

ARTICLE

SB 115: CALIFORNIA'S RESPONSE TO
ENVIRONMENTAL JUSTICE—
PROCESS OVER SUBSTANCE*CAROLINE FARRELL**

I. INTRODUCTION

Shortly after a pivotal decision in Warren County brought the disparate adverse impacts of land-use decisions on communities of color and low-income populations to the national consciousness, California recognized the need to codify environmental justice in state law. This occurred in the 1980's; however, California did not enact its first environmental justice bill until 1999. Even then, California's legislative efforts focused more on process rather than substance, delaying any concrete protection or redress for affected communities.

This article discusses California's development of an institutional framework for addressing environmental justice through the Governor's Office of Planning and Research ("OPR") and the California Environmental Protection Agency ("Cal/EPA"). It will demonstrate the ways these agencies' foci have been on coordination as well as formulating guidelines. Further, the article's purpose is to point out that while these guidelines provide important tools for environmental justice advocates, they do not provide any substantive guarantees that

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disproportionate impacts will not occur in communities of color and low-income populations.

II. BACKGROUND: WARREN COUNTY

In 1982, Warren County, North Carolina brought national attention to the reality that environmental decisions were disproportionately impacting people of color and low-income communities.¹ Five years before, Ward Transformer Company illegally dumped 32,000 cubic yards of soil contaminated with Polychlorinated Biphenyls (“PCBs”) along North Carolina roadsides.² After months of deliberation, and a less-than-rigorous site selection process, North Carolina’s Governor James Hunt determined that the contaminated soil should be disposed of in a PCB landfill in Afton, North Carolina, a community that was 63.7% African American and ranked 92nd out of 100 North Carolina counties in median family income in 1980.³

The decision to site a PCB landfill in Warren County was seen as a political decision rather than a scientifically sound decision. The water table at the landfill was shallow—just 5 to 10 feet below the surface—and was the source of residents’ drinking water. Local Afton residents organized themselves to oppose the toxic-waste landfill and were joined by civil rights leaders, church leaders, African-American elected officials, and environmental leaders, all calling for an end to the State’s environmental racism.⁴ In 1982, just after the landfill began accepting waste, 500 protesters gathered in Warren County, and the environmental justice movement was born.⁵

Following the Warren County protests, in 1983, the Congressional

¹ ROBERT D. BULLARD, *DUMPING IN DIXIE: RACE, CLASS, AND ENVIRONMENTAL QUALITY* 35 (Westview Press 1990), available at <http://www.ciesin.columbia.edu/docs/010-278/010-278chpt2.html>.

² *Id.* at 35-36.

³ *Id.*; see also ROBERT D. BULLARD, *ENVIRONMENTAL RACISM PCB LANDFILL FINALLY REMEDIED BUT NO REPARATIONS FOR RESIDENTS* (2004), <http://www.ejrc.cau.edu/warren%20county%20rdb.htm>.

⁴ ROBERT D. BULLARD, *DUMPING IN DIXIE: RACE, CLASS, AND ENVIRONMENTAL QUALITY* 35 (Westview Press 1990), available at <http://www.ciesin.columbia.edu/docs/010-278/010-278chpt2.html>; see also ROBERT D. BULLARD, *ENVIRONMENTAL RACISM PCB LANDFILL FINALLY REMEDIED BUT NO REPARATIONS FOR RESIDENTS* (2004), <http://www.ejrc.cau.edu/warren%20county%20rdb.htm>.

⁵ ROBERT D. BULLARD, *DUMPING IN DIXIE: RACE, CLASS, AND ENVIRONMENTAL QUALITY* 35 (Westview Press 1990), available at <http://www.ciesin.columbia.edu/docs/010-278/010-278chpt2.html>; see also ROBERT D. BULLARD, *ENVIRONMENTAL RACISM PCB LANDFILL FINALLY REMEDIED BUT NO REPARATIONS FOR RESIDENTS* (2004), <http://www.ejrc.cau.edu/warren%20county%20rdb.htm>.

