TO: California Air Resources Board

FROM: Gordon Piper, 33 Hiller Drive, Oakland, CA 94618; (510) 843-3828

SUBJECT: Comments, Discriminatory Proposed ARB Greenhouse Gas Reduction Fund Guidelines

DATE: August 23, 2015

I am writing as a retired State of California civil rights agency administrator and employee who spent 31 years helping to investigate discrimination complaints involving public and private employers and to enforce State and Federal civil rights laws. I believe the proposed California Air Resources Board (ARB) Greenhouse Gas Reduction Fund (GGRF) Guidelines as well as the Supplement to the Draft Funding Guidelines would result in adding to the discriminatory utilization and investment of both State GGRF funding and the discriminatory administration of the use of this grant funding in violation of the requirements of both applicable State and Federal civil rights laws and regulations, the equal protection requirements in the California and U.S. Constitutions, and the prohibition against preferential treatment and affirmative action contained in section 31 of the California Constitution.

My review of the Interim Guidelines adopted by the Air Resources Board in 2014 combined with the investment plan recommendations of the ARB in fiscal year 2014-2015 led me to conclude that your initial Interim Guidelines were the equivalent of a “How To Discriminate” Guide for State agencies administering GGRF funded programs/investments in fiscal year 2014-2015. The draft GGRF Guidelines and the more recently shared Supplement to the Draft Guidelines for Agencies that Administer California Climate Investments will further result in even substantially more violations in this fiscal year and future years of:

* The California Unruh Civil Rights Act prohibition against arbitrary discrimination in the provision of services, privileges and advantages by a public agency based on considerations of race, color, national origin, ancestry, geographic location and income and that mandates “each person be entitled to equal services, privileges, and accommodation in the State of California”;
* The Equal Protection clause in the California Constitution prohibiting discrimination by government agencies and guaranteeing that no person is discriminated against by government agencies and guaranteeing that no person is discriminated against by State government agencies;
* Government Code Section 11135 (a) which states that no person is denied the right to participate in or the benefits of a program receiving State assistance;
* California Constitution prohibitions against preferential –treatment-based considerations of race, color, national origin or ancestry in public contracting and programs;
* California Resources Code Section 71110 in the California Resources Code which mandates The California Environmental Protection Agency, in designing its mission for programs, policies, and standards shall do all of the following: (a) *Conduct its programs, policies, and activities that substantially affect human health or the environment in a manner that ensure the fair treatment of all races, cultures, and income levels, including minority populations and low income* *populations of the state*”, but which has not been effectively complied with by either CAL EPA or the ARB in its current Interim Guidelines, proposed actions or GGRF final Guidelines and investment recommendations;
* The California Fair Employment and Housing Act and implementing regulations that are supposed to ensure equal treatment in employment practices related to hiring, terminating or training;
* Title VI of the Civil Rights Act of 1964 and implementing regulations of Federal agencies in relation to the Effectuation of Title VI compliance that apply to State agencies that accept Federal funds and combine those with State GGRF funds for programs that do not comply with the various equal treatment and non-discrimination requirements outlined in Title VI and the implanting Regulations for ensuring equal treatment and non-discrimination and that require that “*no person is denied the right to participate in or the benefits of a program receiving Federal assistance*”; and
* Title VII of the Civil Rights Act of 1964 with respect to the requirements for non-discrimination in employment practices related to hiring, terminating or training.

I found in my research of the actions of the California Environmental Protection Agency and the Air Resources Board and other State agencies involved in administering the utilization of State GGRF funds that the investment recommendations/decisions and the guidelines for administering GGRF funded programs resulted in systemic discrimination involving multiple State of California agencies and departments including, but not limited to, the ARB, the California Environmental Protection Agency, the Governor’s Office, and the California Department of Finance in:

* Discriminating against millions of California residents located in many of the 6000 California census tracts that were essentially redlined and not included in the so-called “disadvantaged communities” developed by the California Environmental Protection Agency ;
* A huge class of millions of non-Hispanics whites or Caucasians located in the 6000 California census tract that were denied access to potential funding or program benefits as a result of the actions in largely limiting benefits to so-called “disadvantaged communities” which targeted benefits to primarily minority communities of color in less than 2000 of California’s 8000 census tracts and less than half of California counties;
* Applying criteria in the CALENVIROSCREEN 2.0 benefiting primarily minority residents in less than 2000 California census tracts that had a definite disparate impact on the millions of non-Hispanics whites or Caucasians based on considerations of race, color, national origin and ancestry that would violate the requirements set forth in the U.S. Department of Justice’s Title VI Manual for Enforcement of Title VI of the Civil Rights Act of 1964 for programs receiving Federal assistance;
* Forcing many recipient of State GGRF funds combined with Federal funds to potentially violate the requirements of State and/or Federal civil rights laws such in focusing their services or targeting employment benefits based on affirmative action and preferential treatment considerations related to race, color, national origin, ancestry, and/or geographic location and income to benefit low-income communities of color and racial minorities; and
* Intentionally violating obligations in contracts that some State agencies entered into in 2014 and 2015 with Federal agencies for some jointly funded or supported programs that would violate the Title VI regulations of Federal agencies.
* Violating the definition of environmental justice codified in State of California statute at California Government Code Section 65040.12 found at <http://coes.lp.findlaw.com/cacode/GOV/1/7/d1.5/4/s65040.12>that states *“Environmental Justice is the fair treatment and meaningful involvement of people of all races, cultures, and incomes with respect to the development, adoption, implementation, and enforcement of environmental laws, regulations and policies”.*

