COMMUNITIES FOR A BETTER ENVIRONMENT

VIA FAX, EMAIL (KSTEVENS@AQMD.GOV) AND U.S. MAIL

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June 25, 2002

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South Coast Air Quality Management District
Attn: Kathy Stevens, Barry Wallerstein
21865 E. Copley Drive
Diamond Bar, CA 91765-4182

RE: **Comments on Ultramar Wilmington Refinery Expansion for Phase III Clean Fuels**

Dear SCAQMD:

Communities for a Better Environment (CBE) submits the following comments to SCAQMD on the Draft Subsequent EIR (SEIR) for the Ultramar Wilmington Refinery Phase III Clean Fuels Project ("Project"). These comments are in further reply to SCAQMD's Preliminary Response to Comments dated June 20, 2002.

I. Environmental Justice

SCAQMD Response 7-4 and 7-105 stated that "There is no requirement at this time to focus the analysis in an EIR on any specific groups." In reply to this response, CBE incorporates by reference the attached Air Resources Board memorandum from Leslie Krinsk, Senior Counsel, to Michael Kenny, Executive Officer, and Lynn Terry, Deputy Executive Office ("ARB EJ Memo"), analyzing how CEQA can be used to address the cumulative impacts of air pollution in the context of environmental justice (EJ). As discussed in the ARB EJ Memo, both CEQA, and the Clean Air Act New Source Review provisions, including the SIP, require consideration of environmental justice in permitting decisions. Should SCAQMD not include consideration of environmental justice in this permitting decision, CBE may take legal action to enforce CEQA and the Clean Air Act. SCAQMD appears to also violate 47-1

The ARB EJ memo confirms that factors such as race, culture, and income can and should be taken into consideration in an EIR's cumulative impact analysis. CEQA, the Clean Air Act's New Source Review and Title VI of the Civil Rights Act require it.

The ARB EJ Memo observes that "it is doubtful whether the ARB or many Districts or land use agencies currently prepare EIRs that meet these rigorous standards." Part B concludes with, "CEQA can readily be employed by public agencies to address EJ concerns in new source permitting and other projects undertaken by the ARB, the Districts, and especially local and regional land use agencies." (p. 8). 47-2

The ARB EJ Memo also discusses the fact that the ARB and the Districts are federally funded and, as such, are subject to the regulations of Title VI. Briefly, Title VI requires that no one be discriminated against on the ground of race, color or national origin, or be subjected to discrimination under any program or activity receiving federal assistance. In the environmental justice context, federal courts have upheld regulations that prohibit a discriminatory impact. 47-3

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II. Impacts from Potential Terrorist Attack

SCAQMD Response 7-22. In reply to this response, we incorporate by reference the attached news article dated June 19, 2002, "FBI Launch Search for Al Qaeda Terror Ship Targeting Los Angeles" by William Lowther, *Knight Ridder/Tribune Business News Daily Mail*. This response claims that the risks associated with an intentional attack is the same as that of an accident. This is simply untrue. For example, a terrorist planning an attack would likely create a plan in which the most damage was done, such as attacking several sites within the facility at once. This would exponentially increase an explosion or toxic release. Further, the likelihood of something happening is now increased. A facility has some control over preventing an accident, while an attack would purposefully target where it was most vulnerable. For example, in the attached *Daily Mail* article, Abu Ghaith was quoted as saying, "Let America be prepared to fasten its seat belt, because, thanks to God, we are going to surprise it in a place where it is not expecting." An accident, unlike an attack, may give some warning, giving more time for workers and residents to evacuate. The media and the government are issuing repeated warnings about the vulnerability of both ports and petrochemical facilities to terrorist attacks. Since Ultramar/Valero both stores and transports explosive chemicals and is located at the port, it is extremely vulnerable to targeted attacks. Therefore, more mitigation measures, such as an evacuation plan for residents and schoolchildren, should be required. 47-4

III. CBE Reply to Response 7-99

CBE disagrees with SCAQMD that the dismantling and remediation of the Ultramar Marine Terminal and tanks that are being abandoned because of the loss of the lease with the Port of Los Angeles is a separate project. CEQA §21003 states that it is the policy of the state to integrate the requirements of CEQA "with planning and environmental review procedures otherwise required by law" so that all "those procedures, to the maximum extent possible, run concurrently, rather than consecutively." SCAQMD states that the Port is currently evaluating the need for a CEQA document. Thus the project is reasonably foreseeable and must be evaluated in this CEQA process. SCAQMD is illegally peicemealing the project in violation of CEQA. SCAQMD's "approach is inconsistent with the mandate of CEQA that a large project shall not be divided into little ones because such division can improperly submerge the aggregate environmental considerations of the total project." Citizens Association for Sensible Development of Bishop Area v. County of Inyo (1985) 172 Cal.App.3d 151, 167. A basic tenet of CEQA is that an "environmental analysis should be prepared as early as feasible in the planning process to enable environmental considerations to influence project program and design[.]" Guidelines §15004; Laurel Heights Improvement Assoc. v. Regents of the Univ. of Calif. (1988) 47 Cal.3d 376, 394. 47-5

Even when a project applicant seeks separate permits for different stages of a project, CEQA does not permit piecemeal review. "The term 'project' does not mean each separate governmental approval." (14 CCR § 15378(c).) "The term *'project' refers to the underlying activity and not the governmental approval process.*" Natural Resources Defense Council v. Arcata National Corp. (1976) 59 Cal.App.3d 959, 969 (emphasis in original). 47-6

Here the activity is moving the storage facilities from the marine terminal which is subject to the lost lease to another location. Clearly the tanks and facilities on the portion of land that is leased from the Port must be dismantled and remediated. CBE requests that all documents prepared by the Port related to the possible dismantling and remediation of the Ultramar marine terminal facility that is losing its lease be made part of the administrative record of this project. CBE requests that SCAQMD contact and meet with the Port to discuss the dismantling and remediating of the Ultramar marine terminal facility. 47-6 cont'd