Black Caucus commissioned the General Accounting Office⁶ (“GAO”) to conduct a study on the correlation between hazardous-waste-facility siting in EPA Region IV (Alabama, Florida, Georgia, Kentucky, Mississippi, North Carolina, South Carolina and Tennessee) and race.⁷ The GAO study found that three of the four landfills in Region IV were sited in communities populated predominantly by people of color.⁸ Expanding on this finding, the United Church of Christ’s Commission for Racial Justice released a report in 1987, which found that race is nationally the most consistent predictor of hazardous-waste-facility siting.⁹

At this same time in California, the California Integrated Waste Management Board commissioned a report on criteria for siting hazardous-waste incinerators.¹⁰ The Cerrell Report, named for the Board’s consultant, focused on community demographics that would minimize community opposition rather than scientific criteria for site selection.¹¹ It recommended siting hazardous-waste incinerators in low-income communities, communities with low educational attainment,

⁶ The GAO was renamed in July of 2004 as the “U.S. Government Accountability Office.”

⁷ ROBERT D. BULLARD, DUMPING IN DIXIE: RACE, CLASS, AND ENVIRONMENTAL QUALITY 38-43 (Westview Press 1990) available at <http://www.ciesin.columbia.edu/docs/010-278/010-278chpt2.html>; see also ROBERT D. BULLARD, ENVIRONMENTAL RACISM PCB LANDFILL FINALLY REMEDIED BUT NO REPARATIONS FOR RESIDENTS (2004), available at <http://www.ejrc.cau.edu/warren%20county%20rdb.htm>.

⁸ U.S. GENERAL ACCOUNTING OFFICE, Siting of Hazardous Waste Landfills and Their Correlation with Racial and Economic Status of Surrounding Communities 1-3 (1987); ROBERT D. BULLARD, DUMPING IN DIXIE: RACE, CLASS, AND ENVIRONMENTAL QUALITY 38-43 (Westview Press 1990) available at <http://www.ciesin.columbia.edu/docs/010-278/010-278chpt2.html>; see also ROBERT D. BULLARD, ENVIRONMENTAL RACISM PCB LANDFILL FINALLY REMEDIED BUT NO REPARATIONS FOR RESIDENTS (2004), available at <http://www.ejrc.cau.edu/warren%20county%20rdb.htm>.

⁹ COMMISSION FOR RACIAL JUSTICE, UNITED CHURCH OF CHRIST, Toxic Wastes and Race in the United States: A National Report on the Racial and Socio-Economic Characteristics of Communities with Hazardous Waste Sites, xiii-xvi (1987); ROBERT D. BULLARD, ENVIRONMENTAL RACISM PCB LANDFILL FINALLY REMEDIED BUT NO REPARATIONS FOR RESIDENTS (2004), available at <http://www.ejrc.cau.edu/warren%20county%20rdb.htm>; see also VIRGINIA NATURAL RESOURCES LEADERSHIP INSTITUTE, THE RISE OF ENVIRONMENTAL JUSTICE: RECONSIDERING EQUITY, BALANCING BURDENS, available at <http://www.virginia.edu/ien/vnrli/docs/EJ2005.pdf> (last visited July 13, 2007).

¹⁰ LUKE W. COLE & SHEILA R. FOSTER, FROM THE GROUND UP: ENVIRONMENTAL RACISM AND THE RISE OF THE ENVIRONMENTAL JUSTICE MOVEMENT 71-72 (2001); see also Ellen M. Peter, *Implementing Environmental Justice: The New Agenda for California State Agencies*, 31 GOLDEN GATE U.L. REV. 571-72 (2001).