I found substantial evidence that the draft GGRF Guidelines, the more recently issued Supplement to the Draft Funding Guidelines, and the previously adopted Interim Guidelines issued by the California Air Resources Board were greatly influenced by a coalition of public interest law firms and many minority community organizations and other advocates for affirmative action and preferential treatment benefiting minority communities of color. They were clear in their goal to provide preferential treatment and assure affirmative action to target benefits in public contracting and funding for environmental programs with State and Federal funding based on considerations of race, color, national origin, ancestry, geographic location and income to benefit primarily minority communities of color in violation of the ban on affirmative action and preferential treatment passed Proposition 209 by California voters back in 1996. Proposition 209 banned the use of race and ethnicity in State contracting and this is now included in section 31 of the California Constitution, which states: “*The State shall not discriminate against, or grant preferential treatment to any individual or group on the basis of race, sex, color, ethnicity, or national origin the operation of …public contracting.*” This Constitutional Prohibition against preferential treatment in public contracting has not prevented the multiple coalitions over a series of years from successfully lobbying legislators and State agencies/their staffs, including the California ARB and Environmental Protection Agency in the development of the discriminatory Interim Guidelines for Agencies Administering Greenhouse Gas Reduction Funds and the latest draft GGRF Guidelines. Both of these documents follow extremely closely the April 24, 2013 written recommendations these coalition members made to ARB Chair Mary Nichols on April 24, 2013 that can be found online at: <http://greenlining.org/wp-content/uploads/2013/04/SB535-Coalition-Comments-on-Draft-Cap-and-Trade-Investment-Plan-April-24-2013-Final-2.pdf>.

My online research revealed that Public Advocates law firm, the Greenlining Coalition, and APEN, among others, claimed in a series of website/blog articles that they had influenced:

* The passage of SB535 and AB 1532 that established a framework for spending cap and trade proceeds and the Greenhouse Gas Reduction Fund by *“working in high-impact campaigns that* ***help increase economic opportunity for low income communities of color****”* (see <http://www.publicadvocates.org/2014-04-14/public-advocates/hits-bullesey-with-new-staff-attorney>); In another June 16, 2014 Public Advocates website article entitled “A Quick Primer on the Greenhouse Gas Reduction Fund” found at <http://www.publicadvocates.org/2014-06-16/greenouse-gas-reduction-fund-q-and-a>” pointedly clarified “what has been Public Advocates’ role” relative to the GGRF funds: “*Public Advocates is a leading partner in two key coalitions working hard to ensure that GGRF is used to fund program that both reduce greenhouse gas reduction gas (GHG) emissions and* ***benefit low-income communities of color*** *(emphasis added): The Sustainable Communities for All Coalition (SC4A) and the SB535 Coalition.”*
* The ARB in the development of the Interim Guidelines for Administering Greenhouse Gas Reduction Fund Moneys (see the written comments sent by coalition members on September 17, 2014 to ARB Board Chairman found at <http://greenlining.org/wp-content/uploads/2013/04/SB535-Coalition-Comments-on-Draft-Cap-and-Trade-Investment-Plan-April-24-2013-Final-2.pdf> that went into more detail advocating for increasing local and targeted hiring goals exceeding the “*thresholds exceeding 25%” and also increasing eligibility criteria and making change in “Scoring and Ranking processes to ensure that “benefits to disadvantaged communities are maximized” providing multiple significant benefits, and ARB guidance outlined a process whereby each agency calculates a cumulative scored based on how well several important indicator or eligibility criteria are met” which the coalition contended would allow agencies to make strategic investments focused on benefiting “disadvantaged communities” in 2000 California census tracts targeting “economic for low income communities of color*”;
* State budget allocations in June 2014 approved by the Legislature and Governor that included substantial set asides of recommended GGRF funding for projects benefiting so-called “disadvantaged communities” in 2000 census tracts, in which Maria Taruc, state organizing director for APEN, stated in a press release from the Greenlining Institute found at *http:greenlining.org/issues/2014/calif-budget/make=historic-climate-investments-low-income-communities/)* stated that “*the real winners through this budget process are low income communities of color…”;*
* The continuing efforts to maximize benefits to disadvantaged communities even more in working with the Legislature and ARB Guidelines and staff; for example, a February 10, 2015 article on the APEN website found at <http://apen-4ej.org/breaking-climate-legislation-promiseds-to-benefit/communities-of-color> noted that efforts were under way to maximize benefits to communities of color or so-called “disadvantaged communities” through the efforts of a new California Environmental Justice Alliance (CEJA) named coalition involving some of the same SB535 coalition partners focused on a goal of securing State of California legislation to *“at a minimum doubling the carve-out for disadvantaged communities within the Greenhouse Gas Reduction Fund to 50%. The object is to “Increase climate investments in disadvantaged communities”* and to target disadvantaged communities with preferential treatment/affirmative action benefits to *“ensure energy efficiency programs create high-road, long-term, accessible jobs for communities that have suffered from chronic unemployment”* apparently located in just 2000 of California’s 8000 census tracts. **Among their series of goals is that of adding dedicated staff to the ARB and other agencies to help accomplish this agenda of maximizing the benefits to disadvantaged communities at the risk of institutionalizing discrimination in violation of the ban on preferential treatment in public contracting in the California Constitution and violation of State and Federal civil rights laws that prohibit discrimination in the provision of services, privileges and advantages by public agencies to some residents in California that are being afforded to others based on considerations of race, color, national origin, ancestry, geographic location, or income level**. The new coalition, like the other coalitions organized and led by Public Advocates and partners, have a sophisticated lobbying approach and organizing campaigns with multiple initiatives and multiple coalitions to achieve these aims (see the link cited above). Their Power Point information can also be found at [*http://www.scribd.com/doc/28859319/SB-535-Coalition-Engaging-EJ-Communities-for-Transformative-Climate.scribd*](http://www.scribd.com/doc/28859319/SB-535-Coalition-Engaging-EJ-Communities-for-Transformative-Climate.scribd)outlining ways the coalitions successfully influenced the environmental legislation of the State of California.
* In a March 8, 2013 letter to California ARB Chair Mary Nichols signed by representative of the SB535 Coalition such as Public Advocates Managing Attorney Richard Marcantonio, Greenlining Legal Counsel Ryan Young, APEN Director Mari Taruc, and California Black Chamber of Commerce President Aubry Stone, some of the coalition members raised “color” considers as a basis for the ARB and the State of California in making investments of GGRF noting: *“Low-income and communities of color, who are the majority of California, can be the catalyst for the culture shift needed to ensure the success of our State’s climate programs. California investment in their (emphasis added) climate solutions is key to this shift and many of these efforts will require investments that may require further shaping of existing programs and new programs to meet these needs”.* The letter then went on to have the SB535 Coalition recommend 5 areas for near-term investments, including some of the specific investment targets subsequently prioritized by the ARB for FY 2014-2015 GGRF fund investments. One identified priority was CAL FIRE’s Urban and Community Forestry Program, which as developed and funded in 2014 targeted 100% of tree planting funding and subsequently awarded 29 grants that focused on providing 100% of the benefits to disadvantaged communities in CalEnviroScreen 2.0 that primarily benefit minority communities of color in less than 2000 of California census tracts. As a result, the program redlined and largely excluded millions of residents including a huge class of millions of non-Hispanic whites or Caucasians that were located in the 6000 California census tracts and more than half of California counties that were not identified as “disadvantaged communities” by the California Environmental Protection Agency and the ARB in its Interim Guidelines.
* A December 14, 2014 newsletter article by a Public Advocates attorney described how the Sustainable Communities for All Coalition was advocating to the ARB and other State staff that the SB535 set aside goals actually exceed the disadvantaged communities requirements of SB535, meaning the 25% benefits directly benefiting the so-called disadvantaged communities and 10% of the projects located within disadvantaged communities. The SB535 Coalition that Public Advocates was helping to lead posted online a pdf in 2012 that noted “*After Governor Brown signed SB535 and AB1532 the SB535 Coalition went right to work engaging grassroots, community-based organizations and individual supporters across the state to educate them regarding the top 5 near term program ideas that should be funded by the Greenhouse Gas Reduction Fund.”* The first two program ideas this SB535 Coalition listed were Community Greening (i.e., Cal FIRE Urban and Community Forestry Program) and Low-Income Energy Efficiency Programs (i.e. Energy Savings Assistance Program, Weatherization Assistance Program). As the Public Advocates article noted, by May 2013 both of these recommended priorities for programs were selected by the California Air Resources Board and the California Department of Finance for allocating 100% of their GGRF funding to be utilized either in or to directly benefit disadvantaged communities, which far exceeded the disadvantaged communities set aside requirement of SB535. This violated the requirements of State and Federal civil rights laws and Title VI Regulations in Federal contracts involving millions of dollars with several State agencies such as CAL FIRE and the California Department of Community Services and Development that resulted in restricting 100% of program benefits in a manner that disparately impacted and discriminated against millions of non-Hispanic Caucasian or white residents that lived in census tracts in approximately 6000 of the 8000 California census tracts not designated as “disadvantaged communities” by CAL EPA and the ARB.
* The advocacy activities for preferential treatment that Public Advocates led in 2012-2014 in working with its major partners in the SB535 Coalition appears to have had a substantial influence on California’s Air Resources Board (ARB) that drafted the “Interim Guidance to Agencies Administering Greenhouse Gas Reduction Fund Monies” and more recently the latest draft proposed final GGRF Guidelines that include many of the SB535 Principles first submitted on March 8, 2013to ARB Board Chair Mary Nichols in a letter from SB535 Coalition leaders being led by Public Advocates, which can be found at <http://www.publicadvocates.org/sites/default/files/library/part_1_of_2_sb_535_coalition_comment_letter_to_arb_3-8-13.pdf>­­­­­­­­­­­­­­­­­­ and in the APEN summary of the Top 5 Priorities for GGRF funding found at <http://apen4ej.org/wp-content/uploads/2012/09/SB535Co-5-Priorities-brochure-2pg-v2-1.pdf.>
* In 2014, the Legislature amended the Health and Safety Code to require that ARB develop funding guidelines for administering agencies that are appropriated GGRF monies to ensure the requirements set forth for investments of GGRF fund in “disadvantaged communities” are met. An online article on Public Advocates website by Staff attorney Marybelle Nzegwu dated October 17, 2014 summarized how “*over the past few months, Public Advocates and our SB535 Coalition partners” had made huge strides in influencing the California ARB and the draft “Interim Guidance”*. The article noted: “*At ARB-hosted public workshops in Fresno, Los Angeles and Oakland, the 535 Coalition turned out to urge the agency to make key improvements to the Draft”* including requiring agencies to maximize benefits to disadvantaged communities “to the maximum extent feasible” rather than simply “whenever feasible”.

