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Problems, Promise, Progress, and Perils: Critical Reflections on Environmental Justice Policy Implementation in California

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I.

INTRODUCTION

Over the past two decades, the environmental justice movement has made numerous inroads in defining a number of problems as environmental racism and environmental inequalities. Entire areas of academic research and public policies have emerged to address these sets of social movement concerns.¹ Despite considerable research on environmental justice as a social movement, several important gaps still exist. This article seeks to address those gaps, particularly by elucidating the dynamic relationships between social movement actors and state agencies.

California has undertaken, in many ways, the most aggressive and robust “high stakes experiment” in passing environmental justice legislation and in institutionalizing environmental justice policy.² This article provides a critical assessment of environmental justice policy implementation in California since 2004. We chose 2004 as our start date because that is when the California Environmental Protection Agency (Cal/EPA) developed the landmark Environmental Justice Action Plan, enabling the following period to serve as a kind of large-scale laboratory in environmental justice policy implementation.

There is a substantial gap in the literature on California, although the state has experienced important experiments with en-

1. The following provide useful overviews of the expansion and diffusion of literature on environmental justice: Robert W. Williams, *Environmental Injustice in America and Its Politics of Scale*, POL. GEOGRAPHY 49-74 (Nov. 1999); WILLIAM BOWEN, ENVIRONMENTAL JUSTICE THROUGH RESEARCH BASED DECISION MAKING (Garland 2001); R.J. Brulle & David N. Pellow, *Environmental Justice: Human Health and Environmental Inequalities*, 27 ANN. REV. OF PUB. HEALTH 103-124 (2006); POWER, JUSTICE, AND THE ENVIRONMENT: A CRITICAL APPRAISAL OF THE ENVIRONMENTAL JUSTICE MOVEMENT (David N. Pellow & Robert Brulle eds., The MIT Press 2005).

2. We borrow this language from PETER SCHRAG, CALIFORNIA: AMERICA'S HIGH-STAKES EXPERIMENT (UC Press 2006).

vironmental justice policy implementation and activism.³ This article seeks to remedy the surprising dearth of research on California environmental justice movements.⁴ It also addresses the curious gap in the environmental justice literature that has under-analyzed the policy-making implications of environmental justice activism. Specifically, a large portion of the academic research has either focused on social movements, or the application of environmental justice analytic frameworks to different issues (including transportation, air quality, land use and public health).⁵ While studies generally cite, for instance, President Clinton's Executive Order 12898⁶, there is less understanding about the ways in which state agencies have regulated and enforced environmental justice. Likewise, many policy analyses, by focusing exclusively on public actors, neglect the interrelationships within the social movement/law/policy-making apparatus that influences the form and outcomes of environmental justice policy. Such an interactive analysis is needed to truly understand and explain the patterns of policy success and failure.

We intend our analysis of the successes and failures of California's ongoing experiment with environmental justice policy to inform scholars, the public, legislators and those staff working within state agencies who are grappling with whether these experiments have succeeded, the reasons why or why not, and how to improve their own operations. Our findings are that environmental justice policy in California is implemented primarily as a function of improving *participation*. This is important in that it responds, at least in part, to the demands by the environmental justice movement for procedural justice – self representation and participation to speak for themselves in crucial environmental decision making processes that impact them where they live, work, play, and learn.⁷

3. MODELS OF CHANGE: EFFORTS BY FOUR STATES TO ADDRESS ENVIRONMENTAL JUSTICE, PANEL OF THE NATIONAL ACADEMY OF PUBLIC ADMINISTRATION (2002), <http://www.abanet.org/irrr/committees/environmental/newsletter/dec03/Goode.html> (follow the link at end of summary entitled "here").

4. For example, none of the books on environmental justice themes in the highly regarded MIT Press series on Urban and Industrial Environments has a focus on California.

5. Julie Sze & Jonathan K. London, *Environmental Justice at the Crossroads*, 10 SOC. COMPASS 1331, 1333-37 (2008)

6. Exec. Order No. 12898, 59 FR 7629 (Feb. 14, 1994).

7. LUKE W. COLE & SHEILA R. FOSTER, FROM THE GROUND UP: ENVIRONMENTAL RACISM AND THE RISE OF THE ENVIRONMENTAL JUSTICE MOVEMENT (New York Univ. Press 2001).

However, we find both that state agencies have had uneven success in implementing this narrow view of environmental justice-as-participation and that environmental justice activists remain unsatisfied, demanding more aggressive action in actually reducing health disparities associated with pollution exposure (e.g., increased environmental monitoring and regulatory enforcement.). While self-representation and participation is a valuable goal, it does not address two other key elements of framing and implementing environmental justice in state policy: *distribution* and *recognition*. Participation alone does not make structural changes in social, economic and political systems that effect distribution of environmental inequalities by race, class, gender, location and other factors. Even when agencies do address distribution it is most often through a reformist approach that ignores “the social, cultural and symbolic, and institutional conditions underlying poor distributions in the first place.”⁸ Furthermore, because the agencies’ models of public participation do not fully recognize the legitimacy and value of the cultures of the “publics” they hope to engage, participation often results in further alienation, marginalization, and antagonism of the these environmental justice populations. In this way, we concur with Schlossberg that “recognition” of diverse cultural identities is a precondition for entry into the distributional system and ought to be considered a third definition of justice in environmental justice.⁹

The body of the article will explore the notable but uneven success of implementing environmental justice policies in California. Following this introduction, Part II provides a brief overview of the environmental justice movement in California, presenting the key analytic framework being discussed: the relationship between social movements, the law, and public policy implementation. We discuss how social movements define the problem of environmental injustice, and how legislation has developed to address these problems. In Part III, we further illuminate the progress made as well as the tensions experienced by public agencies as they struggle to deal with these legislative mandates and other external pressures. Therefore, we focus on the history of the processes of environmental justice policy incorporation at the Cal/EPA, including the development and implementation of the Cal/EPA “Environmental Justice Action Plan.”

8. David Schlosberg, *Reconceiving Environmental Justice: Global Movements and Political Theories*, 13 ENVTL. POL. 517, 518 (2004).

9. *Id.* at 518-19.

Part IV focuses on the politics of environmental justice-as-participation demonstrated by a case study at a particular state agency: the California Department of Pesticide Regulation (DPR). We select DPR because its efforts to implement environmental justice policy offer a unique opportunity to review the full spectrum of state agency activities. We review the interactions between four elements of DPR's engagement with environmental justice groups and their concerns. Two of the elements are primarily proactive in nature, including DPR's environmental justice pilot project in the town of Parlier and the work of the DPR Environmental Justice Advisory Working Group. The other two are largely reactive and include responses to a Senate bill legislating liability for pesticide drift incidents and responses to a lawsuit compelling the agency to develop tighter restrictions on ozone-forming pesticides. The contrast between proactive behaviors based on the agency's internal goals and reactive behaviors that respond to external forces provides a useful framework to understand the push and pull of regulatory agency-social movement relationships.

Moreover, the DPR example highlights the continuing perils and challenges that public agencies face in addressing and regulating environmental justice concerns. Taken collectively, our review provides a dynamic exploration of the complex agency-social movement relationships that shape environmental justice policy formation and implementation process at the state level in California.

II.

ENVIRONMENTAL JUSTICE MOVEMENT IN CALIFORNIA: PROBLEMS AND PUBLIC POLICY

A. *Defining the Problem*

The U.S.-based environmental justice movement emerged in the 1980's as a result of a confluence of events and reports¹⁰ about the inequitable burden of toxic facilities and pollution on low-income communities and communities of color that brought the terms "environmental racism" and "environmental justice"

10. See, e.g., COMMISSION FOR RACIAL JUSTICE, UNITED CHURCH OF CHRIST, *TOXIC WASTE AND RACE IN THE UNITED STATES* (1987).

into the public sphere and policy discourse.¹¹ In response to pressure from social movements – and informed by academic research – government agencies also incorporated environmental justice as a basis for public policy in the federal, state, regional, and even local levels. The highest profile policy that initiated further public sector efforts was President Clinton’s 1994 Executive Order 12898, which directed federal agencies to avoid causing “disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minority populations and low-income populations.”¹²

California has been a major leader in the national environmental justice movement through its potent environmental justice activism, its far-reaching environmental justice legislation, and its early implementation of environmental justice policies throughout its state agencies. Such state and social movement actions have arisen in response to the widespread and significant environmental justice problems that plague the state. In 2003, five environmental justice groups documented these problems in a report entitled, “Building Healthy Communities from the Ground Up: Environmental Justice in California.” Each of the organizations—Asian Pacific Environmental Network (Oakland), Environmental Health Coalition (San Diego), Communities for a Better Environment (multiple sites), Silicon Valley Toxics Coalition, and People Organizing to Defend Environmental and Economic Rights (San Francisco)—have been working on different aspects of environmental justice for well over a decade. The report begins by outlining the “Environmental Justice Crisis” in California (pollution, toxic waste, working conditions, environmental health risks, poor housing and inequitable land uses). It then defines “Environmental Justice Approaches to Creating Healthy Communities” and the different tactics that environmental justice organizations have adopted to remediate the problems.¹³

The problems documented in “Building Healthy Communities from the Ground Up” persist and have been validated by other sources as well. According the 2007 Toxic Waste and Race at 20

11. EILEEN MAURA MCGURTY, *TRANSFORMING ENVIRONMENTALISM: WARREN COUNTY, PCBS, AND THE ORIGINS OF ENVIRONMENTAL JUSTICE* (Rutgers Univ. Press 2007).

