019).

181. Ramo, *supra* note 20, at 61.

182. *Id*.

183. *See, e.g.*, Eileen Gauna, *Environmental Law, Civil Rights and Sustainability: Three Frameworks for Environmental Justice*, 19 J. ENV'T & SUSTAINABILITY L. 34 (2012).

environmental justice communities; however, we have seen time and time again how CEQA is indispensable to environmental justice communities.

VIII. OPPORTUNITIES TO ADDRESS ENVIRONMENTAL JUSTICE IN CEQA

There are potential opportunities for reform that could center environmental justice in the CEQA process. California's history of attempted environmental justice bills, along with statutes like the New Jersey Environmental Justice Law, provide a helpful backdrop moving forward when thinking about CEQA reform. CEQA establishes enforceable guidelines and remains "among the most powerful legal tools that low-income communities of color have for getting accurate information . . . and influencing local projects."[184] As discussed above, CEQA is an imperfect tool for environmental justice communities because it frequently puts the impetus on overburdened communities to fight against disparate impacts and environmental injustices. For this reason, an opportunity for CEQA to better serve these communities is by revising CEQA's statutory language to specifically require an environmental justice analysis.

However, before discussing this opportunity specifically, it is important to preface this section by stating that, as with the PCB contamination in Warren County, the communities disproportionately impacted are unmistakably in the best position to define what is or is not an environmental justice issue and how to solve that issue. It is clear that in order to achieve meaningful accountability for environmental justice communities, "the voices of low-income communities must be included in th[e] debate."[185] For that reason, this section does not suggest answers or solutions to environmental injustices through CEQA. The most effective way to ensure that the needs, perspectives, and demands of environmental justice communities are accounted for in CEQA is to directly include them and to amplify their voices in conversations regarding reform. With that in mind, the opportunities presented in this section are intended as potential topics in those conversations.

A. EXISTING ENVIRONMENTAL SETTING

One potential avenue would be to require lead agencies to analyze environmental justice impacts at the outset as part of a proposed project's existing setting. CEQA Guidelines Section 15125 requires lead agencies to "include a description of the physical environmental conditions in the vicinity of [a proposed] project."[186] This existing setting acts as a baseline by

184. Tepperman-Gelfant, *supra* note 149.
185. *Id*.
186. CEQA Guidelines § 15125(a) (2019).

which an agency determines whether an additional impact or change to the environment is significant. As one group of CEQA practitioners explained when discussing best practices for including environmental justice in CEQA, "[i]f the project has the potential to cause adverse effects to people and is located in or near a [disadvantaged community], including those identified by an adopted [environmental justice] element or policy, this information should be disclosed in the existing setting."[187] If lead agencies were required to provide a mandatory disclosure and discussion of the demographics of the community surrounding a proposed project area, it could (1) bring demographics to the forefront and help with environmental justice conversations when projects are in front of a body for approval; and (2) require lead agencies to acknowledge the community under which impacts occur.

One problem with this suggestion is that, while it does require describing important information that comprise environmental justice communities under CEQA, it would not result in a lead agency finding environmental justice impacts. Impacts that are part of the baseline are, by definition under CEQA, not significant impacts of the project, and a lead agency cannot consider those impacts under CEQA, nor mitigate for them.[188] For example, in *World Business Academy v. California State Lands Commission*, World Business Academy ("WBA") challenged the California State Lands Commission's ("CSLC") approval of a lease replacement for ocean water intake and discharge structures, which were located on state-owned tidal and submerged lands and were used to operate cooling systems for an existing nuclear power plant.[189] There, WBA claimed that the nuclear plant's status as the sole operating nuclear plant in the state itself indicated that the lease replacement would have a significant environmental effect.[190] The court disagreed and held that because the CSLS acknowledged that the plant was the sole operating plant in the state, it was therefore part of the project's existing conditions, and the lease replacement "w[ould] not change that circumstance."[191]

Thus, while this suggestion is a step toward initiating important and necessary conversations about demographics and environmental justice in CEQA, because lead agencies can only address *changes* to the

187. Claudia Garcia et al., *Environmental Justice in the California Environmental Quality Act: It is Here, and It is Time*, ASCENT ENT'L (2020), https://perma.cc/UAD2-E2DX.