¹¹ J. Stephen Powell, Cerrell Associates, Political Difficulties Facing Waste to Energy Conversion Plant Siting 17-30, 65 (1984); LUKE W. COLE & SHEILA R. FOSTER, FROM THE GROUND UP: ENVIRONMENTAL RACISM AND THE RISE OF THE ENVIRONMENTAL JUSTICE MOVEMENT 71-72 (2001); see also Ellen M. Peter, *Implementing Environmental Justice: The New Agenda for California State Agencies*, 31 GOLDEN GATE U.L. REV. 571-72 (2001).

communities with a high proportion of Catholics, and communities where jobs are largely in resource extraction, such as mining or agriculture.¹² Thus, the Cerrell Report essentially recommended the siting of hazardous-waste facilities in Latino farmworker communities, although it did not expressly identify the communities as such. While the California Integrated Waste Management Board disavowed the Cerrell Report, all three of California's hazardous-waste facilities—Buttonwillow, Kettleman City, and Westmorland—are located in communities that meet the Cerrell Report factors.¹³ It became clear that these land-use decisions were based more on politics than science.

III. THE CALIFORNIA EXPERIENCE

California's first environmental justice statute, Senate Bill 115 ("SB 115"), was signed into law in 1999. Five previous environmental justice bills had been proposed and passed in the legislature, but Governor Pete Wilson vetoed them all.¹⁴ These bills progressed from a very narrow focus on hazardous-waste facilities to a broader understanding of environmental justice as dealing with all types of environmental issues, from land use to air quality to toxics. But as these bills broadened in applicability, they began to focus more on process than substance.

A. PRE-SB 115

In 1991, the California legislature passed Assembly Bill 937 ("AB 937") (Royball-Allard), its first environmental justice bill, which required any developer of a high-impact development, such as a hazardous-waste facility or solid-waste facility, to submit demographic information about the project area as part of the permit application.¹⁵ While the focus was only on waste facilities, the bill had a substantive and outcome-determinative component. Under this legislation, the local

¹² J. Stephen Powell, Cerrell Associates, Political Difficulties Facing Waste to Energy Conversion Plant Siting 17-30, 65 (1984); LUKE W. COLE & SHEILA R. FOSTER, FROM THE GROUND UP: ENVIRONMENTAL RACISM AND THE RISE OF THE ENVIRONMENTAL JUSTICE MOVEMENT 71-72 (2001); see also Ellen M. Peter, *Implementing Environmental Justice: The New Agenda for California State Agencies*, 31 GOLDEN GATE U.L. REV. 571-72 (2001).

¹³ LUKE W. COLE & SHEILA R. FOSTER, FROM THE GROUND UP: ENVIRONMENTAL RACISM AND THE RISE OF THE ENVIRONMENTAL JUSTICE MOVEMENT 71-72 (2001).

¹⁴ Ellen M. Peter, *Implementing Environmental Justice: The New Agenda for California State Agencies*, 31 GOLDEN GATE U.L. REV. 529, 543 (2001).

¹⁵ 1991 BILL TEXT CA A.B. 937; see also Ellen M. Peter, *Implementing Environmental Justice: The New Agenda for California State Agencies*, 31 GOLDEN GATE U.L. REV. 529, 543-44 (2001).

agency could not approve a project if this demographic information was not included. After this legislation was vetoed, similar legislation was introduced in 1992 as AB 3024 (Royball-Allard) and passed again, only this time it excused a project applicant from submitting demographic information as a separate submittal if it was already included in the environmental review documents.¹⁶ Again, however, the local agency could not approve the project without the demographic information included as part of the project application.¹⁷ Neither bill required that the decisionmaking body make any particular finding with respect to the demographic information.

