



September 15, 2014

Arsenio Mataka
Assistant Secretary for Environmental Justice and Tribal Affairs
California Environmental Protection Agency
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Re: Include Race, Color, National Origin, and Green Access in CalEnviroScreen 2.0 and SB 535 Guidance

Dear Assistant Secretary Mataka:

I. Overview

We support guidance and an improved CalEnviroScreen (CES) tool that properly considers race, color, and national origin, as well as green access, in order to identify underserved communities and to distribute cap and trade greenhouse gas reduction funds under SB 535.

We recommend the following steps to improve CES for the reasons discussed below.

- (1) Reinstate race, color, and national origin data as an indicator in the CES score.
- (2) Include green access as an indicator in addition to pollution burdens and population characteristics in CES.
- (3) Guidance documents on the distribution of greenhouse gas reduction funds under SB 535 should incorporate race, color, and national origin, as well as green access.
- (4) Guidance documents, CES, and other public documents should refer to “underserved communities,” rather than “disadvantaged communities.”

“[W]hen society’s rewards – including the right to breathe clean air[,] live far away from toxic wastes[, and live near parks and green space] – are systematically distributed by race, it is better to know than to remain dangerously ignorant,” as USC Prof. Manuel Pastor has written.¹ Good social research needs data on race and ethnicity. There is no sound social science or technical reason to exclude such data. Federal law requires collecting, analyzing, and publishing data based on race, color, or national origin where, as here, there is evidence of racial and ethnic disparities regarding pollution burdens, vulnerability, and green access. No law prohibits it.

¹ Manuel Pastor and Rachel Morello-Frosch, *Good social research needs data on race*, San Jose Mercury News, April 20, 2001.

Claims that Prop 209 or other state laws prohibit or constrain agencies from collecting, analyzing, and publishing such data to include in the CES or to distribute greenhouse gas reduction funds are false, prejudicial, and discriminatory.

The Environmental Justice Screening Method (EJSM) developed by the USC Program on Environmental and Regional Equity (PERE) includes race and ethnicity. CES should too.

CalEPA should supplement statewide ranking of census tracts with regional scoring and ranking of census tracts, strengthen its hazard proximity analysis, and include EJSM's land-use methodology and climate change indicators in CES. *See* California Environmental Justice Alliance (CEJA)'s June 2, 2014 letter to the Office of Environmental Health Hazard Assessment (OEHHA). As CEJA states, "[t]he impacts of climate change will be a critical issue for communities to contend with in the coming years, and we know that low-income communities and communities of color will be hit first and worst and have least resources to adjust to climatic changes. CalEnviroScreen's assessment of where the most vulnerable communities are located could greatly enhance the statewide conversation on where climate adaptation efforts and investments should be focused, and we recommend CalEPA to begin to consider the development of an indicator on climate change in the next year."²

The City Project joins in (1) the September 15, 2014, letter from the SB535 Coalition to the Air Resources Board (ARB) re Comments on Draft Interim Guidance on Investments to Benefit Disadvantaged Communities; and (2) the September 15, 2014, letter from Los Angeles-based environmental justice groups to ARB re greenhouse gas reduction funds and SB 535 standards, to the extent those letters are not inconsistent with the position described below.