188. *See Baseline and Environmental Setting*, AEP CEQA PORTAL, https://perma.cc/9UZH-HLN6. *See also* Kings Cnty. Farm Bureau v. City of Hanford, 221 Cal. App. 3d 692, 718 (1990) ("The significance of an activity depends on the setting.").

189. World Bus. Acad. v. California State Lands Comm'n, 24 Cal. App. 5th 476, 483 (2018).

190. *Id*. at 508.

191. *Id*.

environmental setting, disparate impacts that are part of the baseline setting could not be analyzed or mitigated under this suggestion.

B. CUMULATIVE IMPACTS AND SB 1000

As discussed in Section IV, a project has a significant effect on the environment if "possible effects of a project are individually limited but cumulatively considerable."[192] In other words, cumulative impacts are "two or more individual effects which, when considered together, are considerable or which compound or increase other environmental impacts."[193] As stated in *South of Market Community Action Network v. San Francisco*:

> An adequate discussion of significant cumulative impacts may be based either on a list of "past, present, and probable future projects producing related or cumulative impacts," or "[a] summary of projections contained in an adopted local, regional or statewide plan, or related planning document, that describes or evaluates conditions contributing to the cumulative impact."[194]

In light of SB 1000, which requires implementing environmental justice elements into city and county General Plans, [195] one recommendation with regard to cumulative impacts would be to have the California Legislature amend CEQA and require OPR to make an additional cumulative impacts guideline requirement, stating that a cumulative impacts analysis must include a summary of projections contained in an adopted General Plan's environmental justice element. This way, even if environmental justice is not a specific impact under CEQA, any impact from a proposed project under CEQA would have to be considered cumulatively with the environmental justice burdens a community is already bearing, as analyzed in the city's environmental justice element.

C. CUMULATIVE IMPACTS AND PAST PROJECTS

Another area for CEQA reform is how "past projects" is defined under cumulative impacts analyses.[196] The term "past projects," is ambiguous because it is unclear from the text of the statute and the CEQA Guidelines

192. CEQA Guidelines § 21083(b)(2) (2019). CAL. GOV. CODE § 65302(h) (2019).
193. CEQA Guidelines § 15355 (2019).
194. South of Market Community Action Network v. San Francisco, 33 Cal. App. 5th 321, 336 (2019) (citing CEQA Guidelines § 15130, subd. (b)(1)(A)–(B) (2019)).
195. CAL. GOV. CODE § 65302 (2021).
196. *See generally* CEQA Guidelines § 21083(b)(2) (2019).

whether this refers to *all* existing conditions and projects, or something much narrower.[197]

The California Court of Appeal provided some insight to interpreting "past projects" in *City of Long Beach v. Los Angeles United School Dist.*[198] There, the City of Long Beach ("Long Beach") claimed that the Los Angeles Unified School District ("LAUSD") omitted from its cumulative impacts section and its responses to comments "'closely related past' projects . . . such as the 405 and 710 Freeways, the ports, petroleum refiners and chemical plants."[199] LAUSD responded with three separate points. First, LAUSD stated that the South Coast Air Quality Management District's CEQA Handbook, on which the air quality assessment was based, "d[id] not require a listing of emissions from *existing* and planned projects (e.g., existing emissions from vehicles traveling on freeways, ports, and refineries, as well as residential and commercial developments) for a cumulative air quality impacts analysis."[200] Second, LAUSD claimed that all of the "past projects" outlined by Long Beach were "necessarily included in the cumulative impacts analysis because they [were] analyzed as *past projects* that comprise the 'baseline,' i.e., the environmental setting or set of environmental conditions against which it then compared its project's anticipated cumulative impact."[201] Lastly, LAUSD asserted that "[e]ach impacts section, of necessity, consider[ed] past projects in its impacts analysis . . . [because] '[p]ast projects' may have already caused impacts that are cumulatively significant."[202] The court responded and stated that "an EIS/EIR must reasonably include information about past projects *to the extent* such information is relevant to the understanding of the environmental impacts of the present project considered cumulatively with other pending and possible future projects."[203] Reviewing LAUSD's cumulative impacts analysis under an abuse of discretion standard, the court held that the scope of the Final EIR's cumulative impact analysis was adequate.[204]