Environmental justice was the focus again in 1997, when the legislature passed two bills, SB 451 (Watson) and SB 1113 (Solis). SB 451 required cities and counties updating the land-use elements of their general plans to provide for the general location of commercial and industrial uses handling hazardous materials. The purpose of this was to “avoid concentrating these uses in close proximity to school, or residential communities and to provide for the fair treatment of people, regardless of race, culture, or income level.”¹⁸ SB 451 also provided a mechanism for people to participate in the general plan process. However, the bill was also very explicit that it did not create any new substantive rights, other than the right to comment.¹⁹

SB 1113 also dealt with land-use decisionmaking. It focused on the California Environmental Quality Act (“CEQA”) and required OPR to recommend proposed changes to the CEQA Guidelines²⁰ by January 1, 2000, to “provide for the identification and mitigation by public agencies of disproportionately high and adverse environmental effects of projects on minority populations and low-income populations.”²¹ SB 1113 also required OPR to review its databases relating to environmental documents submitted to the State Clearinghouse to “identify communities and populations affected by disproportionately high and adverse environmental effects of projects.”²² SB 1113 also required OPR

¹⁶ Ellen M. Peter, *Implementing Environmental Justice: The New Agenda for California State Agencies*, 31 GOLDEN GATE U.L. REV. 529, 543-44 (2001).

¹⁷ *Id.*

¹⁸ S.B. 451 (Cal. 1997), available at http://info.sen.ca.gov/pub/97-98/bill/sen/sb_0451-0500/sb_451_bill_19970905_enrolled.html; see also Ellen M. Peter, *Implementing Environmental Justice: The New Agenda for California State Agencies*, 31 GOLDEN GATE U.L. REV. 529, 544-46 (2001).

¹⁹ *Id.*

²⁰ See CAL. CODE REGS. Tit. 14, § 15000 *et seq.* (Westlaw 2007).

²¹ S.B. 1113 (Cal. 1997), available at http://www.leginfo.ca.gov/pub/97-98/bill/sen/sb_1101-1150/sb_1113_bill_19970911_enrolled.html.

²² *Id.*

to rely on procedures to implement Executive Order 12898²³ in meeting these requirements.²⁴ SB 1113 had some substantive overtones to it. CEQA requires that all adverse environmental impacts be identified, analyzed, and mitigated to the extent feasible in the preparation of environmental documents.²⁵ By explicitly identifying environmental justice as an environmental impact needing mitigation, SB 1113 gave impacted communities a substantive tool with which to advocate for their environmental health.

In 1998, AB 2237 (Escutia) took a different approach to environmental justice. It did not explicitly focus on environmental justice, but rather required environmental agencies, such as Cal/EPA, to examine their loan- and grant-funding criteria with an eye on disproportionate impacts and opportunities for public involvement in decisionmaking.²⁶ While AB 2237 did not create any substantive rights, it did tie equitable decisionmaking and state funding together, thereby creating incentives to prevent disproportionate impacts.

Although none of these bills became law, they provided the framework for future environmental justice legislation in California, such as SB 115.

B. SB 115

SB 115 (Solis) was introduced on December 17, 1998. In its first iteration, SB 115 mirrored SB 1113 by focusing on CEQA. The bill sought to amend § 21087 of and add § 21001.2 to the Public Resources Code. As introduced, SB 115 would have added § 21001.2 to read as follows:

21001.2. The Legislature hereby finds and declares that people of all races, cultures, and incomes must be treated fairly with respect to the development, adoption, implementation, and enforcement of

²³ Executive Order 12898 was signed by President Clinton on February 11, 1994. It required each federal agency to “make achieving environmental justice part of its mission by identifying and addressing ... disproportionately high and adverse human health or environmental effects of its programs, policies and activities” on communities of color and low-income communities in the United States. 59 Fed. Reg. 7629 (1994).

²⁴ S.B. 1113 (Cal. 1997), available at http://www.leginfo.ca.gov/pub/97-98/bill/sen/sb_1101-1150/sb_1113_bill_19970911_enrolled.html; Ellen M. Peter, *Implementing Environmental Justice: The New Agenda for California State Agencies*, 31 GOLDEN GATE U.L. REV. 529, 544, 546-47 (2001).

²⁵ CAL. PUB. RES. CODE §§ 21002, 21002.1(a), 21061.