12. Exec. Order No. 12898, *supra* note 6.

13. MARTHA MATSUOKA, *BUILDING HEALTHY COMMUNITIES FROM THE GROUND UP: ENVIRONMENTAL JUSTICE IN CALIFORNIA* (2003), <http://www.environmentalhealth.org/EJReport.pdf>.

report,¹⁴ toxic facilities in California are disproportionately located in neighborhoods of color at a rate higher than most states (81% of neighborhoods of color host a toxic facility vs. 51% of other neighborhoods where white people are the majority). Nationwide, six metropolitan areas account for over half of all people of color that live in close proximity to all of the nation's commercial hazardous waste facilities, and three of these are in California (Los Angeles, Oakland, and Orange County). Los Angeles alone accounts for 21% the nation's neighborhoods where people of color predominate that also host one or more toxic facilities.

Even before the articulation of the problems of environmental racism *per se* in the late 1980s, California played an important role in the history of the environmental justice movement. One of the early battles in the movement was the struggle in Kettleman City. Cole and Foster note that this battle was "one of the defining struggles of the early days of the environmental justice movement," and they describe the struggle as a "classic David-and-Goliath tale, in which a small farmworker town took on the largest toxic waste dumping company in the world – and won."¹⁵

Likewise, Pulido outlines the United Farm Worker anti-pesticide campaign of 1965 to 1971 in the Central Valley of California that was part of the farmworker unionization campaign.¹⁶ The Central Valley of California historically has high levels of pesticide use leading to a range of ongoing conflicts between community and regional environmental justice organizations and the state agencies that regulate those pesticides.¹⁷ California's environmental justice movement has also mobilized on issues of water quality and air quality affecting low-income communities and communities of color, as well as on issues of transportation, land use, Native American land claims, and contamination of subsistence fisheries.

The "Building Healthy Communities" report itself is an example of how local environmental justice groups moved beyond the

14. TOXIC WASTES AND RACE AT TWENTY 1987-2007, UNITED CHURCH OF CHRIST (2007), <http://www.ucc.org/justice/pdfs/toxic20.pdf>.

15. COLE & FOSTER, *supra* note 10.

16. LAURA PULIDO, ENVIRONMENTALISM AND ECONOMIC JUSTICE: TWO CHICANO STRUGGLES IN THE SOUTHWEST (Univ. of Arizona Press 1996).

17. Jill Lindsey Harrison, *Accidents' and Invisibilities: Scaled Discourse and the Naturalization of Regulatory Neglect in California's Pesticide Drift Conflict*, 25 POL. GEOGRAPHY at 506-29 (2006).

local level and strategized on a statewide level.¹⁸ The report suggested that “while these advances have been important for environmental justice in California, much more strategic and coordinated efforts are needed in order to build and sustain grassroots involvement and leadership at the state level.”¹⁹ It continues, and provides a fitting frame work for our analysis of the promise and perils of environmental justice in California:

[K]ey questions remain about whether or not such policy approaches substantively address issues and conditions in environmental justice communities. Environmental policy-making has historically excluded the communities most impacted from playing a meaningful role in the formation of environmental policy and regulations. Without meaningful participation by communities, legislative strategies may be limited to tactical, short-term, and politically convenient solutions rather than long-term, systematic approaches able to affect real change in communities.²⁰

We now turn to the legislative strategies and regulatory agencies in question.

B. *State Legislation and Regulatory Agencies*

Legislation explicitly concerning environmental justice has rippled through federal, state, and even regional levels with mandates to incorporate environmental justice activists into environmental regulatory agency policies and procedures. Agencies across the United States have tried a variety of implementation approaches.²¹ Gordon and Hartley argue that these state-by-state policy measures are useful to help diffuse tensions that

18. The groups formed an Environmental Justice Working Group (EJWG) focused on three strategies: implementing Cal/EPA’s environmental justice policies, building power from the ground up, and statewide movement building. The EJWG is affiliated with the California Alliance, a broad based effort to “build grassroots progressive power” in CA across a wide range of issues. The report’s synthesis of grassroots involvement in the policy process serves as a useful statement on the possibilities and perils of such strategies, MATSUOKA, *supra* note 13.

19. *Id.*

20. *Id.*

21. Evan J. Ringquist & David H. Clark, *Local Risk, States’ Rights, and Federal Mandates: Remediating Environmental Inequities in the U.S. Federal System*, 29 *PUBLICUS* 73-93 (1999); Nichols Targ, *The States’ Comprehensive Approach to Environmental Justice*, in *POWER, JUSTICE, AND THE ENVIRONMENT: A CRITICAL APPRAISAL OF THE ENVIRONMENTAL JUSTICE MOVEMENT* 171-84 (N.D. Pellow and R.J. Brulle eds., 2005); Veronica Eady, *Environmental Justice in State Policy Decisions*, in *JUST SUSTAINABILITIES: DEVELOPMENT IN AN UNEQUAL WORLD* 168-82 (Julian Agyeman, Robert D. Bullard, & Bob Evans eds., 2003).

have boiled over into lawsuits and administrative complaints.²² But, this can only occur if states develop proactive, programmatic strategies to remedy environmental justice problems and develop new approaches to generate meaningful public participation, hazard characterization, and risk reduction.²³

An analogy arises from the institutionalization of the hate crime law, which also draws on the logic of racism as a key motive of criminal intent. As with hate crime law, questions have arisen about the “susceptibility” of legally-mandated organizations “to environmental influence and organizational alignment . . . in the process of organizational innovation and policy implementation.”²⁴ In other words, regulatory context matters for policy implementation and effectiveness. Once a movement becomes institutionalized – whether it be hate crime or environmental justice – certain entities become responsible for enforcing a law, with potentially wide variation according to their organizational imperatives. Specifically, when discussing issues that encompass interactions between humans and their biophysical surroundings, the concept of “place” – a specific geographic location with cultural meaning and a political economic and biophysical material form²⁵ – matters. It matters in that specific individuals, organizations, and institutions have a stake in “accomplishing” place.²⁶ In addition to the groups striving for environmental justice listed in the preceding section, these stakeholders include state environmental regulatory agencies charged with maintaining the protection of natural resources and addressing issues of environmental quality.

In terms of state-by-state approaches to environmental justice policy and programs, California is far ahead of other states in the United States at the regulatory and legislative realms. The legislative component of California’s approach to environmental justice consists of over twenty laws that have been passed since 1999

22. Holly D. Gordon & Keith I. Harley, *Environmental Justice and the Legal System*, in POWER, JUSTICE, AND THE ENVIRONMENT, 153-71 (David N. Pellow & Robert J. Brulle eds., MIT Press 2005).

23. *Id.*

24. Valerie Jennes & Ryken Grattet, *The Law-In-Between: The Effects of Organizational Perviousness on the Policing of Hate Crime*, 52 SOC. PROBS. 337, 337-59 (2005).

25. Thomas F. Gieryn, *A Space for Place in Sociology*, 26 ANN. REV. OF SOC. 463-96 (2000).

26. Harvey Molotch, William Freudenburg, & Krista E. Paulsen, *History Repeats Itself, But How? City Character, Urban Tradition, and the Accomplishment of Place*, 65 AM. SOC. REV. 791-823 (2000).

that direct state agency practice.²⁷ The first of these was Senate Bill (SB) 115 authored by Hilda Solis (1999).²⁸ SB 115 provided a statutory definition of environmental justice and directed Cal/EPA and all of its boards, departments, and offices (BDOs) to develop environmental justice mission statements under the coordination of the Office of Planning and Research (OPR). The organization of BDOs consists of the Office of the Secretary, the afore-mentioned DPR, the Air Resources Board, the Department of Toxic Substances Control, the Integrated Waste Management Board, the Office of Environmental Health Hazard