**Criteria for Special Preference in GGRF Interim & Draft Guidelines and Green Trees for Golden Gate Tree Planting Program**

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| **SB535 Coalition**  **Positions** | **ARB/Cal EPA Interim Guidance**  **Appendix A Criteria** | **ARB Draft GGRF Guidelines and Supplement** | **CAL FIRE Green Trees for Golden Gate Tree Planting Specifications** | **Comments** |
| Establish a framework to direct investments to disadvantaged communities; establish a minimum of 25% of investments benefit disadvantaged communities; requires at least 10% of investments are for projects located in disadvantaged communities. | Set aside a percentage of funding or a dollar amount used only for projects located within or provide benefits to disadvantaged communities. | Set aside a percentage of funding or a dollar amount that will be used only for projects that are located within or provide benefits to disadvantaged communities, consistent with the criteria in Appendix 2.A. | 100% and “Strong preferences” given to environmental justice communities identified in CalEnviroScreen2.0. | Based on the disparate impact of CalEnviroScreen2.0 on non-Hispanic Caucasians in the 75% of California census tracts that are excluded.  Violate prohibition of arbitrary discrimination in provision of services, privileges and advantages contained in California Unruh Civil Rights Act, Civil Code Section 51.  Violates mandates guaranteeing access and benefits to all persons of a federally supported program in Title VI of Civil Rights Act of 1964.  Violates California Government Code 11135[a] which mandates access and benefits to all persons of a state supported program.  Violates section 31 of the California Constitution prohibiting affirmative action and preferential treatment in public contracting. |
| Require agencies to maximize benefits to the “maximum extent feasible” rather than simply “whenever feasible.”  “Our work with the Air Resources Board on implementing SB 535, led to [guidelines](http://www.arb.ca.gov/cc/capandtrade/auctionproceeds/final535-interim-guidance-11-3-2014.pdf) that direct state agencies to invest GGRF funds to [meet the high-priority needs](http://www.publicadvocates.org/2014-10-17/making-sb-535-promise-a-reality) of communities already overburdened with pollution and the least equipped to deal with its adverse health impacts.” | Higher incentive amounts for projects provide benefit to disadvantaged communities. | #2 Agencies must seek to maximize investments in and benefits to disadvantaged communities, wherever possible.  Offer higher incentive amounts for projects located within or providing benefits to disadvantaged communities, consistent with the criteria in Appendix 2.A.  When developing eligibility requirements in program guidelines and solicitation materials, establish targets or minimum thresholds that will help maximize benefits. | Grant applicants for projects in disadvantaged community might receive “enhanced maintenance funding” subsequently. | See Above |
| Require agencies to maximize benefits to the “maximum extent feasible” rather than simply “whenever feasible.” | Hold competitive solicitations that award extra points to projects that provide benefits to disadvantaged communities. “*Solicitation materials should require applicants to provide a clear description of the expected benefits and proposed metrics for tracking and reporting on those benefits*. “ | Hold competitive solicitations that award extra points to projects that will provide benefits to disadvantaged communities, consistent with the criteria in Appendix 2.A  Make assistance available to respond to questions from likely project applicants in a disadvantaged community to increase their ability to seek funding. | Offered “extra points” in promising the “strong preference” would be given to disadvantaged communities as defined in CalEnviroScreen2.0 and required descriptive information of applicants. | See Above |
| In February, 2015, the Coalition promoted “at a minimum doubling the carve-out for disadvantaged communities within the Greenhouse Gas Reduction Fund to 50%. The object is to “Increase climate investments in disadvantaged communities”  <http://apen-4ej.org/breaking-climate-legislation-promiseds-to-benefit/communities-of-color> |  | SB 862 set 50% of the GGRF appropriation for the Affordable Housing and Sustainable Communities Program to be expended on projects that benefit disadvantaged communities  Governor’s proposed appropriation for FY 15-16 set aside 100% of the funds for disadvantaged communities under this program. |  | These percentages violate the California Unruh Civil Rights Act and the definition of Environmental Justice in Government Code Section 65040.12 found at <http://coes.lp.findlaw.com/cacode/GOV/1/7/d1.5/4/s65040.12>  Where federal funds are combined with state funds, the program as it now stands violates Title VI of Civil Rights Act of 1964 and federal agency Title VI regulations application to contracts with state agencies. |
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There is an opportunity here for ARB’s Board, staff to carefully research and reconsider its existing and proposed GGRF Guidelines and to be part of the solution to these discrimination problems. There is virtually no mention of the requirements of the potentially applicable State of California or Federal civil rights laws and regulations and Constitutional obligations that apply to State agencies/departments and to projects, benefits or grant programs funded or supported in part by State of California and Federal funds. I find a substantial lack of awareness of the requirements of Title VI regulations and requirements and blatant non-compliance with State of California and Federal civil rights laws