²⁶ Assemb. B. 2237 (Cal. 1998), available at http://www.leginfo.ca.gov/pub/97-98/bill/asm/ab_2201-2250/ab_2237_bill_19980827_enrolled.html; Ellen M. Peter, *Implementing Environmental Justice: The New Agenda for California State Agencies*, 31 GOLDEN GATE U.L. REV. 529, 547-48 (2001).

environmental statutes, ordinances, regulations, and public policies.²⁷

Section 21087 required the OPR to propose changes to the CEQA Guidelines to “provide for the identification and mitigation by public agencies of disproportionate high and adverse environmental effects of projects on minority populations and low-income populations.”²⁸ As under SB 1113, OPR was directed to consult with other state agencies and review databases, including the State Clearinghouse, to identify disproportionately impacted communities. OPR was also required to rely on procedures to implement federal Executive Order 12898 in meeting SB 115’s requirements.²⁹ Again, SB 115 had some hints of substantive application based on CEQA’s requirements to identify, analyze and mitigate when feasible significant environmental impacts.³⁰

However, SB 115 was amended six times, three in the Senate and three in the Assembly.³¹ Overall, the Senate amendments consisted of some minor tweaking of the language, and reorganization, but the bill retained its substantive elements. The first amendments on March 10, 1999, required the OPR and the Secretary of Resources to “coordinate their efforts, share information with the United States Environmental Protection Agency, and utilize existing databases, including U.S. census data and any information available from the United States Environmental Protection Agency as a result of its regulatory activities under federal Executive Order 12898.”³²

The second round of Senate amendments on April 5, 1999, was somewhat more extensive. The Senate added subsection (b) to Public Resources Code § 21001.2, requiring the following:

Each state agency shall make achieving environmental justice part of its mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minority populations and low-income populations in the state.³³

OPR was also directed to develop “an agency-wide environmental justice strategy that addresses disproportionately high and adverse human

²⁷ S.B. 115 (Cal. 1998), available at http://info.sen.ca.gov/pub/99-00/bill/sen/sb_0101-0150/sb_115_bill_19981217_introduced.html.

²⁸ *Id.*

²⁹ S.B. (Cal. 1998), available at http://info.sen.ca.gov/pub/99-00/bill/sen/sb_0101-0150/sb_115_bill_19981217_introduced.html.

³⁰ CAL. PUB. RES. CODE §§ 21002, 21002.1(a), 21061.

³¹ S.B. 115 (Cal. 1998), available at http://info.sen.ca.gov/pub/99-00/bill/sen/sb_0101-0150/sb_115_bill_19991010_chaptered.html.

³² *Id.*

³³ *Id.*

health or environmental effects of programs, policies, and activities on minority populations and low-income populations.”³⁴

The Senate also added language to Public Resources Code § 21087 requiring the OPR and the Secretary of Resources to rely in part on “guidelines adopted by the Council on Environmental Quality³⁵ to assist federal agencies so that environmental justice concerns are effectively identified and addressed in their National Environmental Policy Act³⁶ procedures.”³⁷ The bill continued to focus on incorporating environmental justice into all state agencies and particularly into proposed projects’ environmental review.

The final Senate amendment on April 14, 1999, continued the CEQA focus but also added Division 13.2 (commencing with § 21180) to the Public Resources Code, also known as the California Environmental Justice Act of 1999.³⁸ Rather than adding any new substantive provisions, the California Environmental Justice Act was a reorganization of previously proposed changes to the Public Resources Code. It duplicated the definition of environmental justice and the other environmental justice provisions proposed in previous versions of SB 115.³⁹

After SB 115 reached the Assembly, it began to undergo some significant changes. Initially the changes focused on process while maintaining the substantive elements. The first Assembly amendment on June 23, 1999, added language requiring OPR to consult with “state agencies, local agencies, and *affected communities*” in formulating an interagency environmental justice strategy.⁴⁰ This was a significant addition because, as was the case in Warren County, the people disproportionately impacted are in the best position to define what is or is not an environmental justice issue and how to solve that issue. The first Assembly amendment also required that each state agency report its

³⁴ *Id.*

³⁵ The Council on Environmental Quality is the federal equivalent of the Office of Planning and Research. As an office of the President responsible for coordinating environmental efforts between agencies and the White House, one of its main roles is creating guidelines for the National Environmental Policy Act (NEPA), which is the federal equivalent of CEQA. *See* Council on Environmental Quality, <http://www.whitehouse.gov/ceq/aboutceq.html> (last visited July 30, 2007).