27. These include: S.B. 89, 1999-2000 Leg., Reg. Sess. (Cal. 2000) (requiring the Secretary for Environmental Protection to convene a Working Group on Environmental Justice); S.B. 32, 2001-2002 Leg., Reg. Sess. (Cal. 2001) (authorizing local governments to investigate and cleanup small parcels of property contaminated with hazardous waste); S.B. 828, 2001-2002 Leg., Reg. Sess. (Cal. 2001) (adding adds dates for developing an interagency environmental justice strategy affecting boards, departments and offices (BDOs) within the California Environmental Protection Agency); A.B. 1553, 2001-2002 Leg., Reg. Sess. (Cal. 2001) (requiring the Office of Planning and Research (OPR) to adopt guidelines for local agencies when addressing environmental justice issues in its general plans); A.B. 1390, 2001-2002 Leg., Reg. Sess. (Cal. 2001) (directing air districts to target at least 50 percent of the \$48 million General Fund appropriated to three diesel emission reduction programs to environmental justice communities); S.B. 1542, 2001-2002 Leg., Reg. Sess. (Cal. 2002) (requiring the CA Integrated Waste Management Board to provide environmental justice models and information to local jurisdictions (and private businesses) to assist with their consideration of environmental justice concerns); A.B. 2312, 2001-2002 Leg., Reg. Sess. (Cal. 2002) (establishing an Environmental Justice Small Grant Program administered by Cal/EPA); A.B. 1360, 2003-2004 Leg., Reg. Sess. (Cal. 2003) (requiring the Office of Environmental Health Hazard Assessment (OEHHA) to develop and maintain a system of environmental indicators); A.B. 1497, 2003-2004 Leg., Reg. Sess. (Cal. 2003) (requiring an enforcement agency to submit its proposed determination and addressing limited English speaking populations). Major environmental justice legislation since 2002 has included: S.B. 391, 2003-2004 Leg., Reg. Sess. (Cal. 2003) (which requires the California Environmental Protection Agency (Cal/EPA) to establish minimum standard protocols for responding to pesticide drift emergencies (reviewed in detail below)); A.B. 1360, 2003-2004 Leg., Reg. Sess. (Cal. 2003) (that calls for establishment of environmental quality indicators including environmental justice); A.B. 841, 2005-2006 Leg., Reg. Sess. (Cal. 2005) (that directs the San Joaquin Valley Unified Air Pollution Control District to enhance monitoring of particulate matter); A.B. 1430, 2007-2008 Leg., Reg. Sess. (Cal. 2007) and S.B. 870, 2005-2006 Leg. Reg. Sess. (Cal. 2006) (that strengthen enforcement of air quality standards); S.B. 1379, 2005-2006 Leg. Reg. Sess. (Cal. 2006) (that authorizes biomonitoring for environmental contaminants); A.B. 32, 2005-2006 Leg. (Cal. 2006) (California Global Warming Solutions Act that includes the creation of an environmental justice advisory committee); S.B. 791, 2003-2004 Leg. (Cal. 2003) (that adds urban representatives and members with medical and public health expertise to the San Joaquin Valley Unified Air Pollution Control District).

28. http://www.leginfo.ca.gov/pub/99-00/bill/sen/sb_0101-0150/sb_115_bill_199910_10_chaptered.html

Assessment, the State Water Resources Control Board, and nine regional water quality control boards. Each of these BDOs has an organizational infrastructure that is far too expansive to address in this paper. Rather, we outline the main themes that have arisen out of the assemblage of the varied approaches to environmental justice that these BDOs have adopted – with special attention to DPR. We use these cases to explore what environmental justice has meant to agencies and activists involved in California’s “high stakes experiment.”

III.

FROM PROMISE TO PROGRESS

A. *Developing the Cal/EPA Environmental Justice Action Plan*

In 2001, then-Secretary of the Environment, Terry Tamminen, directed Cal/EPA to create an Environmental Justice Action Plan. To launch this effort, in May 2001, Cal/EPA paid for 250 community-based environmental justice activists to come to a planning meeting. The resulting California Environmental Justice Advisory Committee (CEJAC) was formed to help guide the policy. Key leadership from the most well-known community-based environmental justice organizations throughout the State became engaged in the process. According to its own by-laws:

[T]he CEJAC is a Cal/EPA advisory committee that provides information, formulates recommendations and provides advice on environmental justice policy and direction. The CEJAC provides a forum for public discussion and development of independent advice and consultation to the Secretary of Cal/EPA and the Inter-agency Working Group on Environmental Justice.²⁹

CEJAC also refers to itself as an “appellate body” for Cal/EPA, and in this capacity has served as public forum to hear and amplify the voices of typically under-represented communities struggling with environmental justice issues throughout the state. It is also the entity that BDOs within Cal/EPA turn for input on environmental strategies and plans. For example, DPR intends to vet its own environmental justice implementation plan through CEJAC before finalizing it.

Cal/EPA’s Environmental Justice Action Plan integrates key environmental justice elements such as the precautionary princi-

29. CEJAC By-laws, adopted by CEJAC on Nov. 11, 2005, *available at* <http://www.Cal/EPA.ca.gov/EnvJustice/Documents/2005/Bylaws111505.pdf>.

ple, cumulative impacts, and stakeholder participation, thereby requiring all Cal/EPA BDOs to develop their own environmental justice implementation plans and launch a set of pilot projects. We now review the main strategies of this action plan, specifically the focus on pilot projects and the small grants program.

B. Implementing the Action Plan: Pilot Projects and Small Grants

The 2004 Cal/EPA Environmental Justice Action Plan proposed a set of environmental justice pilot projects as “the primary mechanism for exploring the complex issues of cumulative impacts and precautionary approaches, and for implementing tools developed for public participation and community capacity-building.”³⁰ This strategy consists of six pilot projects: one by the California Air Resources Board focused on urban air emissions associated with ports and goods movement in Los Angeles County (Wilmington, Mira Loma and Commerce); two by the Department of Toxic Substances Control, including one focused on brownfields remediation and redevelopment in West Oakland and another targeting drug labs in Oakland and Hayward; two by the State Water Quality Control Board [State Water Board], including riparian restoration on the cross-border New River in Imperial County and on the Klamath River in northeast California; and one by DPR to monitor ambient pesticide levels in the Central Valley (eventually selecting the Fresno County town of Parlier as we discuss further in Part IV). Cal/EPA’s pilot projects promote innovation and partnership between communities, agencies, and non-agency scientists, albeit unevenly. They also allow for a “place-based” approach to learning and collaboration over time, which is a departure from much of the thinking behind past projects run through the agency and its BDOs.

Cal/EPA also created a small grants program to support environmental justice projects by non-profit organizations. Since its inception in 2005, the program has made 32 grants totaling \$574,467. Based on our qualitative coding of summaries³¹ of the

30. CALIFORNIA ENVIRONMENTAL PROTECTION AGENCY, OCTOBER 2004 CAL/EPA ENVIRONMENTAL JUSTICE ACTION PLAN 6 (2004), available at <http://www.calepa.ca.gov/EnvJustice/ActionPlan/Documents/October2004/ActionPlan.pdf>.

31. For further inspection of these suggestive figures, see the project summaries, California Envntl. Protection Agency, 2005/2006 FY Cal/EPA Environmental Justice Small Grant Recipients (2007), available at <http://www.calepa.ca.gov/EnvJustice/Funding/SmallGrants/2007/Summary.pdf> and http://www.calepa.ca.gov/envjustice/Funding/SmallGrants/Summary01_06.pdf.

projects funded through the small grants program, the broad range of activities funded included education (N=27), public participation (N=14), research and publication of materials and reports (N=8), awareness raising about various community and tribal issues (N=6) and internal capacity building and leadership development for non-profit community and tribal organizations (N=3). Over half (19 of the 32) grants contained combinations of these activities with education and public participation being the most frequent combination (N=10).³²

The small grant program has been met with mixed reactions from the environmental justice organizations. While the organizations appreciate the funding and the commitment from the agency that this program represents, they have criticized the small amount of funding provided (both in individual grants and in the total funding program) and the fact that the funding has generally reached only the state-wide or higher capacity local and regional organizations. Without building additional capacity, it is difficult for these grassroots organizations to access these funds and for the agencies to effectively partner with them.

This description of the pilot projects and the small grants program is largely based on our interpretation of the publicly available organizational documents of Cal/EPA and its BDOs, including transcripts of public meetings. However, there is more to the story, particularly in how these projects and programs were implemented and interpreted by the people they were meant to serve. Take, for example, the grant distribution and pilot project associated with Cal/EPA and State Water Board's attention paid to the Klamath River Basin.³³ The pilot project on the Klamath River Basin (Siskiyou County) was largely concerned with a river that was "in a state of decline where impaired flows, disease, toxic algal blooms and diminished habitat have led to loss of fishery and have had a significant impact on the lives,

32. Water quality and food contamination was the main issue addressed by the grant recipients (N=13) and received the most funding (\$216,673; 37.72% of the total \$574,467 allocated). Other issues funded by the EJ small grant program fall in descending order from general incorporation into environmental decision-making and environmental quality assessment processes at a variety of scales (N=7, 24.35% of funding), to pesticides and human health and safety (N=4, 13.92% of funding), to activities associated with goods movement and air quality along the state's major transportation corridors (N=4, 13.75% of funding), *supra* note 31.

33. Authors recorded and transcribed the webcast of CEJAC's last formal meeting at Cal/EPA (May 31, 2007). Curiously, while transcriptions of all other formal CEJAC meetings from 2005 to 2007 are posted on the agency's website, this most significant one is not.

economy, health and traditions of the Klamath River Tribes.”³⁴ One of the project’s goals was “to include Klamath Basin Tribal resources and knowledge in the data collection, documentation, and analysis of impacts to beneficial uses including the Native American cultural uses and subsistence fishing uses of the Klamath River and its tributaries.”³⁵

In addition to the beneficial use analysis, this project was to provide data to develop a total maximum daily load (TMDL) standard for the North Coast Regional Water Board and a certification analysis for a hydroelectric facility located on the river.³⁶ Over the two-year grant period, \$79,871 in funds (about 14% of the total provided in the program) was guaranteed to the potentially impacted Klamath River Basin Tribes to conduct research on water quality, human health, and social impact analyses to aid the decision-making processes described above. However, funds were slow to reach the participating tribal members and their research partners. And while the tribal members’ “resources” were incorporated into the decision making process, their knowledge and participation apparently was not.