The draft GGRF Guidelines and the Supplement to the Draft Funding Guidelines that the ARB is now proposing continue to provide a whole series of special preferences and advantages to programs in so-called "disadvantaged communities" in less than 2000 California census tracts and to "maximize benefits" for these programs well beyond the 25% level for program benefits to disadvantaged communities included in California SB535.   Preferential treatment is basically being provided based on considerations of race, color, national origin, ancestry, geographic location and income levels that appear to violate the requirements of Title VI Regulations and of other State civil rights laws and regulations, as well as the Equal Protection clauses in the California and U.S. Constitution, and the prohibition in Section 31 of the California Constitution against preferential treatment based on considerations of race in public contracting that was approved by California voters and upheld by a Federal court.

For example, when I read through the draft GGRF Guidelines I found a Table 2-1 that summarized for both GY 2014-2015 and for FY 2015-2016 that in relation to the Low-Income Weatherization/Renewable Energy program of the CSD that the chart revealed that the Governor's Proposed FY2015-2016 Appropriation would raise the discriminatory appropriation for this program from last year's $75 million to $140 million and again 100% of the grant funds would be target to benefit and be located in strictly so-called "disadvantaged communities".  I also found that both the U.S. Department of Energy and the U.S. Department of Health and Human Services have adopted and issued Title VI Regulations that would presumably apply to the grant funds being provided to CSD supporting programs such as the Low-Income Weatherization Program. I believe that CSD may be in violation of the contractual obligations it has for ensuring compliance with the Title VI regulation requirements in its development and administering of Low Income Weatherization that it recommended last year be provided with $75 million to provide 100% of benefits in just some of the 2000 California census tracts that the CAL EPA and ARB had identified as eligible for benefits as “disadvantaged communities”. If the $140 million allocation proposed in your proposed GGRF Guidelines and in the Governor’s FY 2015-2016 Appropriation was allocated again for benefiting 100% again just some persons in 2000 census tracts while excluding potentially eligible applicants in 6000 other California census tracts this could lead to continuing violations of Title VI regulations and of applicable State of California and Federal civil rights laws and constitutional requirements.

I recently found a similar Title VI violation in my research regarding the Federal funds granted by the US Forest Service to another State of California agency, the California Department of Forestry and Fire Protection, for urban forestry grant programs, where I believe CAL FIRE did not meet the non-discrimination and equal treatment requirements outlined in the Title VI Regulations of the U.S. Department of Agriculture.  I believe there is a clear and continuing pattern of violations of Title VI Regulations by State of California agencies that are accepting Federal funds and apparently combining these with State of California GGRF funded programs and denying access to and benefits of these programs to millions of Californians in approximately 75% of California census tracts.

I read in the proposed GGRF Funding Guidelines and the Supplement to the Draft Funding Guidelines that the California ARB is proposing that State agencies continue to provide a whole series of special preferences and advantages to programs in so-called "disadvantaged communities" in less than 2000 California census tracts and to "maximize benefits" for these programs well beyond the 25% level for program benefits to disadvantaged communities included in California SB535.   The preferential treatment guidance in your existing Interim Guidelines and the proposed GGRF Guidelines and the Supplement to the Draft Funding Guidelines I believe based on my research were largely developed based on considerations of race, color, national origin, ancestry, geographic location and income levels that appear to violate the requirements of Title VI Regulations and of other State civil rights laws and regulations, as well as the Equal Protection clauses in the California and U.S. Constitution, and the prohibition in Section 31 of the California Constitution against preferential treatment based on considerations of race in public contracting that was approved by California voters and upheld by a Federal court.

The more time that passes the more institutionalized and pervasive  the discriminatory practices reflected in the existing and proposed ARB GGRF Guidelines are going to become, making it more difficult to change or eliminate new and expanded discriminatory practices that the various State of California agencies administering billions in State of California GGRF funds are being encouraged or required to adopt in implementing and administering these jointly funded or supported State and Federal programs.

I believe that the Constitutional prohibition against preferential treatment and affirmative action based on considerations of race, color, national origin and ancestry in public contracting is not trumped by more recent California Legislature bills such as SB535 and AB1532, and the same thing holds in terms of the Unruh Civil Rights Act/Civil Code Section 51 prohibition against arbitrary discrimination in the provision of services, privileges and advantages by public agencies.

The current Guidelines establish a system very similar to the contract compliance programs by government agencies providing preferential treatment in public contracting benefiting minorities with set asides that the California Supreme Court held in “Coral Construction, Inc. v. City and County of San Francisco (2010) (No. S152934.Aug.2.2010) was unconstitutional, which effectively ended San Francisco’s 12 d set aside program. A Federal appeals court also upheld Proposition 209’s validity that barred preferential treatment in public contracting. At the State level, there appeared to be more of an interest in retaining the new millions/billions in GGRF leveraged with Federal funds that funded these programs on the part of the agencies such as CAL FIRE, CSD, Cal EPA, and the ARB than in protecting the rights of all persons that were entitled to participate in and equal access to the benefits of these programs receiving State and Federal funding.