³⁶ NEPA requires projects utilizing federal agencies to consider the environmental effects of their proposed activities, to document those impacts, and to disclose them to the public. *See* 42 U.S.C. § 4332 (Westlaw 2007).

³⁷ S.B. 115 (Cal. 1999). *available at* http://info.sen.ca.gov/pub/99-00/bill/sen/sb_0101-0150/sb_115_bill_19990405_amended_sen.html.

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ S.B. 115 (Cal. 1999). *available at* http://info.sen.ca.gov/pub/99-00/bill/sen/sb_0101-0150/sb_115_bill_19990623_amended_asm.html (emphasis added).

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implementation of its environmental justice mission and strategy to the legislature every two years.⁴¹

The second Assembly amendment completely reworked the bill. Instead of focusing on the Public Resources Code and CEQA, the bill now sought to add § 65040.12 to the Government Code, with an entirely procedural focus. The bill defined environmental justice, named the OPR the lead agency in California for environmental justice programs, and required the OPR director to consult with specified state agencies and coordinate with named federal agencies in the implementation of environmental justice programs.⁴²

The final version of SB 115 also defined environmental justice and divided responsibilities regarding environmental justice implementation between the OPR and Cal/EPA. SB 115 adds § 65040.12 to the Government Code, stating the duties of the OPR:

The office shall be the coordinating agency in state government for environmental justice programs.

The director shall do all of the following:

Consult with the Secretaries of the California Environmental Protection Agency, the Resources Agency, the Trade and Commerce Agency, the Business, Transportation and Housing Agency, and any other appropriate state agencies, and all other interested members of the public and private sectors in this state.

Coordinate the office's efforts and share information regarding environmental justice programs with the Council on Environmental Quality, the United States Environmental Protection Agency, the General Accounting Office, the Office of Management and Budget, and other Federal agencies.

Review and evaluate any information from federal agencies that is obtained as a result of their respective regulatory activities under federal Executive Order 12898.

For the Purposes of this section, "environmental justice" means 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.⁴³

SB 115 also added Section 72000 to the Public Resources Code to read:

The California Environmental Protection Agency, in designing its

⁴¹ S.B. 115 (Cal. 1999). *available at* http://info.sen.ca.gov/pub/99-00/bill/sen/sb_0101-0150/sb_115_bill_19990623_amended_asm.html.

⁴² *Id.*

⁴³ S.B. 115 (Cal. 1999). *available at* http://info.sen.ca.gov/pub/99-00/bill/sen/sb_0101-0150/sb_115_bill_19990903_amended_asm.html.

mission for programs, policies, and standards, shall do all of the following:

Conduct is programs, policies, and activities that substantially affect human health or the environment in a manner that ensures the fair treatment of people of all races, cultures, and income levels, including minority populations and low-income populations of the state.

Promote enforcement of all health and environmental statutes within its jurisdiction in a manner that ensures the fair treatment of all races, cultures, and income levels, including minority populations and low-income populations in the state.

Ensure greater public participation in the agency's development, adoption, and implementation of environmental regulations and policies.

Improve research and data collection for programs within the agency relating to the health of, and environment of, people of all races, cultures and income levels, including minority populations and low-income populations of the state.

Identify differential patterns of consumption of natural resources among people of different socio-economic classifications for programs within the agency.