In a letter submitted to be read at the May 31, 2007 CEJAC meeting concerning the project, an individual working in the Yurok Tribe Environmental Program and the Klamath Environmental Justice pilot project stated:

The participating Klamath River Tribes are very committed to seeing this environmental justice project . . . succeed. But, we remain frustrated by the lack of communication and meaningful collaboration on this project with the [State Water Board] and the lack of adequate funding for . . . meaningful participation. Participating Klamath River Tribes have worked together from the onset, through meetings and correspondence, to develop an environmental justice pilot project proposal that addressed the Native American cultural and subsistence beneficial uses of the Klamath River, specifically for the on-going 401 certification process for the Klamath River Dams. This is, after all, the role and responsibility of the [State Water Board]. Our proposal was received by the [State Water Board] . . . in May of 2006 and then discarded . . . and incor-

34. Draft Cal/EPA Environmental Justice Action Plan, SWRCB Klamath River Pilot Project Update, <http://www.calepa.ca.gov/EnvJustice/Documents/2007/Klamath.pdf> (last visited May 31, 2007).

35. The Hoopa, Karuk, Quartz Valley Indian, Resighini Rancheria, Yurok, Klamath, Modoc, and Yahooskin Tribes also reside or have some stake in the Klamath River Watershed, *supra* note 35.

36. A Federal Energy Regulatory Commission certification process pursuant the Clean Water Act. See 18 C.F.R. § 401.0(a) (2008).

porated selectively into the EJ pilot project contract for documenting beneficial uses of the [Klamath] River.

This suggests that while the agency's stated intention of using a place-based and participatory strategy held great promise, its execution left tribal participants with the impression that all the effort they put forth was "discarded." Ronald Reed, a Karuk Tribal member of the Environmental Justice Coalition for Water, was heavily invested in collecting data for the pilot project and expressed his frustration with agency's perceived disregard of this information:

[I]t'll be a travesty for this information that I've developed to be firewalled from the biggest process in my lifetime. I have children [and] elders home that I'm speaking for, and it becomes overbearing with the work, day in and day out, for things that are really important to your people, for the legacy of your people, to hear this late in the game that it might not be utilized.³⁷

The Klamath River Basin example points to some of the tensions in this model of environmental justice. Participation through incorporation into an agency pilot project, which was marginal in this case, is not enough to qualify as serving the cause of environmental justice. Specifically, a lack of communication, a late delivery in promised funds, and a devaluation of local knowledge provoked great frustration and anger in the community. We explore more of the perils of incorporation in the next section.

IV.

THE PERILS OF INCORPORATION

A. *The Politics of Environmental Justice-As-Participation: Where is the Justice in Advice?*

Our analysis of the small grants program data shows that education and participation are the most funded element of the 2004 California EPA Environmental Justice Action Strategy and that the development of environmental justice advisory committees has become increasingly common across the state agencies, including Cal/EPA California Environmental Justice Advisory Committee (CEJAC)³⁸, California Air Resources Board's Envi-

37. Testimony given at the May 31, 2007 CEJAC meeting, *supra* note 35.

38. See <http://www.calepa.ca.gov/EnvJustice/Participation>.

ronmental Justice Advisory Committee (EJAC)³⁹ and CALFED's Environmental Justice Sub-Committee (EJSC).⁴⁰

The stated intention in developing all of these committees was to provide a *space* and a *voice* for environmental justice advocates and the communities they represent in the policy arena. On the surface, this is an admirable response to the environmental justice principle of "we speak for ourselves." However, all of these efforts have faced significant challenges: the EJSC disbanded in acrimony between agencies and advocates, CEJAC experienced a dramatic resignation of most of its environmental justice members, and EJAC continues to see varying degrees of conflicts between members and its sponsoring agency as policy is being developed. What we find is a pattern of conflicts – some heated and others latent – between environmental justice advocates and the sponsoring agencies. In some cases these conflicts are over the authority and resources granted to the advisory committee such as in the escalating antagonism between the EJSC and CALFED over the lack of sufficient funding, decision-making authority and timely and full access to information. In others the conflict arises over the perceived lack of follow-through by the agencies on the advice of the committees such as the conflict between EJAC and the California Air Resources Board over the prominence of a market-based cap and trade pol-

39. See Global Warming Environmental Justice Advisory Committee Website, <http://www.arb.ca.gov/cc/ejac/ejac.htm>.

40. Emerging on the heels of the 1992 water draught in California, "Club Fed" – a collaboration of the U.S. Environmental Protection Agency, Bureau of Reclamation, National Marine Fisheries Service, and the Fish and Wildlife Service – was forged to manage water supply issues within the Sacramento-San Joaquin (or, Bay-) Delta. Two years later, CALFED was created through the San Francisco Bay Delta Agreement to incorporate California state agencies into the "Club Fed" planning over the Delta. More specifically, CALFED's goal was to coordinate 26 federal and state agencies' activities around the likelihood that massive diversion of water at the pumps in the Southern Delta were causing un-mitigated harm to threatened and endangered habitats and species. To delay or even avoid an otherwise inevitable lawsuit by environmental interests, state and federal agencies created this water-based partnership – one of the largest ever in the history of the United States. In 2005, a Little Hoover Commission investigated CALFED and found it largely failed in much of its stated goals, especially in its integration of EJ into its policies and programs. It concluded that the Delta was "still imperiled" and "still important." See LITTLE HOOVER COMMISSION, STILL IMPERILED, STILL IMPORTANT: THE LITTLE HOOVER COMMISSION'S REVIEW OF THE CALFED BAY-DELTA PROGRAM, REPORT #183 (2005). See also Shilling, Fraser, London, Jonathan & Liévanos, *Third Parties and a Process of Elimination: Environmental Justice Within and Beyond CALFED*, ENVTL SCI. & POL'Y (forthcoming 2008) (for an analysis of environmental justice within CALFED).

icy approach to controlling greenhouse gas emissions over the strenuous objections of the environmental justice advocates. In both situations, these committees provided venues for the environmental justice advocates to “speak,” though it is not clear to what degree these voices are being heard and incorporated in meaningful ways into agency practice; the preceding section suggests that meaningful incorporation is indeed marginal.

B. *Environmental Justice at the Department of Pesticide Regulation*

This section examines the possibilities and perils of environmental justice within one agency, the California Department of Pesticide Regulation (DPR). In 1991, DPR was spun off into the newly formed Cal/EPA after having been a unit of the California Department of Food and Agriculture. Up until this point, the predecessor of DPR was, in the words of one agency official, “widely criticized for being a tool of agriculture.”⁴¹ Even once it was repositioned within Cal/EPA, DPR was viewed with suspicion and even disdain for its role in regulating the introduction of what one DPR strategic planning document called “economic poisons” into the environment.⁴²

DPR has engaged in a series of efforts to integrate environmental justice into the agency’s practices. These efforts commenced with DPR’s “Strategic Plan 2001,” in which environmental justice—phrased as the effort to “regulate the use of pesticides so that no socio-economic group of Californians is disproportionately impacted”—represents one of the five strategic goals. The plan also included goals on protecting people, especially sensitive groups from “unacceptable pesticide risks” and “building good relationships” with the agency’s constituencies. None of these goals explicitly links environmental justice with public participation.⁴³ DPR’s 2008 strategic plan does include

41. Interview with Env’tl. Justice Advisory Workgroup participant (Fall 2006–Spring 2007). Unless otherwise noted, all narrative quotes from environmental justice advocates and public agency personnel are taken from semi-structured interview with one or more of the authors between Fall 2006 and Spring 2007.

42. California Dep’t of Pesticide Regulation, Regulatory Improvement Initiative: Proposals to Improve California’s Pesticide Regulatory Program: Strawman Document 6 (1995), available at <http://www.cdpr.ca.gov/docs/dept/planning/archive/strwman/straw.htm>.

43. CAL. ENVTL. PROTECT. AGENCY, DEP’T OF PESTICIDE REGULATION, STRATEGIC PLAN 2001, 5-10 (2001) available at http://www.cdpr.ca.gov/docs/dept/planning/strg_pln/2001plan/strtrplan1.pdf.

environmental justice in one of its five goals, with an emphasis on both participation and on equal ensuring that “[a]ll Californians, regardless of race, age, culture, income, or geographic location, are protected from adverse environmental and health effects of pesticides.”⁴⁴

In 2004, DPR developed its first environmental justice action plan, which was met by a storm of criticism by environmental justice advocates who objected to the lack of consultation in the plan’s development. Two years later, the agency recommenced the planning process, using a carefully facilitated participation process to develop a new environmental justice action plan. At the same time, DPR launched its environmental justice pilot project in Parlier. These two proactive efforts to develop and implement an approach to environmental justice are described below. Concluding this section, we also examine two reactive features of the agency’s relationship with environmental justice: the litigation against the agency over ozone-producing pesticides and the passing of legislation to tighten liability for pesticide drift incidents. Together, these four elements of the case study help provide a multi-layered perspective on how California state agencies engage with the phenomena of environmental justice.