V. CBE joins in the Comments of Other Organizations, Agencies and Commentators

A. CBE joins in comments of the State Lands Commission, comments 4-1 through 4-11. 47-7

B. CBE joins in the comments of the Port of Los Angeles in requesting analysis and mitigation of the impacts of ethanol, not just at the refinery and tank farm, but also for general use in tanks, gas tanks, pipelines, and the atmosphere. How does SCAQMD know that ethanol will not cause public health and ground water contamination problems? There is not adequate analysis in the SEIR of these issues. 47-8

C. CBE joints in the comments of the Port of Los Angeles, Coments 5-2 through 5-4. 47-9

D. CBE joints in the comments of the Audubon Society, Comments 6-2 through 6-7. 47-10

E. CBE joints in the comments of the Wilmington Coalition for a Safe Environment 92 through 9-11 and 9-13. 47-11

VI. Request for Transcript

CBE requests a copy of the transcript of the public hearing held on June 20, 2002 in Wilmington on this project. Please consider this letter a public records act request pursuant to Gov. §6520. 47-12

Finally, CBE requests a written response to these comments. 47-13

Should you have any questions, please contact me at 323-826-9771 ext. 108.

Sincerely,

Scott Kuhn, CBE Staff Attorney
COMMUNITIES FOR A BETTER ENVIRONMENT

Winston H. Hickox
Agency Secretary

Air Resources Board

Alan C. Lloyd, Ph.D.
Chairman
1001 I Street • P.O. Box 2815 • Sacramento California 95812 • www.arb.ca.gov

Gray Davis
Governor

MEMORANDUM

TO: Michael P. Kenny
Executive Officer

Lynn Terry
Deputy Executive Officer

FROM: Leslie Krinsk
Senior Staff Counsel

DATE: March 8, 2002

SUBJECT: CEQA AND ENVIRONMENTAL JUSTICE

I. ISSUE and RESPONSE

You have requested a legal opinion regarding the suitability of the California Environmental Quality Act (CEQA) for addressing the cumulative impacts of air pollution in the context of environmental justice (EJ). For the reasons set forth below, we will conclude that CEQA can readily be adapted to the task of analyzing cumulative impacts/environmental justice whenever a public agency (including the Air Resources Board (ARB), the air pollution control districts, and general purpose land use agencies) undertakes or permits a project or activity that may have a significant adverse impact on the physical environment. All public agencies in California are currently obligated to comply with CEQA, and no further legislation would be needed to include an environmental justice analysis in the CEQA documents prepared for the discretionary actions public agencies undertake.

Because CEQA does not bestow upon public agencies any additional authority to mitigate any adverse environmental impacts the inquiry would reveal, we will also examine the statutory authority of the ARB and the air districts to meet specified EJ objectives and their responsibility to mitigate the impacts of air pollution in the context of EJ. We will conclude that ample authority exists in current law to require the ARB and the air districts to mitigate the cumulative or disparate impacts of sources of air pollution on all communities, including EJ communities. Focusing on EJ and CEQA, we will also conclude that both state and federal law anticipate the application of CEQA to new and modified source permitting activities in carrying out state and federal EJ requirements. Thus, while CEQA is not the only option by which disparate impacts and cumulative

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impacts may be analyzed and mitigated, it is a currently available, legally viable, and arguably mandated means of doing so. Our analysis follows.

II. ANALYSIS: CEQA, CUMULATIVE IMPACTS, and ENVIRONMENTAL JUSTICE

A. Introduction to CEQA's Key Points

Recent statutory law has invigorated the utility of the California Environmental Quality Act[1] as the procedural means for the ARB and the air pollution control districts (Districts) to ensure

> "the fair treatment of people of all races, cultures, and incomes with respect to the development, adoption, implementation, and enforcement of environmental laws, regulations, and policies" (i.e., environmental justice).[2]

In conjunction with the regulatory provisions of the federal Clean Air Act and Division 26 of the Health and Safety Code,[3] CEQA provides an ideal mechanism for ensuring that environmental justice will be addressed in all activities and projects that may have a significant effect on the environment. The context of the discussion in this memorandum is on the role of the ARB and the Districts in the permitting of new sources of pollution, since questions have been raised regarding the legal authority of air pollution regulatory agencies to affect land use.

The California Environmental Quality Act requires that environmental documents (i.e., an environmental impact report [EIR] or a negative declaration or equivalent document) be prepared whenever a public agency proposes to undertake a discretionary activity that may have a significant effect on the environment.[4] The Legislature has declared that all state agencies that

> "regulate activities of private individuals, corporations, and public agencies which are found to affect the quality of the environment, <u>shall regulate such activities so that major consideration is given to preventing environmental damage, while providing a decent home and satisfying living environment for every Californian.</u>"[5]

Projects that are directly undertaken by public agencies are subject to the same level of accountability as private projects that require a permit or other governmental approval to proceed.[6]

While CEQA is first and foremost concerned with disclosing to citizens and decision-makers the environmental impacts of government decisions, it is conceptually and literally capacious enough to permit the nature of the affected community to be taken into account when determining the significance of potential environmental impacts. Thus, it is state policy that public agencies "protect, rehabilitate, and enhance" the environment; ensure that long-term environmental protection, consistent with a "suitable living environment for every Californian, shall be the guiding criterion in public decisions"; "create and maintain" harmonic conditions "to fulfill the social and economic requirements" of the people; and "require governmental agencies at all levels to consider qualitative factors" in environmental decision-making.[7] All public agencies are required to adopt "objectives, criteria, and procedures for the evaluation of projects" to ensure that the objectives of CEQA are met.[8]