72001. On or before January 1, 2001, the California Environmental Protection Agency shall develop a model environmental justice mission statement for boards, departments, and offices within the agency. For purposes of this section, environmental justice has the same meaning as defined in subdivision (c) of Section 65040.12 of the Government Code.⁴⁴

SB 115 provided a framework for coordinating environmental justice in California. Responsibilities are shared between OPR and Cal/EPA. The framework set out in SB 115 does not prohibit disproportionate impacts. The goal is that, through coordination and cooperation, these disproportionate impacts will not occur, but there is no guarantee. However, SB 115 explicitly recognizes the fact that disproportionate impacts occur and should be addressed. This can be a valuable tool for communities fighting for environmental justice.

IV. PRACTICAL EFFECT OF SB 115

Subsequent environmental justice legislation in California has followed the framework outlined in SB 115. In 2000, SB 89 (Escutia) passed, requiring Cal/EPA to form an Environmental Justice Working

⁴⁴ S.B. 115 (Cal. 1999), available at http://info.sen.ca.gov/pub/99-00/bill/sen/sb_0101-0150/sb_115_bill_19990909_amended_asm.html.

Group and Citizen Advisory Panel.⁴⁵ This was followed in 2001 by AB 1553 (Keeley), which required OPR to add environmental justice to its general plan guidelines for cities and counties.⁴⁶

A. OPR IMPLEMENTATION OF SB 115

The focus of OPR's environmental justice work has been its General Plan Guidelines.⁴⁷ Environmental justice is not a required element for general plans in California.⁴⁸ While OPR's guidelines are only advisory, they contain important recommendations for incorporating environmental justice into city and county general plans.⁴⁹ The Center on Race, Poverty & the Environment ("CRPE") has referenced SB 115 and OPR's guidelines in comments to Kern County on its General Plan Update.⁵⁰ The fact that these principles were grounded in state law added legitimacy to CRPE's comments and prompted Kern County to adopt three environmental justice policies in its general plan.⁵¹

CRPE is currently using SB 115's definition of environmental justice and OPR's guidelines to force Tulare County to adopt environmental justice provisions in its General Plan Update.⁵² Tulare County's current General Plan was last updated in 1971. The 1971 General Plan contains a provision stating that communities that do not have a viable or authentic future will be denied public services, with the expectation that these communities will enter a period of "natural decline" and wither away.⁵³ Many of the communities considered not to have an authentic future are predominantly low-income Latino

⁴⁵ S.B. 89 (Cal. 1999) *available at* http://info.sen.ca.gov/pub/99-00/bill/sen/sb_0051-0100/sb_89_bill_20000927_chaptered.html.

⁴⁶ Assemb. B. 1553 (Cal. 2001) *available at* http://info.sen.ca.gov/pub/01-02/bill/asm/ab_1551-1600/ab_1553_bill_20011012_chaptered.html.

⁴⁷ GOVERNOR'S OFFICE OF PLANNING AND RESEARCH, STATE OF CALIFORNIA GENERAL PLAN GUIDELINES (2003), *available at* <http://www.opr.ca.gov>.

⁴⁸ CAL. GOV'T CODE § 65302 (Westlaw 2007).

⁴⁹ GOVERNOR'S OFFICE OF PLANNING AND RESEARCH, STATE OF CALIFORNIA GENERAL PLAN GUIDELINES 23-32 (2003), *available at* <http://www.opr.ca.gov> (discussing importance of public participation, suggesting tools with which to analyze and avoid environmental justice impacts, and recommending potential policies to address disproportionate impacts).

⁵⁰ See Letter from Caroline Farrell, Attorney at Law, to Lorelei Oviatt, AICP, Supervising Planner, Kern County Planning Department (Mar. 8, 2004) (on file with the author).

⁵¹ KERN COUNTY, KERN COUNTY GENERAL PLAN UPDATE, General Provisions 62 (2004), *available at* <http://www.co.kern.ca.us/planning/pdfs/kcgp/KCGPChp1LandUse.pdf>.

⁵² See Letter from Caroline Farrell, Attorney at Law, to Teresa Syzmanis, Tulare County Planning Department (Feb. 13, 2007) (on file with the author).

