October 16, 2023

**Subject: Comments on Final Draft AB 617 Blueprint 2.0**

These comments request clarifying additions on four provisions of the Blueprint, as described below, following up on comments, attached, filed by myself and Ms. Margaret Gordon on July 31, 2023.

1. **Goal 2 (Non-discrimination), Priority Action 7 – Model Civil Rights Compliance Program.**

This action is an excellent addition to the Program. However, unlike the other actions, it has no dates assigned to it. This action should be initiated as soon as possible and be ongoing. CARB should commit to developing milestones and a stakeholder engagement plan, addressing potential roles for other relevant agencies (e.g. US EPA, CalEPA, OEHHA) and other advisors, EJ communities and advocates.

1. **Goal 2 (Non-discrimination), Priority Action 1 – Update Civil Rights Policy.**

Regarding the Policy update, as noted in our July 31, 2023 comments, CARB should commit to developing a defined engagement process for EJ and other stakeholders.

Complaint procedures. CARB should also commit to develop procedures for investigating complaints under both Title VI and California Code 11135. These procedures should be public, issued first as “interim” procedures subject to public review and comment and then finalized. CARB should establish milestones and a public/stakeholder engagement plan supporting a unique role for EJ and community advocates. Impacted EJ communities are not just “another stakeholder”.

Proactive policies. Further, CARB should also commit to *proactive policies and procedures* to avoid or prevent discriminatory effects rather than relying on public complaints to bring about nondiscrimination. Our July 31, 2023 comments go into more detail regarding this priority.

1. **Goal 2 (Non-discrimination), Priority Action 8 – Environmental Justice and Permitting.**

CARB must exercise its authority, as an oversight Agency and to achieve the intent of AB 617, by ensuring that the cleanest technologies are deployed in overburdened communities.

This Action should commit to going beyond its current reactive posture of “participating” in “US EPA – led efforts” and instead assert a proactive CARB role of “working with” US EPA and other forward leaning state air agencies such as New Jersey, Colorado and New York so that California may join such forward leaning agencies in setting best practices. It is inconsistent with CARB’s history and reputation to position itself as awaiting federal leadership on such timely enhancement of its air program, especially when other states have now taken more aggressive steps to address the needs of overburdened communities.

**Recommendation:** Revise Priority Action 8 as follows:

“~~Participate in~~ **Work with** U.S. EPA **and other forward leaning state and local air agencies** ~~led efforts~~ **to establish best EJ and permitting practices and** further develop national environmental justice and permitting tools.”

1. **Goal 4 (Stationary and Mobile Source Strategies)**

Goal 4 is a welcome addition to the Program, but it is also remarkably devoid of specifics with regard to stationary sources. Bearing in mind that the AB 617 program originated in and is rooted in environmental justice, and that AB 617 communities typically include stationary sources emitting significant quantities of pollutants, for this Goal to have meaning it must go beyond restating 5-6 year old policies and requirements.

It has been noted that the current “expedited BARCT” program is not only behind its originally mandated schedule, but also that it allows an undefined range of local discretion, considering factors such as regional costs, in defining local BARCT and BACT. Two pertinent facts come to mind.

1. BARCT determinations, at both the state and local level, should take into consideration the degree to which an area is disproportionately overburdened. There are examples of air agency programs addressing environmental justice and Title VI in the air permitting process and in determining BACT. Colorado recently considered revisions to its “Regulation 3” rules that tailor RACT/technology requirements to the extent to which an area is overburdened.
2. Title VI, California Code 11135. To the extent “local discretion” is relevant, local decisionmakers – and agencies overseeing those decisionmakers – should bear in mind that compliance with Title VI of the 1964 Civil Rights Act requires that such discretion be exercised in a way that avoids to the extent possible causing or contributing to disproportionate impacts on populations protected under the Civil Rights Act. California Code 11135 imposes analogous requirements.

**Recommendations:**

1. CARB should commit to applying its oversight responsibilities and discretion to the maximum extent possible and consistent with the purposes of AB 617, BARCT and BACT requirements, federal and state civil rights requirements, to ensure that AB 617 plans incorporate stationary source measures reflecting the most protective possible controls.
2. CARB should provide regular comprehensive reporting on how air districts are using AB 617 funding to implement expedited BARCT provisions of the law.
3. Air districts involved in the AB 617 program should be required to regularly report, on a sector specific basis, (1) whether they have adopted locally the most stringent technologies included in the State clearinghouse, (2) if not, their rationale, and (3) the extent to which they have considered other emerging technologies, including any that may have been raised by the public. Leilac’s July comments provide several examples of such approaches.

In conclusion, the above are recommended as clarifications or technical amendments to the Final Draft Blueprint. The intent is not to delay approval of the Blueprint but rather to provide additional clarification by CARB in moving ahead with the Blueprint and Program.