In carrying out the policy that public agencies not approve projects with significant adverse impacts "if there are feasible alternatives or feasible mitigation measures available" to reduce or eliminate such effects,[9] public agencies are authorized to exercise "only those express or implied powers provided by law other than [CEQA]" and "may use discretionary powers provided by such other law for the purpose of mitigating or avoiding a significant effect on the environment" within the constraints of that law.[10] Thus, while CEQA does not bestow upon an agency any new regulatory powers independent of those provided by other laws, CEQA supplements an agency's

> "discretionary powers by authorizing the agency to use [them] to mitigate or avoid significant effects on the environment when it is feasible to do so with respect to projects subject to the powers of the agency."[11]

The lead agency[12] may require changes in "any or all activities involved in the project"[13] to mitigate adverse impacts; a responsible agency "may require changes in a project to lessen or avoid only the effects, either direct or indirect, of that part of the project which the agency" carries out or approves.[14] Generally, for construction projects the Districts are responsible agencies, while cities and counties are lead agencies. For certain facility modifications, however, the Districts are lead agencies because no other permits are required from the local land use agencies. The ARB is a "trustee agency" because, although it does not issue permits for projects, it does have jurisdiction over resources affected by the project (i.e., ambient air) and is a commenting agency under CEQA as well as an oversight agency in accordance with the Health and Safety Code.

Both lead and responsible agencies "may disapprove a project if necessary in order to avoid one or more significant effects on the environment."[15] The authority to approve or disapprove includes within it the authority to approve with conditions.[16] Here again, the

CEQA guidelines distinguish between the broader authority of the lead agency and the more limited (but still quite broad) authority of a responsible agency, with the example that "an air quality management district acting as a responsible agency would not have the authority to disapprove a project for water pollution effects that were unrelated to the air quality aspects of the project..."[17] Projects with significant adverse impacts may nevertheless be approved as long as the required findings are made[18] and a statement of overriding considerations prepared.[19]

The findings required by CEQA include the following:

> "(1) Changes or alterations have been required in, or incorporated into, the project which mitigate or avoid the significant effects on the environment.
>
> (2) Those changes or alterations are within the responsibility or jurisdiction of another public agency and have been, or can and should be, adopted by that other agency.
>
> (3) Specific economic, legal, social, technological, or other considerations... make infeasible the mitigation measures or alternatives identified in the [EIR]"[20]

Thus, if an air district finds that a project would have adverse air quality impacts that the District is not authorized by law to mitigate directly before issuing a permit, it must nonetheless indicate that a particular mitigation measure is within the jurisdiction of the general-purpose land use agency and should be imposed by that agency.[21]

B. Cumulative Impacts

Prior to setting forth the substantive provisions of air pollution and administrative law that require the ARB and the Districts to address and ensure environmental justice, both substantively and procedurally, a discussion of the key provisions in CEQA that lend themselves to an analysis of EJ issues will be useful. Here, the most relevant CEQA requirement concerns cumulative impact analysis. Specifically, CEQA requires the Guidelines prepared by the Office of Planning and Research (OPR) and adopted by the Resources Agency to include criteria for determining whether or not a proposed project may have a significant effect on the environment.[22]

A finding of significant effect is required if "the possible effects of a project are individually limited but cumulatively considerable."[23] "Cumulatively considerable," in turn, "means that the incremental effects of an individual project are considerable when

viewed in connection with the effects of past projects, ...other current projects, and... probable future projects."[24] A finding of significant effect is also required if "the environmental effects of a project will cause substantial adverse effects on human beings, either directly or indirectly."[25] All EIRs, then, must include a description of all significant effects on the environment, including cumulative impacts, as well as a discussion of mitigation measures to eliminate or minimize them and less damaging project alternatives.[26]

The CEQA Guidelines, especially as amended in 1998, devote considerable attention to cumulative impacts in an attempt to shed light on what has proven to be a difficult subject for practitioners. While the Guidelines state that "an EIR must be prepared if the cumulative impact may be significant and the project's incremental effect, though individually limited, is cumulatively considerable,"[27] they also attempt to limit somewhat the scope of the analysis by providing that a project's incremental contribution could be considered "not cumulatively considerable" if it would "comply with the requirements in a previously approved plan" (e.g., an air quality plan) or if the incremental impacts "are so small that they make only a de minimis contribution to a significant cumulative impact caused by other projects that would exist in the absence of the proposed project..."[28] These limiting provisions were recently invalidated by Judge Robie in litigation brought by a number of environmental groups on the basis that reliance on a previously approved plan that was developed in consideration of factors other than environmental protection would nullify the "fair argument" standard[29] and endorses the so-called "ratio rationale" that was invalidated by the courts in several previous lawsuits.[30] The Guidelines are currently being evaluated for amendment later this year by the Resources Agency.

The Guidelines define "cumulative impacts" as "two or more individual effects which, when considered together, are considerable or which <u>compound or increase other environmental impacts</u>," and indicate that "cumulative impacts can result from individually minor but collectively significant projects taking place over a period of time."[31] In discussing precisely how cumulative impacts must be addressed in an EIR, the Guidelines are particularly instructive with regard to mitigation. Thus,

> "an EIR may determine that a project's contribution to a significant cumulative impact will be rendered less than cumulatively considerable... if the project is required to <u>implement or fund its fair share</u> of a mitigation measure or measures designed to alleviate the cumulative impact."[32]

The detail required in the discussion of cumulative impacts is problematic;[33] it is doubtful whether the ARB or many Districts or land use agencies currently prepare EIRs that

meet these rigorous standards. Part of the difficulty with regard to air impacts has been the lack of technical tools and models to enable meaningful and accurate preparation of a cumulative impacts analysis. Some agencies, such as the California Energy Commission, have been performing cumulative impact analyses in power plant siting cases for years. In the air quality arena, the ARB is completing groundbreaking work to make this analysis more accurate and technically defensible.