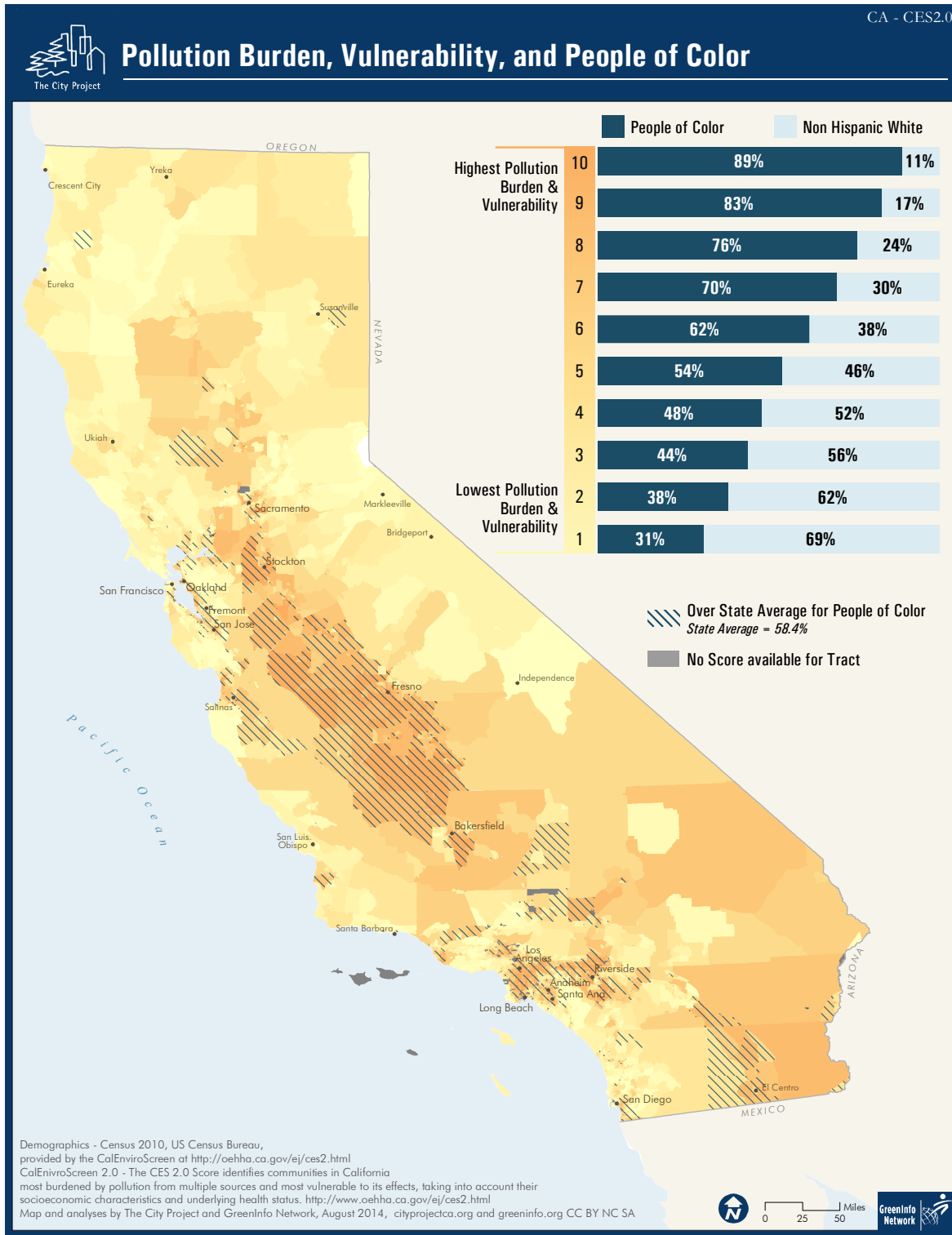
We write separately here on the need to explicitly address equity and disparities based on race, color, or national origin, and compliance in the planning and implementation process with federal and state civil rights and environmental justice laws and principles.

II. CES and Disparities Based on Race, Color, and National Origin

The City Project has mapped and analyzed CES 2.0 scores based on pollution burdens and vulnerability along with race, color, and national origin. OEHHA compiles the data on race, color, and national origin separately from the CES scores, resulting in an inadequate and incomplete picture of underserved communities.

The following map dramatically shows that people of color disproportionately live in the areas that are the most burdened for pollution, and vulnerability to health risks.