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**ATTACHMENT**

July 31, 2023

**AB 617, Environmental Justice and Civil Rights**

These comments are with regard to Goal 3, to “Center Non-discrimination Laws and Protection”. They come from the perspective of having participated in the Writers Group for the Peoples Blueprint. It was in that Peoples Blueprint effort that an emphasis of building civil rights into the AB 617 process was brought into the Blueprint drafting process.

Given that background, it is important to acknowledge that the Draft Blueprint 2.0 has taken major steps forward in putting environmental justice, equity and civil rights squarely on the AB 617 table. In light of the AB 617 program’s precedent setting innovative approach to community-centered environmental and public health protection, integration of meaningful and effective civil rights policies and actions into the program is essential.

**Civil Rights**

By way of background, a main failing of federal environmental justice policies and programs at the federal level, and in particular at the US EPA until recent years, has been the disconnect between environmental justice and civil rights, most specifically with the requirements under Title VI of the 1964 Civil Rights Act. This was partially remedied under the Obama administration, primarily on paper though not in policy or operation. The Biden administration, with Michael Regan heading up EPA and coordinating closely with the Department of Justice, has made substantial strides in policy, guidance and practice in harnessing Title VI, environmental justice and environmental protection in a more coordinated effort.

One unfortunate effect of the US EPA’s previous delinquency on the civil rights front has been that few state environmental agencies have proceeded very far in bringing civil rights into their media programs, or even their environmental justice programs. While this has also been true in California, more recently we are seeing a number of steps forward, a most significant one being the incorporation of civil rights, specifically federal Title VI requirements and those under California Code 11135, into the AB 617 program by way of the Draft Blueprint 2.0.

**Civil Rights in the Blueprint**

The six Priority Actions listed in Part One are excellent as far as they go. When it comes to implementation in Part two, however, the Blueprint confines civil rights to a discussion of the “legal foundation” at pages 16-20. While the “prohibitions” under federal and state non-discrimination laws are well described, their practical implementation is not described in terms relevant to or understandable by participants in the AB 617 program.

The only actions described in any practical detail in Part Two have to do with complaint processes at the federal and state level, i.e. in a reactive role in response to violations of civil rights requirements. While there are vague references to “oversight” roles at US DOJ and EPA, as well as California’s Civil Rights Department, their relevance to CARB activities is clearly theoretical or aspirational at best, with no signs of practical effect yet on environmental and public health decisionmaking in California.

**Proactive civil rights**

“NOW, THEREFORE, BE IT RESOLVED that CARB condemns racism and racial bias

in all forms and in all spaces, and welcomes the opportunity to establish and enhance

proactive measures to ensure racial equity permeates all of CARB’s activities both internal and external.”

* Board Resolution 20-33, October 22, 2020

“…the recipient acknowledges it has an ***affirmative obligation*** to implement effective Title VI compliance programs and ensure that its actions do not involve discriminatory treatment and do not have discriminatory effects even when facially neutral. The recipient must be prepared to ***demonstrate to EPA that such compliance programs exist and are being implemented*** or to otherwise demonstrate how it is meeting its Title VI obligations.” (Emphasis added)

* Terms included in every US EPA award to CARB since 2013 (see pp 25-26 of “EPA General Terms and Conditions”[[1]](#footnote-1))

For CARB’s commitments to bringing civil rights effectively and meaningfully into the AB 617 program it must carry out a *proactive* approach, going beyond the reactive role of the complaint process. The core elements of a truly proactive non-discriminatory approach, without which a program cannot truly be said to be exercising due diligence in avoiding substantive discriminatory effects of any action are (1) an “equity” or environmental justice assessment of the distribution of benefits and burdens resulting from that action and (2) to the extent there is a potential disproportionate burden likely to affect a protected population, consideration of whether there is a reasonably available “less discriminatory alternative”.

For the AB 617 program to live up to its promise, and in light of the historical context in which it was created – amidst substantial environmental justice concerns regarding extension of the State’s cap and trade component of the State’s climate program – it is essential that the core principles of environmental justice and civil rights by applied to every aspect of the AB 617 program.

The “Priority Actions” for civil rights outlined in Part One should be carried over, expanded and elaborated upon in either Part One or Part Two at a level of detail allowing the reader to know what to watch for and when. Following are comments on the Priority Actions, intended to be reflected as implementation commitments and included in Blueprint 2.0. Transparency and accountability would require that estimated completion dates for those commitments be included.

Detailed comments follow and are organized according to the list of six Priority Actions included in Part One of the draft Blueprint for Goal 3, “Center Non-Discrimination Laws and Protections”.