Because CEQA is focused on the physical environment and does not explicitly mention environmental justice, it is legitimate to ask whether the environmental documents prepared under CEQA can or should consider such factors as race, culture, and income. We conclude that they can, in consideration of the following statutory provisions.

First, in addition to the findings set forth above regarding a decent home and a suitable living environment for all Californians, CEQA states that "economic or social changes may be used...to determine that a physical change shall be regarded as a significant effect on the environment" even though economic and social changes alone cannot be treated as significant effects on the environment.[34] Thus, the 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.[35]

Similarly, in assessing the impact of a proposed project, the public agency is to include in the discussion "the relevant specifics of the area," such as "changes in population distribution, population concentration, the human use of the land...[and] health and safety problems caused by the physical changes."[36] The ethnic and economic characteristics of the affected population are relevant to this discussion. The example provided in the Guidelines is instructive:

> "if the construction of a new freeway or rail line divides an existing community, the construction would be the physical change, but the social effect on the community would be the basis for determining that the effect would be significant."[37]

Moreover,

> "economic, social, and particularly housing factors shall be considered...together with technological and environmental factors in deciding whether changes in a project are feasible to reduce or avoid the significant effects on the environment.

> If information on these factors is not contained in the EIR, the information must be added to the record in some other manner to allow the agency to consider the factors in reaching a decision on the project".[38]

It appears, therefore, that CEQA can readily be employed by California public agencies to address EJ concerns in new source permitting and other projects undertaken by the ARB, the Districts, and especially local and regional land use agencies. Indeed, while former Governor Pete Wilson vetoed five bills addressing environmental justice,[39] the Governor's explanation upon vetoing AB 937, regarding hazardous waste facilities, endorsed CEQA as already accomplishing EJ goals:

> I am sympathetic to the concern that these facilities are sited near low-income and minority communities; I believe that this possibility is minimized by the extensive environmental studies that must be completed under [CEQA]....[40]

C. EJ: What is Required?

In 1999 and 2000, the Legislature enacted and Governor Gray Davis signed into law four environmental justice bills.[41] These new bills animate the previously implicit EJ responsibilities of specified public agencies by establishing an organizational and procedural framework, as well as some substantive criteria, for the design of EJ programs. A brief discussion of California's statutory scaffolding will be helpful here.

The implementation of the State's new EJ programs is to occur under the tutelage of the Governor's Office of Planning and Research (OPR) and, for the ARB among six specified agencies – OEHHA, the Integrated Waste Management Board, the Water Resources Control Board, the Department of Pesticide Regulation, and the Department of Toxic Substances Control – under the direction of CalEPA.

Briefly, the primary mission of OPR is to "adopt guidelines for the preparation and content of the mandatory elements" of city and county general plans and to recommend changes to the CEQA Guidelines to the Resources Agency for adoption by the Secretary for Resources. Under SB 115, OPR is to coordinate environmental justice programs among all state agencies as well as with the federal government, including the Environmental Protection Agency. New legislation[42] requires OPR to "include guidelines for addressing environmental justice matters in city and county general plans" when it adopts the next set of general plan guidelines (as required by Government Code section 65040.2), and no later than July 1, 2003. However, the OPR

guidelines are advisory and not mandatory, and cities and counties do not always include the optional elements.

In contrast, the environmental justice responsibilities of CalEPA are substantive and mandate specific actions on the part of its member BDOs. In addition to developing a model EJ mission statement[43] for the six boards, departments, and offices, CalEPA is required to

> "conduct its programs, policies, and activities that substantially affect human health in a manner that ensures the fair treatment of all races, cultures, and income levels, including minority populations and low-income populations of the state."[44]

Moreover, CalEPA is required to promote the evenhanded enforcement of health and environmental statutes; "improve research and data collection" for programs relating to the environment and health of minority and low-income populations; "identify differential patterns" of resource consumption "among people of different socioeconomic classifications"; coordinate and share information with the federal EPA; consult with the EJ Working Group in developing EJ strategies; and "ensure greater public participation in the agency's development, adoption, and implementation of environmental regulations and policies."[45]

Legislation enacted in 2001 augments the responsibilities of the Working Group on EJ and requires the performance of specific tasks. These tasks include the development of "an agencywide strategy for identifying and addressing any gaps in existing programs, policies, or activities that may impede the achievement of environmental justice by July 1, 2002.[46] The Working Group is charged with recommending criteria for identifying and addressing gaps impeding EJ progress, as well as coordinating data and information collection; facilitating public participation; and consulting with federal, state, and local agencies and affected communities on EJ issues.[47]

Once CalEPA develops the agencywide strategy, and before December 31, 2003, each BDO must "review its programs, policies, and activities" to identify and address program obstacles impeding the achievement of EJ. The ARB is rapidly responding to these mandates both substantively and procedurally in all significant program areas.[48]

The new legislation for the first time requires EJ considerations to be incorporated into the CEQA process. In creating a new position within CalEPA as Assistant Secretary for Environmental Justice, the 2000-01 fiscal year budget bill lists a number of activities that the Assistant Secretary must perform. Among them is the following:

> "(a) Review the activities each [BDO] within [CalEPA] undertakes to comply with Division 13 (commencing with section 21000) of the Public Resources Code [i.e., CEQA] to ensure that those activities take into account and address environmental justice considerations."[49]

It is clear that the Legislature intends CalEPA and its constituent BDOs to utilize CEQA as one means to infuse EJ into all agency activities. The following additional statutes provide similar impetus and authority for doing so.