1. “Public” Participation at DPR: The Environmental Justice Advisory Workgroup

DPR’s Environmental Justice Advisory Workgroup (EJAW) was initiated to develop a framework for the agency’s environmental justice implementation plan as called for by Cal/EPA Secretary Tamminen. Through a rigorously designed facilitation process, the members of the working group drafted a plan with goals, objectives, and recommended actions to increase public participation by communities affected by pesticide applications and to decrease the negative impacts of such pesticides in these communities. The agency will incorporate this draft into its own proposed plan, and vet it through CEJAC (once it is reconstituted) and a series of public meetings before finalizing the plan. However, due to competing staff priorities within DPR, the workgroup’s draft plan had not proceeded as of April 2008, despite the draft being completed in June 2007. In fact, in an email bulletin dated May 29, 2008, the Deputy Chief of DPR, writing

44. CALIFORNIA ENVTL. PROTECTION AGENCY, DEP’T OF PESTICIDE REGULATION, STRATEGIC PLAN 2008, available at http://www.cdpr.ca.gov/docs/dept/planning/strg_pln/2008plan/strtplan.pdf.

for the Chief, Mary Ann Warmerdam, described the agency's delays as budget-related:

We had anticipated conducting facilitated workshops throughout the state as part of our EJ plan development. However, the budget for these facilitated workshops would be approximately \$35,000. In this period of constrained resources, we believe these funds would be better spent maintaining and improving programs important to EJ communities. Therefore, instead of a series of public workshops, once our draft plan is complete we will seek comment on it through our Web site and by sending it to interested parties via our EJ list server.⁴⁵

Despite the delay in moving forward with DPR's environmental justice implementation and action plan, the advisory workgroup may have achieved the greatest level of success and the least degree of contention as compared to the others previously described. The key to this, perhaps, is that the agency only invited people who were considered likely to get along as members of the advisory workgroup. While there were a number of conflicts between members of the DPR advisory workgroup, skillful and closely managed facilitation, coupled with a specific purpose and timeline, allowed this effort to largely accomplish its stated objective. The goals around which the group did achieve consensus were:

- Ensure meaningful public participation and promote community capacity-building to allow communities to effectively participate in environmental decision-making processes.
- Integrate environmental justice into the development, adoption, implementation, and enforcement of environmental laws, regulations, and policies.
- Improve research and data collection to promote and address environmental justice related to the health and environment of communities of color, low-income populations, or both. Use research results to improve health in these communities.
- Ensure DPR is accountable for effective collaboration, coordination and communication within DPR, with County

45. Email bulletin to the DPR Environmental Justice Listserv. May 29, 2008. From CA DPR Chief Deputy Director Chris Reardon for Director Mary Ann Warmerdam.

Agricultural Commissioners (CACs), and with other government agencies in addressing Environmental Justice.⁴⁶

The lack of follow-through to date by DPR to incorporate these recommendations into a final plan has frustrated some of the workgroup members who have come to question the use of their time and even whether the agency takes their input seriously. One advisory workgroup participant and environmental justice activist reflected on this concern on the lack of follow-through within DPR:

Now we might hear more . . . flowery language . . . [like], 'Well, we really want all these multi-stakeholder inputs. We're going to consider it carefully, and . . . really, everyone, has input and it's really important . . . [But] DPR's going to do what they want, and that's, still at the end of the day, what's going to happen.'⁴⁷

While it is possible that DPR has intentionally let the process drop, it is more likely that this lapse results from limited staffing capacity with only one mid-level administrator in charge of environmental justice in addition to other extensive responsibilities. This staff capacity issue will be further discussed in the context of the delay in the production of DPR's final report on its Parlier monitoring pilot project. Of course, this frustration about the good use of participants' input does raise the structural issue of the mismatch between the agency's stated intention and its ability to procure and prioritize the resources necessary to follow through. This pattern can undermine trust in DPR and in public agencies more generally.

In addition, the environmental justice activist in the advisory workgroup expressed frustration that the process was not able reach consensus on their highest priority and otherwise consequential goal to actually *reducing* exposures. This goal proposed by the environmental justice members of the advisory committee in the following language:

Prevent harmful exposure in communities of color and/or low-income populations through an integrated approach, including:

- Encouraging less harmful alternatives, including non-chemical;
- Reducing use of the most harmful chemicals; and

46. California Dep't of Pesticide Regulation Environmental Justice Planning Advisory Workgroup. Recommendations on Implementing Environmental Justice Practices (June 2007), available at <http://www.cdpr.ca.gov/docs/envjust/planning.htm>.

47. Interview with Env'tl. Justice Advisory Workgroup participant, *supra* note 41.

- Reducing risk through mitigation strategies and reduced-exposure technologies.⁴⁸

While the goal of this language was developed through skillful facilitation and consensus-building approaches that diffused immediate conflict in the room, the group was unable to reach adequate consensus to endorse this goal. The reason for the lack of consensus is partly attributable to the political positions of the agricultural and chemical industry's concerns about the impacts of further restrictions in pesticide use. As one DPR official put it:

We had some . . . fairly high-powered people in that group. . . EJ groups told us that they could not accept a plan unless they had some role in formulating it. . . [W]e would hear the same thing from the aggies, from the chemical industry. . . [T]hey are just as much as our stakeholders as anyone else.⁴⁹

Indeed, the “aggies” are amongst the biggest stakeholders in any policy developed by DPR. At the same time, continued use of pesticides is part of DPR's very organizational mission and, therefore, stopping chemical use was not a realistic goal for this stakeholder deliberation. This sentiment was reflected by one of the working group members associated with the agricultural sector. “It wasn't about stopping chemical use; it was about having environmental justice fairly put forth in any communities . . . [which was] to participate in any democratic processes.”⁵⁰ Here environmental justice is synonymous with participation, not structural changes in the economic and political conditions that distribute environmental risks. Likewise, a top DPR official, genuinely attempting to describe the difference in agency and activist views of “acceptable risk” also highlighted the radically different positionality of the two:⁵¹

From a science perspective, we're willing to take a certain amount of risk. . . . Scientifically, risk is part of the equation. . . . But, if you're on the other side of the equation, just acknowledging that

48. The Results Group, Recommendations of the California Department of Pesticide Regulation Environmental Justice Planning Advisory Workgroup on Implementing Environmental Justice Practices (2007), available at http://www.cdpr.ca.gov/docs/envjust/documents/ejaw_final.pdf.

49. Interview with Env'tl. Justice Advisory Workgroup participant, *supra* note 41.
50. *Id.*

51. Compare Interview with Env'tl. Justice Advisory Workgroup participant, *supra* note 41 and Laura Pulido & Devon Pena, *Pesticides and Positionality: The Early Pesticide Campaign of the United Farm Workers' Organizing Committee, 1965-71*, 6 RACE, GENDER & CLASS 33-50 (No. 1, 1998) (discussing relevance of positionality to environmental justice).

our decision involves a level of risk is unacceptable. [Our staff] look at the work they do as being protective . . . but [acknowledge] the risk factor. . . . I think the disadvantage that the community activists labor under is that they don't understand the science and the language of science, and they don't know how to respond to science.⁵²

Meanwhile, to the many of the activists involved, the goal of environmental justice refers to more than participating in an agency process: it also drives towards changes in lived realities. As one of the environmental justice activists in the working group put it:

[E]nvironmental justice to me. . . [means there] are people that . . . are exposed to toxics in their work or because of where they live. . . . But, I mean, it's fundamentally about being able to breathe and our environment getting polluted because we don't have a voice in the issue and then, not being able to do much about it because we're disempowered and not a part of the system.⁵³

In the face of this sense of disempowerment, the environmental justice movement in California has been working to become more "a part of the system", and when possible, to change that system. The movement's ability to do this, while not sacrificing their original goals is key challenge and one explored further below.

2. DPR's Pilot Project: "I keep coming back to Parlier"

As stated earlier, the Parlier pilot project was DPR's component of the Cal/EPA's pilot project initiative. This pilot project developed and implemented a monitoring protocol for ambient pesticides that was precedent setting for its broad sampling (forty pesticides as opposed to the typical individual chemical target), its extensive duration (repeated samples each week over eighteen months as opposed to a one week window), taken at multiple sites (three elementary schools in one community), and its model of community involvement. This model of "place-based" monitoring, in which the agency made a long-term commitment to study the complexities of one location and to substantively engage with a wide range of local and regional stakeholders represented a true innovation in the progress of environmental justice practices by public agencies.

52. Interview with Envntl. Justice Advisory Workgroup participant, *supra* note 41.

53. *Id.*

A DPR official close to its environmental justice program described a “visceral” and “emotional” experience through the Parlier pilot project that went beyond the substantive content derived from the environmental justice advisory workgroup. Because of this experience “of the heart”, this official reflects: “I keep coming back to Parlier. . . Everything I learned about EJ, I learned from Parlier.”⁵⁴ Similarly, DPR’s Director, Mary Ann Warmerdam, described this transformational effect in an open letter to interested parties in the Parlier pilot project: “[I]t changed how we view our work. I do not think we will ever be the same, or approach our research the way we did before Parlier. It gave us an appreciation of the importance of what we do, as we got to know the people our work is designed to protect.”⁵⁵

What is it about Parlier that led this and other DPR personnel to “keep coming back?” The 2000 U.S. Census indicates that of the roughly 11,145 residents living in the city of Parlier, 97% are Hispanic or Latino with roughly 86% of Mexican decent.⁵⁶ Also, the median household income is \$24,539, as compared to a state median of \$47,493. In Parlier, 34% of the community’s families live below the poverty line, and almost 17% of its labor force is unemployed.⁵⁷ Of those working, a plurality (29%) are employed in agriculture and other natural resources industries as compared to 1.9% statewide.⁵⁸ The fact that many of these people are relatively poor, undocumented or have family members who lack immigration papers banish much of the population into an “invisible” status, uncounted in the census, unrepresented politically, and therefore often grossly underserved by social, medical and educational systems.⁵⁹ In addition to its demographics, which similarly characterize much of the Central Valley, Parlier

54. *Id.*

55. Mary Ann Warmerdam, Director, California Dep’t of Pesticide Regulation, Open Letter to Interested Parties: Parlier Project Status Report - Update on Projected Release of Final Report (Oct. 29, 2007).