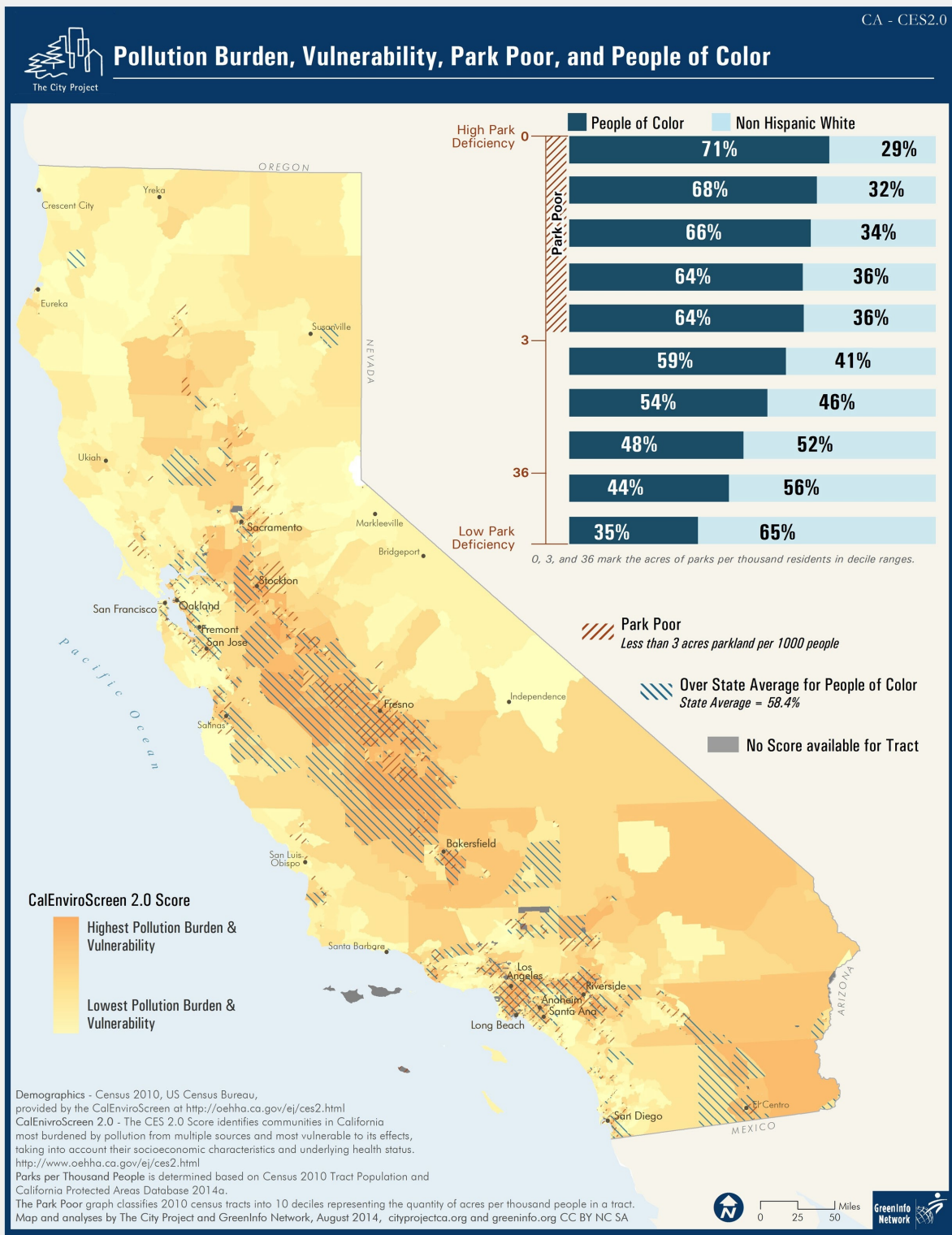
² www.oehha.ca.gov/ej/pdf/ces2comments/CEJA_2.0CESComments.pdf



1. In the areas with the 10% highest CES score (most burdened) for pollution burden and vulnerability, fully 89% of the people are of color; only 11% are non-Hispanic white people. Statewide, the population average is 58% people of color.
2. In the areas with the 10% lowest CES score (least burdened) for pollution burden and vulnerability, only 31% of the people are of color; fully 69% are non-Hispanic white people.
3. 64% of people of color in the state live in areas with the 50% highest CES scores (most burdened) for pollution burden and vulnerability; only 31% of non-Hispanic white people live in those areas.
4. Only 36% of people of color in the state live in areas with the 50% lowest CES scores for pollution burden and vulnerability; fully 69% of non-Hispanic white people live in those areas.

Explicitly including race, color, and national origin data is essential for the CES score to properly reflect the reality of people's lives.

The following map shows that people of color disproportionately live in areas that are park poor and are the most burdened for pollution and vulnerability.



III. Analysis and Recommendations

A. Restore Race, Color, and National Origin Data as an Indicator in CES

CalEnviroScreen 1.0 included race, color, or national origin as part of the score – as it properly should have.