In addition, the California Court of Appeal also stated in *South of Market Community Action Network* that "discussion of cumulative impacts in an EIR 'should be guided by the standards of practicality and reasonableness'" and that "[a]bsent a showing of arbitrary action, a court must assume the agency has exercised its discretion appropriately."[205] Thus, it is

197. *See generally* CEQA Guidelines § 21083(b)(2) (2019).
198. City of Long Beach v. Los Angeles Unified Sch. Dist., 176 Cal. App. 4th 889, 910 (2009).
199. *Id*.
200. *Id*.
201. *Id*.
202. *Id*.
203. Los Angeles Unified Sch. Dist., 176 Cal. App. 4th at 910.
204. *Id*.
205. S. of Mkt. Cmty. Action Network., 33 Cal. App. 5th at 338.

clear from these cases that courts give lead agencies broad discretion when determining the scope of projects considered in cumulative impacts analyses.

With that in mind, another potential amendment to CEQA could require OPR to create additional guidelines clarifying that when analyzing "past projects" under a cumulative impact analysis, they are not to be dismissed as part of the existing setting or "baseline" analysis under CEQA. OPR could clarify that, under a cumulative impacts analysis, to better serve overburdened communities, a cumulative impacts analysis must include examining all existing past projects that have impacted environmental justice communities. This could be helpful in the context of EIRs, because lead agencies are required to make findings of fact and create a Statement of Overriding Considerations ("SOR") for all significant unmitigable impacts of the project.[206] Under this revision, a SOR could include impacts of "past projects" on environmental justice communities, and when a lead agency presents the SOR to the deciding body for project approval, it would require acknowledgment of existing and future environmental justice issues when deciding to approve or disapprove the project. In addition to forcing lead agencies to analyze existing environmental justice impacts, this would also create more avenues for environmental justice communities to have viable claims in court if such acknowledgments are not made.

D. ENVIRONMENTAL JUSTICE IMPACT CATEGORY

The last, most drastic reform would be to amend CEQA to mandate lead agencies to analyze environmental justice as its own separate and independent factor for environmental review. This amendment would be comparable to SB 1113 and would likely command OPR to write more precise guidelines to implement environmental justice. Importantly, however, this suggestion should require development of a CEQA Environmental Justice Guidelines task force, made up of environmental justice advocates and community members, to draft the precise language of the guidelines. Ideally, this factor would resemble New Jersey's Environmental Justice Statute, and focus on impacts to specific communities, requiring mitigation measures to serve the interest of the community directly impacted by the project. Similarly, the environmental justice factor could ask lead agencies to consider whether the project would lead to gentrification.[207] As stated

206. CEQA Guidelines § 15093 (2019).

207. Fox, *supra* note 3, at 803 ("Gentrification is a term often used, much maligned, and difficult to define. A few general principles can nonetheless be distilled regarding the concept. First, gentrification is spurred by rising desirability of an area for housing or commercial purposes. Second, this rising desirability, following basic supply-and-demand principles, leads to higher property values and rents in an uncontrolled market. Third, gentrification leads to a shift in the demographics of a neighborhood. This shift can change not only the socioeconomic and racial composition of the area but also the community's character,

earlier in this section, the details of this section would need to be defined by environmental justice communities.

IX. CONCLUSION

While many attempts and opportunities for integrating environmental justice into CEQA and environmental laws have come and passed in California, the environmental justice movement is proof that environmental laws have not been as "colorblind" as former Governor Wilson claimed in his veto message of SB 1113. This paper does not offer hard and fast solutions; however, it highlights that systemic reform is needed to achieve environmental justice and supports that it is possible. California has endorsed environmental justice, specifically and generally, through its creation of an Environmental Justice Bureau, environmental justice statute, stringent civil rights laws, and multiple efforts to center environmental justice in CEQA. As the environmental field expands its vision for change, it is crucial that environmental justice initiatives be embraced rather than feared. As Professor Yang so brilliantly stated:

> [E]nvironmental justice challenges environmental regulators to look up from their desks and environmentalists to come out of the wilderness and to understand how environmental protection efforts are related to broader social agendas. A failure to live up to the challenge will not only leave environmentalism weaker as a compelling ideal, but also poorer as a moral force.[208]

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as residential and commercial options begin to reflect the preferences of the new arrivals to the neighborhood.").

208. Yang, *supra* note 170, at 32.