56. DP-1. Profile of General Demographic Characteristics: 2000. Census 2000 Summary File 1 (SF 1) – Sample Data *available at*, http://factfinder.census.gov/servlet/QTTable?_bm=y&-geo_id=04000US06&-qr_name=DEC_2000_SF1_U_DP1&-ds_name=DEC_2000_SF1_U&-_lang=en&-redoLog=false&-_sse=on.

57. DP-3. Profile of Selected Economic Characteristics: 2000. Census 2000 Summary File (SF 3) – Sample Data *available at*, http://factfinder.census.gov/servlet/QTTable?_bm=y&-geo_id=04000US06&-qr_name=DEC_2000_SF3_U_DP3&-ds_name=DEC_2000_SF3_U&-_lang=en&-redoLog=false&-_sse=on.

58. *Id.*

59. Phillip L. Martin & Edward Taylor, *Poverty Amid Prosperity: Farm Employment, Immigration, and Poverty in California*, 80 AM. J. OF AGRIC. ECON. 1008-1014 (1998).

rose to the top of DPR's pilot site ranking system due to its disproportionate exposures to environmental threats in the form of extensive pesticide application in close proximity to schools and residential areas.

DPR's monitoring project was challenging on multiple fronts. Indeed, a review of the areas of contention experienced by DPR in the Parlier environmental justice pilot project can go a long way to understanding the visceral reaction of the department staff and the ways in which regulatory scientific practice, agricultural and chemical industry notion of legitimate science, and environmental justice activist understanding of proper community participation and adequate scientific studies were at stake in this interaction. The project consumed the entire budget and much of the staff capacity for monitoring for a two-year period. This brought the notion of "place-based" approaches to a new level, as Parlier became not just a central place, but *the singular site* of department air monitoring. Of course, the limitations on DPR's funding associated with government cutbacks and retrenchment (generated primarily through pesticide regulation fees and providing only \$200,000 per year for the entire department's monitoring budget) are as much a factor as the costs of this project. Beyond cost, DPR faced questions from both environmental justice activists and agricultural industry interests about whether they should invest in monitoring for their environmental justice pilot project. While the agricultural industry organizations recommended using existing studies instead of new research, many environmental justice activists pushed for greater enforcement and engagement of communities in reporting pesticide violations.

Once it became clear that DPR would persist in its plan to engage in monitoring, the department was beset by competing pressures on how this monitoring should be conducted, including conflicts about the monitoring sites, chemical targets, and methods. While the environmental justice activists advocated for either a multi-site collection strategy or one located in the highest pesticide use area, the agricultural industry called for the selection of a "typical" Central Valley community as a monitoring site that would not represent an extreme of pesticide application. Where the environmental justice activists demanded a broad range of chemicals from multiple vectors (air, water, land) to be assessed, the agricultural industry recommended a smaller set of the most common pesticides as the monitoring targets. However, the agricultural industry also called for monitoring of non-pesti-

cide air pollution targets to make the case that pesticides are not the only – or the most important – component of air pollution and health affects. Both environmental justice activists and agricultural industry representatives appealed to “science” to bolster their interests with the industry seeking to limit and discipline the project through strict adherence to scientific methods and standards of proof. Environmental justice activists, on the other hand, sought to introduce a wider range of pollution issues, techniques, and data sets to DPR’s protocol.

In the end, DPR hewed a middle course between these interests, developing their monitoring protocol in consultation with both a Local Advisory Group (“LAG”) consisting of regional environmental justice activists with ties to Parlier and local and regional agricultural interests. It also consisted of a Technical Advisory Group (“TAG”) drawn from regulatory and academic scientists. This method differed from DPR’s typical approach. As one DPR official put it:

The typical way we do an air monitoring project: we go in, we decide where to set up the air monitoring stations, we set ‘em up, we monitor for a few months, we leave. Nobody even knows we are there. This time here we went to the community, we appointed a LAG. We worked very closely with the community.⁶⁰

In substance, DPR also steered a middle course and selected one community, Parlier, which ranked the highest on their environmental justice and pesticide criteria matrix (rejecting both the multiple case request of the environmental justice activists and the typical case of the industry). DPR expanded their list of air quality targets to forty (in cooperation with the California Air Resources Board) and attempted to link their study to air pollution exposure studies in Parlier conducted by scientists from UC Davis.

While results from the study are still preliminary at this writing, the monitoring has documented a range of pesticides in Parlier’s air. Several of these pesticides (including the harmful chemicals of chlorpyrifos and diazaon) appear to be above the “screening level” developed by DPR to indicate a need for additional study and potential regulatory responses. The term “potential” is an important one, in that there are no established regulatory limits on ambient air concentrations of pesticides, nor regulatory responses. The lack of a local organized environmen-

60. Interview with Eenvtl. Justice Advisory Workgroup participant, *supra* note 41.

tal justice presence in Parlier (against the recommendations of regional environmental justice activists who pushed for a monitoring site with such an organizational capacity) has also reduced the immediate impact of the study. As a result, it appears that those most affected by the monitoring are those of DPR officials themselves who were touched by the hard conditions of the Parlier residents. One DPR official summed up this notion:

That's again, part of how I've learned more about not being a bureaucrat here—but actually going out there and seeing, you know, there are people who are suffering. Now, they are not just suffering from pesticides: there are also problems with education, job security, with a lot of different things. Pesticides are just another thing, but . . . this is all we can affect.⁶¹

Despite the significant investment made by DPR in the Parlier pilot project, the agency has decided to delay the production of a final report until 2009. In her open letter to interested parties, DPR Director Warmerdam describes the department's decision as follows:

We find that we must delay that report, perhaps to as late as the first part of 2009. DPR's air monitoring staff (which will write the Parlier project report) has been assigned the huge task of implementing new regulations designed to reduce smog-producing emissions from fumigant pesticides. Although reducing toxic exposure to fumigants is not the primary goal of the regulations, in reducing emissions and use, these regulations will also help reduce exposure. In this, we will all benefit. While completing the Parlier report is important, all the data and preliminary evaluations have been released. Getting the new regulations in place and working effectively must take priority.⁶²

This explanation is notable both for its forthright statement of agency priority-setting, but also for what it omits. That is, DPR has "been assigned" the new regulations on smog-producing fumigant pesticides (volatile organic compounds, or "VOCs") as a result of a lawsuit against DPR and its parent agency Cal/EPA. The lawsuit was filed by the Center on Race, Poverty and the Environment (CRPE) on behalf of several Central Valley plaintiffs and is addressed in the following section.⁶³ CRPE itself was one of the organizations represented in DPR's advisory work-

61. *Id.*

62. *Id.*

63. *El Comité para el Bienestar de Earlimart v. Helliker*, 416 F.Supp.2d 912 (E.D. Cal. 2006).

group to inform the agency's development of an environmental justice implementation strategy and the lead plaintiff (El Comité para el Bienestar de Earlimart), also had a member on the work-group. In addition to demonstrating the interconnected nature of the environmental justice policy arena, the fact that DPR is not able to accommodate both its pre-existing commitment to its pilot project report and this new regulatory activity indicates the limited resources available to DPR. Likewise, DPR was only able to partially allocate the time of one its senior staff to the project (who also directs its external affairs) and only recently hired a part-time consultant. Therefore, the lack of agency resources and personnel suggests that the value placed on environmental justice by DPR in its strategic plan and program area goals is out of keeping with the resources available to implement it.

3. Litigation and Legislation: Environmental Justice and Pesticides

a. *Citizen Suits: El Comité v. Helliker et al.*

While there have been a range of critiques of a legalistic environmental justice strategy,⁶⁴ "citizen suits" have been an important strategy for the enforcement of environmental laws in general and, particularly, to address environmental justice issues. Most of the attention on the use of environmental laws in the pursuit of environmental justice has focused on their ability to provide an instrumental means to the goal of stopping a negative project.⁶⁵ Several notable legal cases have influenced the interactions between DPR and the environmental justice movement. Specifically, *El Comité para el Bienestar de Earlimart v. Helliker*,

64. Robert Benford, *The Half-Life of the Environmental Justice Frame: Innovation, Diffusion and Stagnation*, in POWER, JUSTICE, AND THE ENVIRONMENT: A CRITICAL APPRAISAL OF THE ENVIRONMENTAL JUSTICE MOVEMENT 37-53 (David N. Pellow & Robert J. Brulle eds., 2005).