**From Blueprint Part One list of Priority Actions for Goal 3:**

**1. Update CARB’s 2016 Civil Rights Policy and Discrimination Complaints Process20. (2023-2024)**

Comments:

CARB currently has no investigative guidance applicable to “external” complaints, i.e. complaints filed by parties external to CARB. For the complaint process to be meaningful, transparent and accountable CARB must develop investigative guidance for such complaints. For a starting point CARB should consult the DOJ Title VI Legal Manual[[2]](#footnote-2), EPA’s Case Resolution Manual[[3]](#footnote-3) and EPA’s 2017 Title VI Compliance Toolkit[[4]](#footnote-4).

CARB should have procedures for investigating complaints under both Title VI and California Code 11135. Further, these procedures should be public, issued first as “interim” procedures subject to public review and comment and then finalized.

**2. Ensure that OCAP’s orientation for new AB 617 Community Steering Committee members includes a focus on civil rights and communicates the process for making a complaint.**

Comments:

Education for AB 617 program participants should go beyond “orientation” and should include particular attention to requirements and obligations imposed on recipients of federal and/or state assistance. This should also go beyond the complaint process (recommendations for which are included above in discussion of Priority Action No. 1) and address the affirmative proactive requirements (see comments under Priority Action item No. 3 below).

**3. Update terms and conditions in all grant agreements administered by OCAP to ensure consistency with guidance from the California Department of Civil Rights and the U.S. Environmental Protection Agency’s External Civil Rights and Compliance Office. (2024)**

Comments:

Updated terms and conditions should be included in all grants administered by CARB (not just “administered by OCAP”) to any and all participants in any role in the AB 617 program. CARB should fully incorporate and adapt EPA’s detailed civil rights conditions, among them the “affirmative” commitment referenced above in comments on Priority Action No. 1:

“…the recipient acknowledges it has an ***affirmative obligation*** to implement effective Title VI compliance programs and ensure that its actions do not involve discriminatory treatment and do not have discriminatory effects even when facially neutral. The recipient must be prepared to ***demonstrate to EPA that such compliance programs exist and are being implemented*** or to otherwise demonstrate how it is meeting its Title VI obligations.” (Emphasis added)

(see pp 25-26 of “EPA General Terms and Conditions”[[5]](#footnote-5))

**4. Apply a racial equity lens to the current process for applications for Community Air Grants.**

Comments:

The scope of this action must be expanded. An equity assessment is an essential aspect of any duly diligent effort to comply with federal and state civil rights requirements. Without systematic use of such assessments there will be a lack of information available, for either decisionmakers or the affected public, to determine whether there are disproportionate effects being imposed on people whose protection is the intent of those requirements.

Thus a “racial equity lens” should be applied to many more activities than just applications for Community Air Grants. While it would be useful to see it applied to the CAG program, AB 617 community advocates have often raised the issue that there should be minimum “floor” requirements for air districts participating in the AB 617 program. One plank in such a “floor” should be compliance with federal and State civil rights requirements.

As discussed elsewhere in these comments and under Priority Action No. 6 (permitting), CARB has responsibilities under Title VI and California Code 11135 for ensuring that many different programs at CARB and at the agencies it oversees and provides assistance to also exercise due diligence in avoiding discriminatory effects of their many programs, policies and actions. There is a role for an “equity lens” in all of these programs and activities.

Application of a racial equity lens can and should be a basic component of CARB’s proactive compliance with Title VI and 11135. Regarding use of the lens:

* In the event there are questions about the adequacy of currently available assessment tools, consideration should also be given to the approach taken by Colorado’s air agency in its permitting program (see comments under Priority Action No. 6 below).
* Meaningful application of an equity assessment tool in avoiding discriminatory effects requires that it be applied in a context of consideration of alternatives. Both US DOJ and US EPA investigatory guidance provide a role for consideration of “less discriminatory alternatives” in addressing whatever the situation is (i.e. permitting a new facility, reducing fine PM impacts in San Joaquin Valley, etc.) that fall within the discretion of the agency taking an action (permit issuance, SIP adoption etc.) As described in a statement included in the DOJ Title VI Manual:

“Frequently, discrimination results from policies and practices that are neutral on their face but have the effect of discriminating[.] Those policies and practices must be eliminated unless they are shown to be necessary to the operation and there is no less discriminatory alternative.”[[6]](#footnote-6)

**5. Ensure that CARB staff are trained on civil rights responsibilities.**

Comments

CARB should work with the U.S. EPA, California Department of Civil Rights to develop and implement such training.

* In order to maximize effectiveness, leverage available resources and avoid conflicting programs, CARB should also coordinate with the California Attorney General’s office.
* Further, in order to bring adequate technical expertise to a CARB proactive approach, expertise from other relevant agencies such as OEHHA, DPR and others should be considered.