First, the federal Clean Air Act prohibits the issuance of permits to construct and operate new or modified major sources[50] in non-attainment areas unless the permitting agency determines that

> "(a)n analysis of alternative sites, sizes, production processes, and environmental control techniques for such proposed source demonstrates that the benefits of the proposed source significantly outweigh the environmental and social costs imposed as a result of its location, construction, or modification.[51]

The EPA has determined that this provision requires state and local air agencies to consider EJ issues during facility permitting.[52] Moreover, the ARB and the Districts have maintained since 1980 that compliance with section 173(a)(5) of the Clean Air Act is accomplished in California through CEQA, and the SIP contains those CEQA provisions that are intended to fulfill this commitment.[53] This federally-enforceable commitment can be enforced by the EPA or by private citizens."[54]

In addition to federal authority that pertains specifically to air quality and permit issuance, the Civil Rights Act of 1964 prohibits discrimination in programs and activities carried out by recipients of federal funds. Title VI of that legislation provides that

> "[n]o person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."[55]

While claims brought directly under title VI require a showing of discriminatory intent, federal agencies have adopted, and federal courts have upheld, regulations under title VI that prohibit activities that have discriminatory or disparate impacts.[56] The EPA implementing regulations, developed in coordination with the U.S. Department of Justice, state that

> "[a] recipient shall not use criteria or methods of administering its program which have the effect of subjecting individuals to discrimination because of their race, color, national origin, or sex, or have the effect of defeating or substantially impairing accomplishment of the objectives of the program with respect to individuals of particular race, color, national origin, or sex."[57]

The ARB and the Districts are recipients of EPA funds; the acceptance of even one federal dollar for one state agency program imposes the title VI regulatory obligation on all of the agency's programs.[58] The EPA Office of Civil Rights (OCR) implements the EPA's EJ compliance program, and several complaints concerning projects proposed for construction in California currently reside in OCR awaiting disposition.[59]

President Bill Clinton's Executive Order 12898, issued February 11, 1994, expanded the scope of EJ to include low-income as well as minority populations.[60] In the accompanying memorandum, President Clinton noted that the National Environmental Policy Act of 1964, the federal statute that provided the model for CEQA,[61]

> "was an existing mechanism to optimize public participation and to consider mitigation measures which would minimize significant and adverse effects of proposed federal actions on minority and low income communities."[62]

The EPA issued a guidance document addressing NEPA and EJ in 1998,[63] and has recently developed several iterations of draft guidance documents to advise the states on addressing EJ during new source permitting.[64] Although the permitting guidance has not been finalized and is not legally binding, it provides useful insight and information on current EPA views of EJ compliance and has been cited as a model for states to consider when performing EJ analyses.[65]

The ARB and the Districts are not general land use agencies with affirmative siting authority; nevertheless, the issuance of a permit prior to the construction or operation of a stationary source is a discretionary act that must be undertaken in compliance with applicable law. Recent studies suggest a significant inequity in the exposures of minority and low-income populations, especially in urban areas, to chemical mixtures of hazardous air pollutants from myriad stationary and vehicular sources, resulting in higher lifetime cancer risk in some communities. As noted above, current law requires

> "the fair treatment of people of all races, cultures, and incomes with respect to the development, adoption, implementation, and enforcement of environmental laws, regulations, and policies."

As direct recipients of federal funds, state permitting agencies have an obligation to comply with title VI. Stated another way, title VI and the EPA regulations provide legitimate grounds, in addition to those found in state law, for requiring the mitigation of cumulative and other environmental effects on EJ communities or otherwise conditioning or denying permits. The air districts are advised to adopt regulations in accordance with their statutory authority to ensure that EJ and cumulative impacts are addressed.

III. CONCLUSION

The recent enactment of Public Resources Code sections 71110 through 71115 and Government Code section 65040.12, in conjunction with the requirements of federal law, the SIP, and EPA regulations, require the ARB to infuse EJ into every aspect of decisionmaking. This panoply of statutory authority animates the general authority of the ARB to "do such acts as may be necessary for the proper execution of the powers and duties granted to, and imposed upon, the state board by this division [26 of the Health and Safety Code] <u>and by any other provision of law</u>."[66] Further, the rules, regulations, and standards that the ARB adopts must be "consistent with the state goal of providing a decent home and suitable living environment for every Californian"[67] – and so, full circle back to CEQA.

The ARB, as the agency responsible for "coordinating efforts to attain and maintain ambient air quality standards,"[68] "coordinat[ing], encourag[ing], and review[ing] the efforts of all levels of government as they affect air quality,"[69] and "undertak[ing] control activities <u>in any area wherein it determines that the local or regional authority has failed to meet the responsibilities given to it by this division or by any other provision of law</u>,"[70] has the authority and the responsibility to ensure that the Districts[71] also comply with the EJ requirements imposed by state and federal law. This may be done formally or informally, by binding regulations, directory guidance, or informal cooperation and discussion.

While CEQA is not the only means available to ensure that EJ becomes a reality, it is one option that is currently up and running; that public agencies and the private sector to whom they issue permits have substantial experience with; that has spawned considerable regulatory guidance and decisional precedent; that can be readily adapted to the task at hand without creating another layer of bureaucratic report-making; that

has been endorsed by the Legislature and the federal government; that meshes well both procedurally and substantively with the regulatory law implemented by the ARB and the Districts; and that can be supplemented with additional EJ compliance tools as necessary or desirable.