⁵³ County of Tulare General Plan Policy Summary 2.D.3, *available at* http://www.westplanning.com/docs/tulare/documents/gp_issues_summary/02-Water-LiquidWasteMgmt.PDF (last visited Jul. 23, 2007).

communities.

That state law and state guidelines contain provisions for environmental justice provides a level of legitimacy that decisionmakers often do not give to disproportionately impacted communities. While these tools do not guarantee that communities of color and low-income communities will not suffer disproportionate impacts, they do help highlight that such impacts exist and must be addressed.

B. CAL/EPA IMPLEMENTATION OF SB 115

Cal/EPA has been addressing environmental justice through its Interagency Working Group and Citizens Advisory Committee. Its website contains an entire section on its efforts to address environmental justice.⁵⁴ In October 2004, Cal/EPA adopted its Environmental Justice Action Plan.⁵⁵ At the outset, Cal/EPA states,

The EJ Action Plan should not be viewed as a mechanism to provide direct solutions to EJ problems in a particular community. Instead, the EJ Action Plan is intended for Cal/EPA and its [Boards, Divisions, and Offices] to assess different environmental scenarios, identify challenges and opportunities, explore practical application of strategies, and develop recommendations to address environmental justice issues.⁵⁶

Rather than providing direct assistance to communities, the plan is divided into five phases; all phases were expected to be accomplished by the end of 2006.⁵⁷ However, at the time of this writing, Cal/EPA is just finishing stage two of its plan.⁵⁸ While the plan consists of some positive aspects, such as adopting working definitions for precautionary principles, cumulative impacts, public participation policies, and capacity building,⁵⁹ it does not provide any immediate assistance for communities living with disproportionate impacts. It is unclear at this time whether

⁵⁴ California Environmental Protection Agency, Environmental Justice Program Homepage, <http://www.calepa.ca.gov/EnvJustice/> (last visited Jul. 23, 2007).

⁵⁵ CALIFORNIA ENVIRONMENTAL PROTECTION AGENCY, ENVIRONMENTAL JUSTICE ACTION PLAN (2004), *available at* <http://www.calepa.ca.gov/EnvJustice/ActionPlan/Documents/October2004/ActionPlan.pdf>.

⁵⁶ *Id.* at 2.

⁵⁷ *Id.* at 8.

⁵⁸ As part of its Action Plan, Cal/EPA identified six pilot projects. The results of these projects have recently been released to the public. *See* CALIFORNIA ENVIRONMENTAL PROTECTION AGENCY, ENVIRONMENTAL JUSTICE ACTION PLAN (2004), *available at* <http://www.calepa.ca.gov/EnvJustice/ActionPlan/>.

⁵⁹ CALIFORNIA ENVIRONMENTAL PROTECTION AGENCY, ENVIRONMENTAL JUSTICE ACTION PLAN 4-5 (2004), *available at* <http://www.calepa.ca.gov/EnvJustice/ActionPlan/>.

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this process will benefit such communities substantively.

V. CONCLUSION

The Warren County protests sparked a movement for Environmental Justice. California identified Environmental Justice as an issue of concern shortly after the Warren County protests. However, initial attempts to codify Environmental Justice were not successful until the passage of SB 115 in 1999. The institutional framework embodied in SB 115, dividing Environmental Justice responsibilities between OPR and Cal/EPA, has been followed in subsequent legislation.

While these legislative efforts have validated Environmental Justice as an issue that should be considered in all aspects of environmental planning, the agency focus has been largely on process. OPR and Cal/EPA have developed action plans and guidelines requiring consideration of environmental justice, but these plans do not guarantee communities of color or low income communities will not be disproportionately impacted. Concentrating on process rather than outcome does not ensure that Warren County is not repeated, it merely ensures that everyone has had the opportunity to participate in the process before the decision to dump PCBs in Warren County, Buttonwillow, Kettleman City or Westmorland is made again. The value of SB 115 and the subsequent regulatory plans and guidelines is in the tools they give to community activists and environmental justice advocates. They allow communities rather than government to define what constitutes Environmental Justice.