According to OEHHA, the indicator for race/ethnicity was removed from the CES score “to facilitate the use of the tool by government entities that may be restricted from considering race/ethnicity when making certain decisions.”³ With all due respect, no relevant agencies are restricted from considering race/ethnicity. Removing race, color, and national origin from the CES score is misguided, prejudicial, and discriminatory.

Indeed, federal law *requires* recipients of federal funding to gather, analyze, and publish data based on race, color, or national origin where, as here, there is evidence of disparities based on those characteristics. Civil rights and environmental justice laws and principles require recipients of federal funding to address those disparities.

“How can we effectively protect the environmental health of . . . vulnerable communities when the crucial data chronicling their demographic [characteristics] is not systematically collected?” as USC Prof. Manuel Pastor has wisely noted.⁴ “Race data . . . help us understand how little progress has been made on . . . diminishing the disparities in environmental conditions facing whites and non-whites in the state. . . . [S]uch data can lead to a shared vision of effective interventions.” “If what we want is a society in which everyone has an opportunity for a better life regardless of race or heritage, then learning when and why this is not taking place is crucial,” according to Prof. Pastor.⁵

1. Data Collection and Analysis

Title VI of the Civil Rights Act of 1964 and its regulations require recipients of federal funding to comply with non-discrimination requirements based on race, color, or national origin. Title VI and its regulations prohibit intentional discrimination and unjustified discriminatory impacts. An important starting point for assessing discrimination is the impact of the action, and whether it bears more heavily on one racial or ethnic group than another. *See, e.g., Village of Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 265 (1977).⁶

The Department of Justice directs agencies to “provide for the collection of data and information from applicants for and recipients of federal assistance sufficient to permit effective enforcement of Title VI” of the Civil Rights Act of 1964. 28 C.F.R. § 42.406(a). The Justice Department gives the following examples of data and information that should be required to the extent

³ www.oehha.ca.gov/ej/pdf/CalEnviroScreenVer11report.pdf

⁴ Manuel Pastor and Rachel Morello-Frosch, *Good social research needs data on race*, San Jose Mercury News, April 20, 2001.

⁵ Manuel Pastor and Belinda Reyes, *The color of research*, San Jose Mercury News, Sept. 23, 2003.

⁶ *Accord, U.S. Department of Justice, Civil Rights Division, Title VI Legal Manual* at section X(A)(4). Available at www.justice.gov/crt/about/cor/coord/vimannual.php#4.%20Data%20Collection. Cal. Govt Code 11135 and its regulations provide similar protections against intentional and disparate impact discrimination.

necessary and appropriate for determining compliance with Title VI:

- (1) The manner in which services are or will be provided by the program in question, and related data necessary for determining whether any persons are or will be denied such services on the bases of prohibited discrimination;
- (2) The population eligible to be served by race, color and national origin; . . .
- (4) The location of existing or proposed facilities connected with the program, and related information adequate for determining whether the location has or will have the effect of unnecessarily denying access to any person on the basis of prohibited discrimination.

28 C.F.R. at § 42.406(b)(1), (2), (4).

The Environmental Protection Agency (EPA) regulations require recipients of federal funding to “collect, maintain, and on request of the OCR [Office of Civil Rights], provide . . . [r]acial/ethnic, national origin” data to show compliance with Title VI. 40 C.F.R. at § 7.85 (a)(2).

Similarly, Federal Transit Administration (FTA) regulations require recipients to collect and analyze racial and ethnic data showing the extent to which members of minority groups are beneficiaries of programs receiving federal funding. FTA recommends, for example, a “demographic map that plots the above information and also shades those Census tracts . . . where the percentage of the total minority and low-income population residing in these areas exceeds the average minority and low-income population for the service area as a whole.”⁷

As a matter of common sense, good policy, and good law, FTA emphasizes the need for data collection and analyses based on race, color, and national origin as follows:

An EJ analysis starts with determining whether minority populations and/or low-income populations will experience potential environmental or health impacts from a proposed program, project, or activity. . . .

Once you have identified your EJ populations, you will want to compare the burdens of the activity experienced by EJ populations with those experienced by non-EJ populations. Similarly, you will want to compare the activity’s benefits experienced by EJ populations as compared to non-EJ populations. . . .