In addition to the two CAL FIRE publications issued in 2014 that contained discriminatory restrictions for the Green Trees Grant Program, the “Cap-and-Trade Auction Proceeds Interim Guidance to Agencies Administering Greenhouse Gas Reduction Fund Monies” [file://localhost/(http/::www.calepa.ca.gov:EnvJustice:GHGInvest) at link “ARB Interim Guidance to Administering Agencies.PDF”(http://www.arb.ca.gov/cc/capandtrade/auctionproceeds/final535-interim-guidance-11-3-2014.pdf)](file:///C:\(http\::www.calepa.ca.gov:EnvJustice:GHGInvest)%20at%20link%20âARB%20Interim%20Guidance%20to%20Administering%20Agencies.PDFâ) issued November 3, 2014--ten days before the CAL FIRE application deadline for the Green Trees for the Golden State Tree Planting Grant Program--, presented even more requirements and recommendations for screening applications and provided special incentives and preferences for projects in and directly benefiting disadvantaged communities, as well as many requirements and “guiding principles” that would result in maximizing benefits in disadvantaged communities to levels that exceeded the statutory provisions in SB535. The guidance being provided by the California Environmental Protection Agency (Cal EPA) and the Air Resources Board (ARB) to agencies such as CAL FIRE encouraged CAL FIRE representatives to engage in preferential treatment and affirmative actions in the use of State Greenhouse Gas Reduction Fund monies in 2014 and 2015 in violation of both California and Federal civil rights laws., such as the Unruh Civil Rights Act, Government Code Section 11135 (a), Title VI of the Civil Rights Act of 1964 and the prohibition in the California

ARB’s Interim Guidelines and Proposed GGRF Guidelines recommending preferential treatment for so-called “disadvantaged communities” in 2000 California Census tracts while largely redlining persons and program benefits for persons in most of the 6000 other California census tract utilizing the CalEnviroScreeen 2.0 methodology has now and will continue to have a discriminatory impact or disparate impact that violates Title VI of the Civil Rights Act of 1964 and helps to establish a discriminatory intent in relation to the ARB Guidelines and their discriminatory impact on millions of persons in the census tracts that are largely excluded and redlined and denied program benefits. This is another important reason for the ARB to revise its discriminatory existing and proposed GGRF Guidelines.

The process for identifying these disadvantaged communities by CAL EPA and ARB was far from “race neutral”. According to a staff member in the Cal EPA Office of Health Hazard Assessment that developed the CalEnviroScreen methodologies, race and color considerations were among those considered in the original work on the Calenviroscreen2.0, and the final Calenviroscreen2.0 certainly has an adverse impact on Caucasians in 6000 of the 8000 California census tracts. I have found discrimination by CAL FIRE under the Unruh Civil Rights Act not only based on “geographic location” but on it having a disparate impact on millions of Caucasian Californians located in the 6000 census tracts that were largely redlined and excluded from receiving grant funding and benefits based on considerations of race, color, national origin and ancestry on Caucasians or whites born in the United States and not of Hispanic ancestry.

On October 31, 2014 Cal EPA came out with a definition of disadvantaged communities that would be utilized in the Calenviroscreen2.0 limiting this to 25% of the 8000 California census tracts, or to 2000 of the 8000 census tracts in California, which combined with CAL FIRE’s insistence on 100% of the Green Trees for the Golden State Tree Planting Grant Program funding going to disadvantaged communities, essentially redlined or excluded most of the persons residing in 6000 California census tracts from receiving any benefits and from equal access to the benefits of the Grant Program. This violates the Unruh Civil Rights Act based on the broad coverage of the Act barring discrimination by a public agency in provision of services, privileges and advantages.

The first indication appeared online in a Cal EPA “Analysis of Calenviroscreen2.0 Scores and Race/Ethnicity” chart (<http://oehha.ca.gov/ej/pdf/CES20RaceEthnicity_05082014.pdf>) from August 2014 summarizing “Fraction of racial/ethnic groups living in one of the 20% most impacted census tracts” that revealed:

* 1 in 14 were white;
* 1 in 3 were Hispanic
* 1 in 4 were African American
* 1 in in 7 were Native American
* 1 in 8 were Asian/Pacific
* 1 in 9 were other/multiple

This strongly suggests that Caucasian and whites (that were not Hispanic) were being adversely impacted by the way that “disadvantaged communities” had been defined by Cal EPA ,ARB, other involved State agencies and that this might result in discrimination against Caucasians and whites if more research was done in not on the fraction of racial/ethnic groups living in one of the 20% most impacted census tracts but in the 25% most impacted census tracts, which was the standard announced on October 31. I made multiple requests to Cal EPA in November and December 2014 for a breakdown by race of the 25% and was told that Cal EPA’s Office of Environmental Health Hazard Assessment (OEHHA) hadn’t yet completed developing this information. I submitted a public records request for this information after an OEHHA rep indicated the information had finally been developed. I learned from the representative that race and color had originally been included in the criteria that were evaluated under earlier versions of the CalEnviroScreen2.0, and I was interested to find out what the ramifications or impacts were on different racial groups from the 25% standard that was selected that excluded 75% of California census tracts (6000 out of 8000 census tracts) versus the 25% of the census tracts that were included (2000 census tracts).