65. Alice Kaswan, *Environmental Justice: Bridging the Gap Between Environmental Laws and "Justice"*, 47 AM. U. L. REV. 221, 243 (1997) (providing an overview of the legal literature on Environmental Justice). See generally Luke J. Cole, *Environmental Justice Litigation: Another Stone in David's Sling*, 21 FORDHAM URB. L.J. 523, 526-28 (1994) (describing use of environmental laws on behalf of poor and minority communities); Michael B. Gerrard, *The Role of Existing Environmental Legislation in the Environmental Justice Movement*, 9 ST. JOHN'S J. LEGAL COMMENT. 555 (1994) (discussing environmental laws that could be useful to communities opposing sitting decisions or seeking to improve environmental conditions).

represents an instance of social movement actors compelling a significant change in public agency regulation.⁶⁶

In 2004, a plaintiff group of grassroots activist organizations – including El Comité para el Bienestar de Earlimart, Association of Irrigated Residents, Community and Children’s Advocates Against Pesticide Poisoning, Wishtoyo Foundation, and Ventura CoastKeeper (collectively “El Comité”) – were represented by the Center for Race Poverty and the Environment and brought suit under § 304(a)(1) of the Clean Air Act, 42 U.S.C. § 7604(a)(1). This suit sought to compel DPR and other state and regional agencies to adopt regulations to curb pesticide-related emissions of volatile organic compounds (VOCs) by 20% from 1990 levels in five non-attainment area (NAA) air basins in Central and Southern California. Plaintiffs argued that such reductions were mandated under the 1994 Ozone State Implementation Plan (“SIP”), and since they were not achieved through voluntary means by 1997, regulations must be implemented to meet these standards. While the NAA’s failed to reach the emissions reductions specified in the SIP, no regulations were developed to limit VOC-forming pesticides. In the San Joaquin Valley, for example, fumigants emitted 17.9 tons of VOCs per day, 2.4 daily tons more than allowed under the order.⁶⁷

The defendants first attempted to have the case dismissed based on an argument that the SIP’s mandate to reduce VOCs did not require regulation of pesticide-based emissions. Instead, a federal judge ruled in February 2006 that the state had violated the Clean Air Act by not reducing pesticide-based VOC emissions despite its commitment to do so under the 1997 SIP.

Plaintiffs established standing to sue in federal court by noting the impacts of ozone on their health and well-being:

Members of the plaintiff organizations live, work, recreate, and raise their families in the San Joaquin Valley and Ventura non-attainment areas. Smog levels that exceed the one-hour and eight-hour National Ambient Air Quality Standards for ground-level ozone adversely affect members. These adverse effects include lung damage, exacerbated respiratory disease, and perceived threats to their health, the health of their children, neighbors, and

66. Mary Ann Warmerdam Letter, *supra* note 55.

67. Marla Cone, *Farm Air Pollution Targeted*, L.A. TIMES and TRI-VALLEY HERALD, May 18, 2007, http://www.valleyair.org/Recent_news/News_Clippings/2007/In%20the%20News%2005-18-07.pdf (discussing California’s plans for “strict, costly rules on the use of fumigants in soil”).

students. Members' aesthetic enjoyment of the environment in the San Joaquin Valley, Sierra Nevada Mountains, and Ventura County is also harmed by smoggy skies with diminished visibility.⁶⁸

Once plaintiffs established standing, their arguments addressed the specific policy mechanisms that needed to be changed by focusing on the State's incorrect use of higher baseline emissions (using the 1991 year as opposed to 1990 year levels) that allowed the agency to set a higher level of permissible emissions. In contrast, the State's arguments in the case went to the "nexus" between the continued non-attainment of VOC standards and the relief of new pesticide VOC regulations.

The court held that the State was indeed in violation of the Clean Air Act and the 1994 Ozone SIP.⁶⁹ Furthermore, the judge ruled that for the SIP to be valid, pesticide emissions regulations ("enforceable control measures") must be promulgated using the more restrictive 1991 baseline levels to calculate the 20% reduction. In making its order, the court allowed for some flexibility but made it clear that its authority trumped that of DPR and its parent agency Cal/EPA: "The court has chosen not to micro-manage the manner in which the defendants shall comply with this order, but only admonishes the defendants that it shall retain jurisdiction to ensure such compliance."⁷⁰

In response to the trial court ruling, DPR both initiated promulgation of new regulations on pesticidal VOCs and appealed the case to argue for several modifications to the order. According to its own regulatory statement, DPR's proposed regulations will "require the Director to establish field fumigant VOC emission limits for NAA's that exceed 80 percent of the emissions benchmarks to make sure those benchmarks are not exceeded. The benchmarks are based on each NAA's emissions in 1991, and are set 20 percent below that level."⁷¹ These emissions limits will require reductions of 30% to 40% from current levels statewide and up 52% in Ventura County. This large, mandated decrease, coupled with the heavy fumigant dependence of the County's strawberry industry, is a concern to area growers.

68. *Helliker*, 416 F. Supp 2d 912 (E.D. Cal. 2006) (Civ. S-04-822).

69. *Helliker*, 416 F. Supp 2d at 912.

70. *El Comité v. Helliker*, No. 2:04-cv-00882-LKK-KJM at 2 (E.D. Cal. 2006), available at http://emerginglitigation.shb.com/Portals/f81bfc4f-cc59-46fe-9ed5-7795e6eea5b5/epa2006_07991.pdf.

71. California Dep't of Pesticide Regulation, Field Fumigant Emission Limits No. 08-001, Notice of Proposed Regulatory Action, tit. 3 (2008), available at www.cdpr.ca.gov/docs/legbills/rulepkgs/08-001/notice.pdf.

While DPR accepts the court's order for the most part, it has proposed several modifications: using the 1990 emissions data instead of 1991 to set the baseline levels, increasing the total fumigant emission benchmarks allowed under the order, and providing for a "phase-in" until 2012 of emissions limitations. Such a phase-in is intended to allow time for growers to make modifications to their practices (such as alternative agricultural uses and lower emitting application methods, as well as pest management techniques) rather than remove land from agricultural production all together. These proposed modifications are currently under review by the appellate court with a hearing scheduled for May 2008.

DPR's Environmental Program Manager of the Environmental Monitoring Branch, the same person who has been in charge of the Parlier environmental justice pilot project, is also overseeing the development of these regulations. As a result of this overlapping responsibility (coupled with the general understaffed character of DPR and the current across-the-board budget cuts proposed by the Governor), DPR decided to delay the production of its Parlier pilot project report. Notwithstanding the merits of the legalistic strategy by the environmental justice activists, such a shift in emphasis from a proactive measure (the pilot project) to a reactive measure (developing regulations in response to a court order) is one consequence of the pesticide litigation.

b. SB-391: Activism Drifting In and Out of the Legal Focus

Just as the litigation described above represents an outside force compelling a reaction from an agency like DPR (the promulgation of new regulations), state legislation can also represent a powerful outside influence on the agency behavior. This section profiles a particular legislative process relating to SB-391, a bill that pushed agency enforcement on pesticide drift.

Authored by State Senators Dean Florez and Martha Escutia and signed into law on September 30, 2004, SB-391, or the Pesticide Drift Emergency Response Act, added two elements to the state's Food and Agricultural Code.⁷² The first is a to-be-determined "area plan" and protocol of coordinated emergency medical response to an "acute" injury or illness from a pesticide drift

72. Pesticide Drift Emergency Response Act, S. B. 391, S. Reg. Sess. (Cal. 2004) (added Cal. Food & Agric. Code § 12996.5, 12997.5, and 12997.7 relating to pesticides).

incident to an individual in a “non-occupational” setting. This protocol is to be coordinated between Cal/EPA, DPR, the Office of Environmental Health and Hazard Assessment, the County Agricultural Commissioner (CAC), local health officers, a “certified unified program agency,” and affected community members. The second element requires anyone found responsible for the acute injury or illness to be held liable for the cost of “uncompensated medical care” to the harmed individual or to the medical provider, in addition to possible penalties paid in relation to other violations of sections of the Food and Agricultural Code.⁷³ Arguably, the need for such a mandate seems clear and commonsensical, particularly to someone who is exposed to pesticide drift. But, the events and discourse leading up to the passage of this law, as well as its implementation, suggest otherwise.

The passage of SB-391 signaled vindication for grassroots, regional, statewide, and international environmental justice and pesticide reform activists and consumer interests.⁷⁴ They argued that:

[H]undreds, if not thousands, of people are affected annually by pesticide exposures. Illnesses and ailments include rashes, vomiting, irritation of the eyes, fainting, and respiratory problems . . . This bill is intended to provide treatment for pesticide exposure victims and ensure immediate and proper response to each incident.⁷⁵

Notwithstanding the impacts of pesticide exposure, various agricultural interests opposed the law.⁷⁶ The agricultural opposition had three main objections: “(1) that liability insurance for farmers will become more expensive, (2) that this bill expands the authority of DPR to impose fines, and (3) that the protocols are mandated, limiting regulators’ discretion.”⁷⁷

73. Cal. Food & Agric. Code §§ 12996, 12997, 12999, 12999.5 (West 2008).

74. Among these, the Legislative Counsel of California (www.leginfo.ca.gov) notes the formal supporters include the California Rural Legal Assistance Foundation (particularly, Martha Guzman, one of CRLAF’s prominent lawyers, an author behind the bill, and a long-time EJ and farmworker representative), California Communities against Toxics (CCAT), Consumer Federation of California, and the Natural Resources Defense Council (NRDC). Other supporters of the bill, in various capacities, include such groups as *El Comité para el Bienestar de Earlimart*, Californians for Pesticide Reform, and the Pesticide Action Network (of North America).