An EJ analysis starts with knowing basic socioeconomic information about the people who live and/or work in your community. Without this information, you cannot determine whether your proposed activity will affect minority and/or low-income populations. Once you know who is in your community, you can develop a targeted public engagement plan that will encourage the full and fair participation by all members of the affected communities. Your public engagement plan will then help guide you through the rest of the analysis as you consider whether the proposed programs, policies,

⁷ FTA, *Title VI Requirements and Guidelines for Federal Transit Administration Recipients, Circular FTA C 4702.1A, chapter V (1) and V(1)(a)(2) at page V-1* (Oct. 1, 2012). *Accord, FTA, Title VI Requirements and Guidelines for Federal Transit Administration Recipients, Circular FTA C 4702.1B, page IV -7* (Oct. 1, 2012).

and activities will result in disproportionately high and adverse human health or environmental effects on EJ populations.

FTA, *Environmental Justice Policy Guidance for Federal Transit Administration Recipients, Circular (FTA C 4703.1)*, pages 6, 8, 11 (Aug. 15, 2012). *Accord*, Executive Order 12898 on Environmental Justice, Sec. 3-3 (research, data collection, and analysis).

2. Address Disparities Based on Race, Color, or National Origin

Civil rights and environmental justice laws and principles require recipients of federal funding to address disparities in environmental benefits and burdens based on race, color, or national origin. This is clear from recent actions by federal agencies in California. Thus, for example, the U.S. Army Corps of Engineers (USACE) draft 2013 study for the revitalization of the Los Angeles River recognizes that there are disparities in green access for people of color and low-income people in Los Angeles, that those disparities contribute to health disparities, and that civil rights and environmental justice laws and principles require agencies to address those disparities. Of key concern is the growing disparity of access to and use of open space resources, including parks, ball fields, and natural areas by those living in low-income communities of color. The President's Executive Order 12898 focuses attention on the environmental and human health conditions of minority and low-income populations with the goal of achieving environmental protection for all communities. The Order directs agencies to develop environmental justice strategies to identify and address disproportionately high and adverse human health or environmental effects of their programs, policies, and activities on minority and low-income populations. Environmental justice concerns may arise from impacts on the natural and physical environment, such as human health or ecological impacts on minority populations, low-income populations, and Indian tribes, or from related social or economic impacts, according to USACE.⁸

Similarly, the National Park Service recognizes that there are disparities in access to green space for people of color and low-income people in Los Angeles, that those contribute to health disparities, and that environmental justice requires agencies to address the disparities, citing Order 12898, and related laws and principles.⁹

Andrew Cuomo, as Secretary of HUD, would not issue federal subsidies for a proposed warehouse project in downtown L.A. unless there was a full environmental study that considered the impact on people of color and low-income people, and considered the park alternative. HUD cited Executive Order 12898 on environmental justice and health, and Title VI of the Civil Rights Act of 1964 and its regulations in reaching that decision. HUD's action led to the creation of the L.A. State Historic Park and the greening of the L.A. River.

⁸ USACE, Los Angeles River Ecosystem Restoration Draft Integrated Feasibility Report, pages 3-61, 3-86, 5-106 (Sept. 2013). *Accord*, Letters from FTA to Metropolitan Transportation Commission and San Francisco Bay Area Rapid Transit District (Jan. 15, 2010 and Feb. 12, 2010). Office of Civil Rights, U.S. Dep't of Agric., DR 4300-4, Civil Rights Impact Analysis (2003), available at www.ocio.usda.gov/sites/default/files/docs/2012/DR4300-4.pdf.

⁹ NPS, San Gabriel Watershed and Mountains Special Resource Study & Environmental Assessment, p. 231 (Newsletter #5, Nov. 2011) at p. 219, 231, and Errata p. 11-12.

3. No Laws Prohibit Data Collection based on Race, Color, or National Origin

State officials reportedly have opined that Prop 209 or Prop 187 prohibit an agency from collecting, analyzing, publishing, or using data based on race, color, or national origin related to health and the environment. These claims are wrong, harmful, and prejudicial.

Indeed, California voters rejected Prop 54 in 2003, which would have banned the state from collecting data based on race, color, or national origin.