Significantly, I found that Calenviroscreen2.0 methodology had a disparate impact on Caucasians and whites (that were not Hispanic) both in the 84 Oakland census tracts or 77% of all Oakland census tracts that were not identified as “disadvantaged communities” and that there was also a disparate impact on Caucasian and whites in the 6000 California census tracts not identified as “disadvantaged communities” by Cal EPA. Based on the insistence by CAL FIRE and supported by ARB that 100% of the combined State and Federal funding from the Green Trees Tree Planting Grant Program would go to projects either in or directly benefiting defined “disadvantaged communities”, the result caused preferential treatment by color, race, national origin and ancestry by census tract locations for persons in California. Significantly higher percentages of Hispanics and African-Americans by race benefit from limiting 100% of the CAL FIRE Green Trees tree planting grant funding for tree planting/maintenance to projects in the 2000 “disadvantaged community “ census tracts than to whites (not of Hispanic ancestry). The information obtained from Cal EPA in January 2015 as a result of my public records request for “a breakdown by race of the population in the 25% of California census tracts included in the definition of disadvantaged communities by Cal EPA versus a breakdown of the 75% of California census tracts that were not included in the definition of disadvantaged communities” revealed:

* Of the total population living in the approximately 2000 census tracts identified as disadvantaged, 64% are Latino; 16% are white (while Caucasian or whites other than Hispanics make up almost 39% of the total population statewide); 9.5% Asian; 8.2% African American; 0.3% Native American; and 1.7% other or multiple ethnicities; Statewide persons of Hispanic or Latino origin made up only 37.6% of California residents in the 2010 census (14,013,719 out of 37, 253, 956) but as the Cal EPA analysis revealed 64% of the Hispanic or Latino population in California resides in the Environmental Justice or so-called disadvantaged communities and a substantially larger percentage stands to benefit from the investment in millions of dollars each year in these communities, while only about 10% of the total white population in the 8000 California census tracts would potentially benefit.
* An analysis by Cal EPA of the fraction of racial/ethnic groups living in one of the 25% high scoring census tracts in Calenviroscreen2.0 revealed:
  + 2 in 5 Hispanics or 40% of the total Latino population lived there and would benefit;
  + 1 in 3 African-Americans lived in these census tracts or 33% of the total African-American population and would benefit;
  + 1 in 5 Native American population or 20% of the total Native American population and would benefit;
  + 1 in 6 or 17% of the total Asian population lived in these census tracts and would benefit;
  + 1 in 7 or other/multiple ethnicities lived in these census tracts and would benefit;
  + while only 1 in 10 Whites or 10% of the total White population lived in these census tracts and would benefit.

I believe CAL EPA and ARB aided CAL FIRE in violating my civil rights and Constitutional rights in the last year, along with the civil rights of millions of California residents in the 6000 California census tracts ostensibly redlined and restricted from receiving most GGRF program benefits in programs such as CAL FIRE’s approximately $16 million urban and community forestry grant programs funded by State of California and Federal fund that recently announced 29 contract awards restricted to projects benefiting so-called “disadvantaged communities”. I contacted by phone and email on December 15, 2014 Cal EPA Deputy Secretary for Law Enforcement and Counsel Alice Reynolds. I discussed in detail in my telephone conversation and two detailed emails some of the evidence that showed the discrimination and preferential treatment and the violation of State and Federal civil rights laws and regulations and equal protection clauses in the California and U.S. Constitution including:

* The actions of CAL FIRE and of Cal EPA and the ARB that led me to file an Unruh Civil Rights Act complaint with DFEH and also a Title VI complaint DFEH Complaint No. 411904-134246 with the USDA Office of Civil Rights in Washington regarding the apparent violation of Title VI of the Civil Rights Act of 1964, as well as the provisions of California Government Code Section 11135 (a) and implementing regulations in the California Code of Regulations Title 22 Sections 98211 (c) and 98100;
* The evidence of the disparate impact of Cal EPA’s CalEnviroScreen2.0 and the decision by Cal EPA limiting the definition of disadvantaged communities to 25% of California census tracts (2000 out of 8000 census tracts) versus the 6000 California census tracts that would result in benefiting a significantly higher percentage of Hispanics, African Americans, Asians, Native Americans, and Asian/Pacific residents in comparison to whites/Caucasian, based on CalEPA’s “Analysis of CalEnviroScreen2.0 Scores and Race/Ethnicity”;
* My complaints to CAL FIRE representatives (including Forester I James Scheid, Urban Forester John Melvin, EEO Rep Christine Martinez, General Counsel Stephanie Shimazu, Chief of the Office of Program Accountability Windy Boulin, and the office of CAL FIRE Director Ken Pimlott) and Governor Brown about the arbitrary discrimination and discriminatory features in the Green Trees for the Golden State Tree Planting Grant program that violated the Unruh Civil Rights Act as well as other State and Federal laws and regulations.
* The failure of these State representatives to modify the Request for Proposals for the discriminatory Green Trees for the Golden State Tree Planting Grant Program prior to the November 13 grant application deadline to ensure nondiscrimination and to allow project applications for potential projects on a non-discriminatory basis by CAL FIRE in any California census tract;
* My filing of a formal complaint with CAL FIRE General Counsel Stephanie Shimazu on November 11, 2014 pursuant to Government Code Section 1135 (a) regarding the Grant Program of CAL FIRE that discriminated I felt based on color, race, national origin and census tract locations, and my not receiving any subsequent communications from Ms. Shimazu or CAL FIRE;
* Other State programs funded by GGRF funds that may also arbitrarily discriminate in violation of the Unruh Civil Rights Act, such as the $75 million in funding being set aside for the Low Income Weatherization Program for disadvantaged communities in the California Department of Community Services and Development;
* I further pointed out that the “Interim Guidance to Agencies Administering Greenhouse Gas Reduction Fund Monies” issued by the ARB and Cal EPA on October 31, 2014 promotes discrimination and preferential treatment in other State administered programs by encouraging them to maximize benefits using different approaches for GGRF funded programs for disadvantage communities while denying participation or denying rights to the benefits of other State and/or Federally assisted programs to persons in many census tracts not identified as “disadvantaged communities”;
* Section 71110 of the California Resources Code mandates “The California Environmental Protection Agency, in designing its mission for programs, policies, and standards shall do all of the following: (a) Conduct its program, policies, and activities that substantially affect human health or the environment in a manner that ensure the fair treatment of all races, cultures, and income levels, including minority populations and low income populations of the state.;” I believe this requirement mandates the “fair treatment of people” of “all races” and “income levels” and that the Environmental Protection Agency needs to ensure that its programs, policies and standard do not result in unfair or discriminatory treatment. It doesn’t appear that Cal EPA ever followed up on this requirement.
* I further noted: “I believe this obligation would mandate a review of:

1. The Calenviroscreen2.0 system that doesn’t currently ensure fair treatment of all races, cultures and income levels;
2. How the decision to designate 25% of California census tracts in California impacts persons by race and income level in California and the GGRF funding in some instances to exclusively benefit disadvantaged communities or persons in disadvantaged communities;
3. The Interim Guidance to Agencies Administering Greenhouse Gas Reduction Fund moneys issued by Cal EPA and the Air Resources Board which do not appear to necessarily ensure “fair treatment of all races, cultures and income levels” and appear to encourage some State agencies to grant more services, preferences, and advantages to only some persons located in some locations with predominantly minority population and/or low-income populations of the State;
4. The recommended 100% allocation of GGRF funding made by the Air Resources Board and Cal EPA in the Interim Guidance for the $17.8 in urban forestry program funding by CAL FIRE and the $75 million of LIWP program funding of the California Department of Community Services and Development that would not ensure “fair treatment of people of all races, cultures, and income levels, including minority populations and low-income populations of the state;
5. The requirements of the Unruh Civil Rights Act, Government Code Section 11135 (a), California Administrative Code Title 22 Section 98211 (c) and 98100, Title VI of the Civil Rights Act of 1964 and Section 601 and 602, and the Equal Protection Clauses of the California Constitution and 14th Amendment of the U.S. Constitution, and whether you’ve adequately considered these in relation to the requirements of California Public Resources Code Section 71110 relative to ensuring by Cal EPA, the State, and State agencies of fair treatment of all races, cultures, and income levels, including minority populations and low-income populations of the state.”

NEXT STEPS

The ARB Board and CAL EPA administrators and staff need to immediately address the problems with their Interim Guidelines and these proposed GGRF Guidelines and the Supplement to the Draft Funding Guidelines that violate a public trust and obligation to ensure compliance with the legal requirements of State and Federal Civil rights laws and constitutional requirements as described above. The State and Federal Constitutions and equal protection and other clauses prohibit preferential treatment and discrimination by public agencies, and no one in State service is above the requirements of State and Federal civil rights laws and obligations to ensure equal treatment and non-discrimination for all persons in all California census tracts. The ARB Interim Guidelines and proposed GGRF Guidelines and the Supplement to the Draft Guidelines do not meet the legal requirement and mandated contractual obligations for State agencies to ensure non-discrimination and to bar preferential treatment and affirmative in public contracting. The ARB and CAL EPA need to start afresh in drafting GGRF Guidelines and also to replace the CalEnviroScreen 2.0 methodology and approach to ensuring the fair treatment of all races, cultures and incomes in relation to the requirements of the Unruh Civil Rights Act, Government Code Section 11135 (a) ,California Resource Code Section 71110, Section 31 of the California Constitution, the Equal Protection clauses in the State and U.S. Constitution barring discrimination by State government and public agencies, the requirement of Title VI and Federal agency Title VI regulations for the effectuation of Title VI, and the requirements of the California Fair Employment and Housing Act and Title VII of the Civil Rights Act of 1964.

As part of the corrective action, I would like to see:

* Training of civil rights staff, program staff and legislators of the requirements of state and federal civil laws and prohibition of affirmative action and preferential treatment in public contracting so that programs don’t discriminate.
* Appoint a compliance officer to review the guidelines and recommendations to make sure that they are in compliance with these laws.
* Meet with federal agencies to understand and comply with the requirements for non discrimination and mandated equal treatment under Title VI and to apply them whenever implementing programs fully or partially funded with federal monies.
* Develop a new screening system to replace CalEnviroScreen 2.0 and the current definition of disadvantaged communities that does not discriminate as the current one does nor disparately impact Caucasians and the residents in the 75% of the census tracts now unable to participate in the program or many benefits.
* Establish a complaint and investigation procedure to enforce these requirements.
* Training and information for recipients of these grant funds so that they can also be in compliance with the state and federal civil rights laws.