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[1] CEQA; Public Resources Code sections 21000 et seq. See also, CEQA Guidelines developed by the Office of Planning and Research for adoption by the Secretary for Resources, 14 Cal. Code Regs. Sections 15000 et seq.
[2] SB115, Solis; Stats. 99, ch. 690, Gov't. Code section 65040.12 and Public Resources Code sections 72000-01
[3] 42 U.S.C. sections 7401 et seq. (Public Law 88-206, 77 Stat. 392, December 17, 1963, as last amended by the Clean Air Act Amendments of 1990, P. L. 101-549, November 15, 1990); and Health and Safety Code sections 39000 et seq., respectively
[4] See Public Resources Code (PRC) sections 21002.1, 21061, 21064, and 21080.1. See also, 14 Cal. Code Regs. §15002
[5] PRC §21000(g); emphasis added
[6] PRC §21001.1
[7] PRC §21001(a), (d), (e), and (g)
[8] PRC §21082
[9] PRC §21002
[10] PRC §21004
[11] 14 Cal. Code Regs. §15040
[12] 14 Cal. Code Regs. §§15050-51
[13] 14 Cal. Code Regs. §15041(a)
[14] 14 Cal. Code Regs. §15041(b)
[15] 14 Cal. Code Regs. §15042
[16] McManus v. CAB (2nd Cir. 1961) 286 F.2d 414, 419; City of Seabrook, Texas v. U.S. EPA (5th Cir. 1981) 659 F.2d 1344 (cert. den. 459 U.S. 822); Connecticut Fund for the Environment, Inc. v. EPA (2nd Cir. 1982) 672 F.2d 998 (cert. den 459 U.S. 1035); and Kamp v. Hernandez (9th Cir. 1985) 752 F.2d 1444
[17] 14 Cal. Code Regs. §15042; emphasis added
[18] PRC §21081(a) and 14 Cal. Code Regs. §15091
[19] PRC §21081(b) and 14 Cal. Code Regs. §15093
[20] PRC §21081(a); emphasis added
[21] The author notes that a number of air districts appear to believe they have less legal authority to condition or deny permits to avoid adverse impacts than is actually the case; many times Districts do not take advantage of their statutory authority in adopting rules and regulations, unnecessarily narrowing their scope of action (e.g., section 41700 of the H&SC can be used in conjunction with other provisions to require that cumulative impacts be addressed through mitigation or even permit denial).
[22] PRC §21083
[23] PRC §21083(b)
[24] Id.
[25] PRC §21083(c)
[26] PRC §21100
[27] 14 Cal. Code Regs. §§15064(i)(1), 15065(c), and 15130
[28] 14 Cal. Code Regs. §§15064(i)(3) and (l)(4), respectively
[29] Communities for a Better Environment v California Resources Agency (Sacramento Superior Court: Case No. 00CS 00300, April 13, 2001). Currently on appeal.
[30] Kings County Farm Bureau v City of Hanford (1990) 221 Cal. App. 3d 692; Los Angeles Unified School District v City of Los Angeles (1997) 58 Cal. App. 4th 1019
[31] 14 Cal. Code Regs. §15355; emphasis added
[32] 14 Cal. Code Regs. §15130(a)(3); emphasis added
[33] See 14 Cal. Code Regs. §15130
[34] 14 Cal. Code Regs. §15064(e)

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[35] Id.
[36] 14 Cal. Code Regs. §15126.2(a)
[37] 14 Cal. Code Regs. §15131(b)
[38] 14 Cal. Code Regs. §13131(c); emphasis added
[39] AB 937 (Royball-Allard; 1991-92 Reg. Sess.); AB 3024 (Royball-Allard; 1991-92 Reg. Sess.); SB 451 (Watson; 1997-98 Reg. Sess.); SB 1113 (Solis; 1997-98 Reg. Sess.); and AB 2237 (Escutia; 1997-98 Reg. Sess)
[40] AB 937, California Legislature 1991-92 Reg. Sess. Similarly, Governor Wilson's veto message on AB 3024 stated that the "bill would impose an unnecessary burden" upon development projects applicants because "existing law allows an interested party to provide any information on the demographics pertaining to the proposed site" and that the local public "officials who consider such projects...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." In 1997, Governor Wilson vetoed SB 451 and SB 1113 because CEQA already allowed consideration of the fair treatment of people, regardless of race, culture, and income level, that "nothing of practical value" would be added "to the present extensive and rigorous protections and planning requirements demanded by existing law"; and that CEQA was already too cumbersome "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."

By 1997, it appears that Pete Wilson had changed his mind regarding CEQA's role in addressing EJ concerns. His veto message on SB 1113, which would have amended CEQA to require the Guidelines to provide for the identification and mitigation of disparate environmental impacts on minority and low-income populations, asserted that "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 [CEQA] was not designed to be used as a tool for social movement..."
[41] SB 115, Stats. 1999, ch. 690 (Gov't. Code §65040.12 and Public Resources Code §§72000-01); SB 89, Stats. 2000, ch. 728 (Gov't. Code §65040.12 and Public Resources Code §§72000, 72001.5, and 72002-04); AB 970, Stats. 2000, ch. 329 (Public Resources Code §25550(g)); and AB 1740, Stats. 2000, ch. 52 (budget bill appropriation for CalEPA, item 0555-001-0001). Sections 72000-72004 of the PRC have been renumbered as sections 71110-71115 and amended by Stats. 2001, ch. 765 (SB 828), §§3-7 and 9.
[42] AB 1553, Stats. 2001, ch. 762 (Gov't. Code §65040.12)
[43] PRC §71111; see CalEPA, "Final Draft Environmental Justice Model Mission Statement, "December 20, 2000. The statement will continue to be discussed at public workshops, and reads as follows:

> To accord the highest respect and value to every individual and community, the CalEPA and its BDO's shall conduct their public health and environmental protection programs, policies, and activities in a manner that is designed to promote equality and afford fair treatment, full access, and full protection to all Californians, including low-income and minority populations.