Prop 209 addresses affirmative action in university admissions and state employment and has no application here. It does not prohibit collecting, analyzing, and publishing racial and ethnic data. Prop 209 even contains an explicit exemption for recipients of federal financial assistance. Even if it did not contain such language, federal law would still supersede state law on such matters.

Prop 187, which attempted to limit immigrant services, was declared unconstitutional years ago and in any event would not apply here.

OEHHA recently published a document separate from CES called “Analysis of CalEnviroScreen 2.0 Scores and Race/Ethnicity.”¹⁰ Presenting the data documenting racial and ethnic disparities separately in this way is no substitute for including that data as part of the CES score. One cannot use CES population characteristics excluding race, color, or national origin to determine compliance with civil rights laws prohibiting discrimination based on race, color, or national origin. One cannot use CES mapping tools online, for example, to analyze a given community or geographic area to determine the racial and ethnic demographics. One cannot compare communities that are disproportionately of color to those that are not, such as Beverly Hills and Watts. That capability is necessary to analyze and address the situation, and to analyze compliance with civil rights laws. Without it, agencies and communities are left without vital information. The state should analyze and publish such data to ensure equal access to public resources. Non-profits and academics should not be required to do the state’s work. The problem is race based. The solutions may nevertheless be race neutral or narrowly tailored to address the problem.

B. Compliance Analysis

CalEPA and the Air Resources Board can use the CES tool including race, color, national origin, and green access, along with pollution burdens and vulnerability to prioritize the distribution of greenhouse gas reduction funds to underserved communities to help ensure compliance under civil rights and environmental justice laws and principles. The elements of the plan are simple:

1. Describe what you plan to do.
2. Analyze the benefits and burdens on all people, including people of color and low income people.
3. Include people of color and low income people in the decision making process.

¹⁰ www.oehha.ca.gov/ej/pdf/CES20RaceEthnicity_05082014.pdf

4. Analyze the alternatives.
5. Develop an implementation and monitoring plan to distribute benefits and burdens fairly.

There are several best practice examples implementing this planning process, including the NPS San Gabriels study and the USACE Los Angeles River study. The Department of Housing and Urban Development (HUD) provides a third best practice example. Andrew Cuomo, as Secretary of HUD, would not issue federal subsidies for a proposed warehouse project in downtown L.A. unless there was a full environmental study that considered the impact on people of color and low-income people, and considered the park alternative. HUD cited Executive Order 12898 on environmental justice and health, and Title VI of the Civil Rights Act of 1964 and its regulations in reaching that decision. HUD's action led to the creation of the L.A. State Historic Park and the greening of the L.A. River. In addition, the Federal Transit Administration articulates these compliance and planning principles in its guidance on Title VI and Executive Order 12898.¹¹

C. Include Green Access Data in CES

The environmental justice movement is not just about stopping exposure to pollution and toxics. The movement is proactively creating health and environmental benefits including parks and green space. People of color disproportionately live in areas that lack green access and are the most burdened for pollution and vulnerability. They are entitled to their fair share of environmental benefits including green space.

D. Refer to underserved communities, not disadvantaged communities

The term “disadvantaged community” (often shortened to “DAC”) can alienate people who are characterized as living in such communities. *See* Council for Watershed Health, *Disadvantaged Community Outreach Evaluation Study: An Analysis of Technical Assistance and Outreach Methods* at 1, 6, 21 prepared for the California Department of Water Resources (undated) (grant concluded in Dec. 2013). CalEPA and ARB should use other language in public documents that is not offensive to the communities. For example, “underserved” and “severely underserved” puts the focus on the need for agencies to provide services.

III. Conclusion

We look forward to working with you and the community to ensure the investment of public resources under SB 535 meet the needs of underserved communities.

Sincerely,

¹¹ Federal Transit Administration, *Environmental justice policy guidance for Federal Transit Administration recipients, Circular (FTA C 4703.1)* (Washington, DC: Department of Transportation, Aug. 15, 2012); FTA, *Title VI Requirements and Guidelines for Federal Transit Administration Recipients, Circular (FTA C 4702.1B)* (Washington, DC: Oct. 1, 2012); Letters from FTA to Metropolitan Transportation Commission and San Francisco Bay Area Rapid Transit District (Jan. 15, 2010 and Feb. 12, 2010), available at www.cityprojectca.org/blog/archives/4468.



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