75. Pesticide Drift Emergency Response Act, S. B. 391, 2003-2004 Leg., Reg. Sess. (Cal. 2004), available at <http://www.leginfo.ca.gov>.

76. The Legislative Counsel of California as the California Farm Bureau Federation, Western Growers, and the Wine Institute formally listed these agricultural interests. Pesticide Drift Emergency Response Act, *supra* note 75.

77. Pesticide Drift Emergency Response Act, *supra* note 75 (enacted).

Nonetheless, mobilizing efforts by environmental justice and pesticide reform activists on a variety of levels – especially in response to pesticide drift incidents that sickened dozens of residents in the Central Valley communities of Earlimart (1999), Arvin (2002), and Lamont (2003) – drew attention to the massive hazards of pesticide drift. In all three of these communities, pesticides applied in nearby agricultural fields drifted into residential neighborhoods and schools causing burning eyes, breathing difficulties, fainting, vomiting and other symptoms in these communities inhabited predominately by Hispanic farmworkers. The emergency response to these drifts required numerous exposed individuals to strip their clothes and be hosed down while being quarantined in public view. Both the pesticide exposures and the arguably heavy-handed agency response caught the eye of many, including state Senator Dean Florez. He later conducted a series of public hearings to interrogate the CACs and local authorities responsible in the various incidents for their lack of immediate action and skepticism to reports from the exposed. Senator Florez's support for SB-391 represented an important shift in his position. Up until this point, Senator Florez had a record of largely supporting agricultural interests in the region, and his championing of the legislation transformed him into a potent ally for the environmental justice movement. These hearings and the narratives gave voice to open space for what Schlossberg⁷⁸ calls "a justice of recognition." The struggles and injustices suffered by those affected by pesticide drift are moving from the margins of public discourse onto the center stage of policy relevance.

SB-391, like much of the environmental justice-specific policies and programs discussed above, held much promise, as pesticide reform activists mobilized around the injustice of pesticide drift experienced by racial and ethnic minorities and low-income Central Valley residents. Yet, compromises came along the way. Much to the dismay of many activists pushing for the legislation, stipulations for pesticide-poisoning training for medical personnel, the development of a pilot program to establish an internet site with information identifying applications near a pesticide drift complaint, and a 24-hour hotline to contact a pesticide applicator were all stripped from the bill.⁷⁹ Furthermore, there has

78. Schlossberg, *supra* note 8.

79. SB 391 Bill text accessed at info.sen.ca.gov/pub/03-04/bill/sen/sb_0351-0400/sb_391_bill_20040930_chaptered.pdf). For a full legislative history see http://info.sen.ca.gov/pub/03-04/bill/sen/sb_0351-0400/sb_391_bill_20040930_history.html

yet to be a case that uses the authority of SB-391. While many would claim that it is fortunate that no *documented* cases have occurred on the level of previous drift incidents described above, some remain skeptical about whether the victory by environmental justice activists to get this bill passed will ever really achieve any form of the distributive justice that it sought to implement in the case of an acute illness or injury from pesticide drift. As one environmental justice and pesticide reform activist put it:

“It was great [to] pass the law. [But] [i]t has yet to be . . . where we get to see a case. Some fear that . . . any cases that do come up will be mired in appeals for years, and it won’t, in effect, work. But we’ll see.”⁸⁰

Indeed, although pesticide drift has been targeted by environmental justice and pesticide reform activists, a “rift” remains over permit conditions for various fumigants⁸¹ and environmental justice advocates’ use of drift catchers and human biomonitoring⁸² to draw a connection between the pesticides in the air drifting into Center Valley schools⁸³ and pesticides drifting into citizens’ bodies. In other words, while SB 391 moves significantly closer to the model of both participatory and distributive justice, serious questions and practical limits remain as to how far this can extend in practice.

V.

CONCLUSION

We began with the broad question of how well the promise of environmental justice has been implemented in California’s policy framework. We see that environmental justice movement in California has made great strides in the area of procedural justice. As evidenced in the proliferation of environmental justice advisory groups, the environmental justice movement is gaining

80. Interview with Env’tl. Justice Advisory Workgroup participant, *supra* 43.

81. Sarah Jimenez, *Drift Targeted but Rift Remains; Pesticide Proposals Draw Criticism from Farmworkers, Growers*, FRESNO BEE, June 1, 2007, at B1. The article closes with a quote from Lupe Martinez, an organizer with the Center on Race, Poverty & Environment: “We can have the most restricted permits and paperwork filed. . . [b]ut what really counts is what’s done in the field.”

82. See the summary of the collaboration between *El Quinto Sol de América*, based in Lindsay, California, Californians for Pesticide Reform (CPR), Pesticide Action Network of North America, and Commonweal Researchers at <http://www.pestidereform.org/downloads/Biodrift-Summary-Eng.pdf>.

83. Associated Press, *Activists: Pesticides Threaten Schools: November Incident in Strathmore Highlights the Danger, Group Says*, VISALIA TIMES-DELTA, May 16, 2007, at 1A-3A.

relatively unprecedented access to insider participation in the environmental decision-making processes that impact its members' and constituents' lives at the regional and statewide levels. Also notable is the way in which agencies as well as activists are organizing themselves at multiple scales of regulation with important implications for power relationships. We have seen that pilot projects, such as the Parlier monitoring project, have been primarily carried out on the local or place-based level. Focusing the scale of projects on the local level and extending these efforts over a longer period of time can provide unique opportunities for social movement organizations and agencies to build trust, share knowledge and engage on a common terrain. At the same time, the power of the environmental justice activists to compel agency attention to local conditions derived from the movement's growing regional and statewide mobilization to match the regulatory scale of the agencies themselves.

Despite this important progress, through a close review of the major forms that implementation of environmental justice has taken in the state (legislation, pilot projects, small grants, advisory groups, and law suits), we have illustrated a significant disconnection between agencies and activists. This disconnection arises for two principal reasons. First, we have found that most approaches to environmental justice in California have addressed the procedural or participatory elements – whether this is in the form of advisory groups designed to inform agencies (as in the DPR environmental justice advisory workgroup), to advise specific projects (the Local Advisory Group for the Parlier pilot project), or to advise a group of state agencies (as in the California Environmental Justice Advisory Committee to the multi-agency Interdepartmental Work Group). Because this advisory role carries little authority over decisions and the allocation of resources, such participation did not easily translate into changing the actual distribution of environmental inequalities in the state. As a result, even environmental justice organizations that have engaged in collaborative forums such as advisory groups, still turn to oppositional tactics such as lawsuits and legislation to force agency attention to their demands.

Second, we observe a tension in the processes and outcomes for incorporation of social movements into state agency processes. Social movements are often characterized as agents of social change, but activists' attempts to transform agencies often results in changes to the movements themselves, sometimes in

ways that can compromise the original goals of the movement. These compromises have been attributed to the process of institutionalizing the goals of a social movement into a preexisting political context with often conflicting organizational dynamics and regulatory imperatives.⁸⁴ Indeed, as issues move from social movements into policy, the meaning and methods of statutory and regulatory enforcement are highly contested. Understanding the dynamics of these power relations and the relative strengths and weaknesses of the parties as they intersect to form this policy arena is critical to a full analysis of environmental justice in California. This will be a crucial focus of theory and practice as environmental justice laws, policies, and programs develop in the state and abroad.

Third, the institutionalized forms of participation as reviewed in this paper rarely offer opportunities for a kind of “recognition” of the cultural contexts or perspectives of the participants.

As a result of these structural and cultural disconnections, environmental justice activists remain largely unsatisfied with state agencies’ responses to their demands for greater control over the decisions that affect their lives and the reduction in the disproportionate environmental risks faced by their communities. This disconnection between agencies and activists is seen in the patterns of conflict in the various advisory groups and the continued appeal to the courts and the legislature to compel agency actions. Even when agencies are able to design processes with lower levels of conflict, such as DPR’s environmental justice advisory workgroup and its Parlier pilot project, the inability to mobilize and allocate sufficient resources suggest that while containing some necessary elements, the current agency model is not sufficient to achieve environmental justice in the state.

84. See, e.g., Lauren B. Edelman, *Legal Ambiguity and Symbolic Structures: Organizational Mediation of Civil Rights Law*, 97 AM. J. OF SOC. 1531-76 (May 1992); Lauren B. Edelman & Mark C. Suchman, *When the ‘Haves’ Hold Court: Speculations on the Organizational Internalization of Law*, 33 LAW & SOC’Y REV. 941-991 (No. 4, 1999); Valerie Jenness & Ryken Grattet, *The Law-In-Between: The Effects of Organizational Perviousness on the Policing of Hate Crime*, 52 SOC. PROBLEMS 337-359 (No. 3, 2005); and DAVID S. MEYER, VALERIE JENNESS, & HELEN INGRAM, *ROUTING THE OPPOSITION: SOCIAL MOVEMENTS, PUBLIC POLICY, AND DEMOCRACY* (Univ. of Minn. Press, eds. 2005).