[44] PRC §71110(a)
[45] PRC §71110(b) - (g)
[46] SB 828, Stats. 2001, ch. 765 (PRC §71113(a))
[47] PRC §71113(c)
[48] See "Policies and Actions for Environmental Justice," ARB, December 13, 2001.
[49] Stats. 2000, ch. 52, item 0555-002-0001, emphasis added. The other responsibilities of the assistant secretary include the following: reviewing the regulatory activities of each BDO to ensure EJ is addressed; establishing a public education program and ensure that information is provided "to affected populations in forms and languages that are understandable, informative, and usable"; coordinating and overseeing the agency's EJ activities; identifying shortcomings in the EJ activities of the BDOs; and developing the EJ mission statement.
[50] The definition of "major source" depends upon the severity of the nonattainment problem; while the general definition in section 302(j) defines a major stationary source as one with the potential to emit 100 tons or more per year of any air pollutant, a major source in an "extreme" nonattaiment area such as the South Coast Air Basin includes any source with a potential to emit 10 TPY of VOC or NOx (see Clean Air Act sections 182(e) and (f)).
[51] Clean Air Act section 173(a)(5); emphasis added
[52] Memorandum from Gary S. Guzy, EPA General Counsel, to EPA Assistant Administrators (December 1, 2000)

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[53] The State of California Implementation Plan for Achieving and Maintaining the NAAQS, (originally submitted February 21, 1972), submittal of October 20, 1980; 40 CFR §52.220(c)(63)
[54] Clean Air Act sections 113 and 304, respectively
[55] 42 USC §2000d
[56] Guardian Ass'n. v Civil Service Commission of City of N.Y. (1983) 463 U.S. 582, 584, and 607; Alexander v Choate (1985) 469 U.S. 287, 293
[57] 40 CFR §7.35(b)
[58] 40 CFR §2000d-4a
[59] Of over 100 complaints filed to date with OCR, only one – Select Steel – has been decided on the merits. Of the twelve complaints filed against California agencies and projects between 1994 and 2000, six have been rejected, three accepted for consideration and investigation, and three are currently under review.
[60] Exec. Order No 12898, 59 Fed. Reg. 7629 (1994)
[61] See Friends of Mammoth v Bd. Of Sups. (19--) 8 Cal. 3d 247
[62] Ellen M. Peter, "Implementing Environmental Justice: The New Agenda for California State Agencies." 31 Golden Gate U. Law Review 529 (Spring 2001)
[63] US EPA, Office of Federal Activities, "Final Guidance for Incorporating Environmental Justice Concerns in EPA's NEPA Compliance Analysis" (April 1998)
[64] "Draft Title VI Guidance for EPA Assistance Recipients Administering Environmental Permitting Programs" and "Draft Revised Guidance for Investigating Title VI Administrative Complaints Challenging Permits," 65 Fed. Reg. 39650 (June 2000)
[65] See South Camden Citizens in Action, et. al. v New Jersey Dept. of Environmental Protection, et. al. (U.S. District Court for the District of New Jersey, 2001) 145 F. Supp. 445. (Reversed on other grounds.)
[66] Health and Safety Code §39600; emphasis added
[67] Health and Safety Code §39601(c)
[68] Health and Safety Code §39003
[69] Health and Safety Code §39500
[70] Health and Safety Code §39002, emphasis added. (See also, Health and Safety Code sections 41500 – 41505)
[71] We note that Health and Safety Code section 39037 defines "local or regional authority" as "the governing board of any city, county, or district." However, it is beyond the scope of this memo to opine on the extent to which the ARB could direct city and county land use authorities to address EJ cumulative impact issues in carrying out the air quality aspects of their facility siting decision-making and the best means to use in doing so.

Daily Mail June 19, 2002, Wednesday

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June 19, 2002, Wednesday

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HEADLINE: FBI Launch Search for Al Qaeda **Terror** Ship Targeting Los Angeles

BYLINE: By William Lowther

BODY:
The U.S. Coast Guard and the FBI were last night searching for a cargo ship carrying Al Qaeda terrorists on a suicide mission to attack Los Angeles.

CIA sources said the freighter was believed to be somewhere in the Pacific with secret plans to land the terrorists and an arsenal of weapons near Santa Catalina Island, just off the California coast.

But the U.S. Navy says it is impossible to stop every one of the thousands of vessels sailing up and down America's west coast. The FBI discovered the plot about a month ago when an informer revealed that the ship had left a Middle Eastern port with up to 40 highly-trained Al Qaeda fighters on board.

The **terror** ship is believed to have crossed the Indian Ocean and stopped at ports, including at least one in Indonesia, before entering the Pacific.

The FBI has questioned Middle Eastern men in the Los Angeles area in connection with the ship.

An FBI spokesman confirmed the investigation but refused to comment further.

U.S. intelligence officials believe there is a connection between the ship and state-ments made by Al Qaeda spokesman Suleiman Abu Ghaith.

He was quoted as saying: "What is in waiting for the Americans will not be inferior to what the United States has already gone through."

Abu Ghaith told the Arabic newspaper Al-Hayat: "Let America be prepared to fasten its seat belt, because thanks to God, we are going to surprise it in a place where it is not expecting."

U.S. Defence Secretary Donald Rumsfeld said last night that Al Qaeda terrorists were looking for softer targets as tighter security had made airliners, embassies and military facilities more difficult to penetrate. He said: "Their goal is to kill innocent men, women and children and there are lots of ways to do that."

Meanwhile, Saudi Arabia said yesterday it was holding seven Al Qaeda members on suspicion of planning **terror** attacks in the kingdom.

An interior ministry official said authorities were questioning six Saudis and one Sudanese.

The arrests followed months of surveillance, he said.

The seven had planned to "carry out terrorist attacks aimed at vital installations" in the kingdom by using explosives and surface-to-air missiles, the official said.

The Sudanese had been involved in an abortive missile attack near a Saudi airbase used by U.S. forces.

The arrests, the first involving members of Al Qaeda announced by the kingdom since the September 11 attacks, follow claims by some U.S. lawmakers that Saudi Arabia was not doing enough to fight terrorism.