* Finally, in order to ensure effective consideration of potentially discriminatory effects, there should be inclusion of non-technical experts and expertise from areas such as social and political sciences, public health, intergenerational trauma and other areas relevant to understanding the broader context of *institutional and systemic racism*. As CARB noted in Resolution 20-33, “A Commitment to Racial Equity and Social Justice”, adopted on October 22, 2020 in the wake of the murder of George Floyd:
  + “…it is incumbent on CARB to also function as an agent of responsible social change, especially when it is clear that injustices persist that perpetuate institutional and structural racism;
  + “…institutional and structural racism continues to threaten CARB’s ability to equitably fulfill its charge so that all people of color - both inside the organization, and those outside the organization for whom CARB serves and works with as constituents and stakeholders - are treated without prejudice, bias and derision.”

**6. Participate in national efforts led by U.S. EPA to further develop environmental justice and permitting tools.**

Comments:

CARB must go beyond participating in U.S. EPA efforts and proceed, working with U.S. EPA and other relevant agencies, with developing its own policies and practices incorporating environmental justice and civil rights. As an agency both (1) funded by the federal government and (2) providing state funds and assistance to agencies and other parties, CARB has a number of roles and responsibilities relevant to permitting. CARB is both a “recipient” and “provider” of funds and assistance subject to federal and state civil rights requirements.

As a provider of guidance and assistance to regional and local air agencies, CARB should cognizant that best practices for ensuring that permitting practices are consistent with requirements for environmental justice and civil rights are constantly evolving. In just the past year EPA has issued two documents outlining in practical detail what such practices entail:

* “Interim Environmental Justice and Civil Rights in Permitting Frequently Asked Questions”, August, 2022[[7]](#footnote-7).
* “Principles for Addressing Environmental Justice in Air Permitting”, December 22, 2022[[8]](#footnote-8).

For an example of an air agency program seeking to address environmental justice and Title VI in its air permitting process, California air agencies should also consider taking an approach as recently adopted in Colorado as an “environmental justice report tool for air quality”[[9]](#footnote-9). The tool makes use of Colorado EnviroScreen, which is very similar to, and perhaps adapted from CalEnviroScreen.

All of the above establish a minimum bar for best practices in avoiding discriminatory permitting. There is no reason why California’s CARB, with its reputation for leadership in addressing air quality, should not also require best practices in nondiscriminatory permitting.

CARB should also address permitting requirements as they are impacted by AB 617’s Expedited BARCT requirement. One of CARB’s key roles spelled out in AB 617 is as the developer, implementer and overseer of the “expedited BARCT” requirement. While this in some ways takes the form or regulations, where the rubber hits the road is in its role in permitting. In implementing and overseeing the AB 617 Expedited BARCT requirement CARB should ensure that any deviations from the maximum BARCT benchmark require a justification showing compliance with Title VI and 11135. CARB should also consider imposing a higher standard for BARCT in areas demonstrably overburdened. Again, Colorado’s practices for incorporating environmental justice (and Title VI) into its air permitting practices should be considered.

Submitted by:

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1. <https://www.epa.gov/system/files/documents/2022-09/fy_2022_epa_general_terms_and_conditions_effective_october_1_2022_or_later.pdf> [↑](#footnote-ref-1)
2. <https://www.justice.gov/crt/fcs/T6manual> [↑](#footnote-ref-2)
3. <https://www.epa.gov/ogc/case-resolution-manual> [↑](#footnote-ref-3)
4. <https://www.epa.gov/sites/default/files/2017-01/documents/toolkit-chapter1-transmittal_letter-faqs.pdf> [↑](#footnote-ref-4)
5. <https://www.epa.gov/system/files/documents/2022-09/fy_2022_epa_general_terms_and_conditions_effective_october_1_2022_or_later.pdf> [↑](#footnote-ref-5)
6. Footnote 5, p4 Section VII of DOJ Title VI Legal Manual, Memorandum from the Assistant Attorney General to heads of Departments and Agencies that Provide Federal Financial Assistance (Jul. 14, 1994), available at http://www.justice.gov/ag/attorney general july 14 1994 memorandum use disparate impact standard administrative regulations. [↑](#footnote-ref-6)
7. <https://www.epa.gov/system/files/documents/2022-08/EJ%20and%20CR%20in%20PERMITTING%20FAQs%20508%20compliant.pdf> [↑](#footnote-ref-7)
8. Memorandum and Principles available at <https://www.epa.gov/caa-permitting/ej-air-permitting-principles-addressing-environmental-justice-concerns-air> [↑](#footnote-ref-8)
9. <https://cdphe.colorado.gov/new-environmental-justice-report-tool-for-air-quality-regulation-3> [↑](#footnote-ref-9)