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COMMENT LETTER NO. 47
LETTER FROM COMMUNITIES FOR A BETTER ENVIRONMENT

Scott Kuhn
June 25, 2002

Response 47-1

This comment states that a CARB legal memorandum disagrees with the statement that "there is no requirement at this time to focus the analysis in an EIR on any specific groups." However, the California Air Resources Board has provided a memorandum dated July 26, 2002 (copy attached) which confirms that CARB agrees that CEQA "does not require an analysis of the impacts on specific groups." The July 26th CARB memo states that CARB's legal memo, relied upon by the commenter, does not mean that the EIR must include an analysis of the effects of the project on specific groups. This does not mean that environmental justice is not being considered in the SCAQMD's permitting decisions. With regard to air toxics, the SCAQMD enforces rules to prevent project specific impacts from exceeding significance thresholds (Rule 1401). SCAQMD reduces cumulative air toxics impacts through rules applicable to specific types of sources (examples are: 1421 (drycleaning), 1425 (film cleaning and printing), 1467 (hexavalent chromium – chrome plating), 1404 (hexavalent chromium – cooling towers), 1420 (lead)) as well as through Rule 1402, which requires existing sources to reduce carcinogenic risks to 25 in a million if feasible. Similarly, criteria pollutants are reduced by requiring the best available control technology for new or modified sources and best available retrofit control technology for existing sources. U.S. EPA has recognized that denial of an individual permit is not necessarily an appropriate solution to a disparate impact. (65 Fed.Reg. at 39683.) Under CEQA, because this project has significant adverse environmental impacts, it may only be approved upon making a statement of specific overriding considerations justifying the approval. This is analogous to the requirement for justification for projects having a disparate impact on a specific group. The SCAQMD staff does not believe that denying this project would be an appropriate solution to the expressed environmental justice concerns. Such "redlining" would have serious adverse impact on the availability of reformulated gas in the area affected as well as Southern California as a whole. Instead, the most effective solution is to reduce such project specific impacts to the maximum extent feasible, and to aggressively address cumulative impacts through rules and incentive programs such that air quality improves to acceptable levels. The SCAQMD is implementing an aggressive program to reduce emissions to address cumulative impacts.

Response 47-2

The commenter asserts that a CARB memo (attached to Comment 47) observes that it is doubtful whether the ARB or many districts or land use agencies currently prepare EIRs that meet these rigorous standards (p. 50-6). This observation was made in reference to the requirement to analyze cumulative impacts of the project. However, the SEIR for this project contains an extensive (46-page) discussion of cumulative impacts, including discussion of other local refineries' reformulated fuels projects and other projects occurring in relatively nearby areas, such as the Alameda Corridor and the Ports of Los Angeles and Long Beach. Cumulative impacts from all such projects are

assessed and identified as to whether they are significant. Mitigation measures and level of significance after mitigation are discussed. The cited CARB memo also notes there is a "lack of technical tools and models to enable meaningful and accurate preparation of a cumulative impacts analysis," but that CARB is conducting work to improve the tools for such analysis. SCAQMD looks forward to improving cumulative impacts analysis as new tools become available.

This comment also notes that the CARB memo states that CEQA can be employed by public agencies to address EJ concerns in permitting (p. 7). But the memo goes on to explain that CEQA already accomplishes EJ goals, because of the extensive environmental studies that must be completed under CEQA.

Response 47-3

This comment notes that the SCAQMD, as a federally funded agency, is subject to the requirements of Title VI of the Civil Rights Act and its implementing regulations. The SCAQMD recognizes this fact and is implementing extensive measures to address environmental justice concerns (see Response 44-2).

Response 47-4

See Responses 4-1, 4-2, and 45-11 regarding the hazards related to terrorist attacks. The proposed project will occur at existing facilities so a terrorist attack and resulting effects would in large be part of the existing setting. Further in response to the September 11, 2001 terrorist attacks in New York, increased/enhanced safety/security measures are being put into place or are already in place (see Responses 4-2, 7-22, 7-25, and 45-11).

The comment that "(t)his would exponentially increase an explosion or toxic release" is incorrect as the worst-case analysis has been completed for the proposed project and the maximum impacts have been determined.

Developing/implementing evacuation plans relative to terrorist attacks is the responsibility of civil defense authorities (e.g., the local fire departments and U.S. Coast Guard) in conjunction with the local schools, as would be the case in time of war. Evacuation plans for residents and local schools would not be the responsibility of local businesses. Local business are responsible for evacuation/emergency plans for their own businesses.

Response 47-5

See Responses 7-101 and 45-13 regarding the redevelopment of the Ultramar Marine Terminal.

Response 47-6

See Responses 7-101, 45-14 and 45-15 regarding the redevelopment of the Ultramar Marine Terminal.

Response 47-7

Please see Responses 4-1 through 4-11 for responses to the comments from the California State Lands Commission.

Response 47-8

Please see Response 5-1 regarding the storage of ethanol at Ultramar facilities. Also, note that the State of California under an Executive Order from the Governor conducted numerous studies on the impacts of both MTBE and ethanol on water supplies. Those studies are summarized on pages 3-36 through 3-37.

Response 47-9

Please see Responses 5-2 through 5-4 for responses to comments from the Port of Los Angeles.

Response 47-10

Please see Responses 6-2 through 6-7 for responses to comments from the Audubon Society.

Response 47-11

Please see Responses 9-2 through 9-11 and 9-13 for responses to comments from the Wilmington Coalition for a Safe Environment.

Response 47-12

A copy of the transcript from the June 20, 2002 has been provided to CBE.

Response 47-13

Pursuant to Public Resources Code §21091(2)(4), a lead agency may respond to comments submitted after the close of the comment period, but is not required to respond. The SCAQMD has evaluated all comments on environmental issues received from persons who reviewed the Draft SEIR and has prepared written responses to all comments, even those submitted after the close of the public comment period. Responses will be provided to the commentator.

DABWORD:1936RTC3