

2002

CALIFORNIA'S ENERGY CRISIS - THE PERILS OF CRISIS MANAGEMENT AND A CHALLENGE TO ENVIRONMENTAL JUSTICE

Alan Ramo

Golden Gate University School of Law, alan_ramo@att.net

Follow this and additional works at: <http://digitalcommons.law.ggu.edu/pubs>

 Part of the [Environmental Law Commons](#)

Recommended Citation

7 Albany L. Env. Outlook J. 1 (2002)

This Article is brought to you for free and open access by the Faculty Scholarship at GGU Law Digital Commons. It has been accepted for inclusion in Publications by an authorized administrator of GGU Law Digital Commons. For more information, please contact jfischer@ggu.edu.

ARTICLES: ISSUE 1

CALIFORNIA'S ENERGY CRISIS – THE PERILS OF CRISIS MANAGEMENT AND A CHALLENGE TO ENVIRONMENTAL JUSTICE

*Alan Ramo**

I. INTRODUCTION.....	2
II. CALIFORNIA'S DEREGULATION EXPERIMENT.....	2
III. CALIFORNIA'S EMERGENCY RESPONSE	7
IV. THE REAL REASON FOR BLACKOUTS	9
V. CALIFORNIA'S CRISIS MANAGEMENT AND ENVIRONMENTAL JUSTICE	12
VI. PEAKER PLANTS, A FOCUS OF ENVIRONMENTAL INJUSTICE	20
VII. LESSONS FROM CALIFORNIA'S EXPERIENCE WITH ENERGY CRISIS MANAGEMENT	23
VIII. CONCLUSION	25

* Alan Ramo, BA, Stanford University, JD, University of California at Berkeley Boalt Hall School of Law, is an Associate Professor of Golden Gate University School of Law in San Francisco, California where he directs the Environmental Law and Justice Clinic and the LL.M. Graduate Program in Environmental Law. This article relies upon substantial research by Professor Karina Garbesi, Department of Geography and Environmental Studies, California State University, Hayward for a joint article with Professor Ramo.

I. INTRODUCTION

California's energy crisis represented a profound moment in energy policy, crisis management and environmental justice. California's deregulation led to blackouts and rapid increases in ratepayer bills that eventually fueled the Governor's declaration of emergency and emergency legislation by the State Legislature. Lessons about deregulation, crisis management and environmental justice abound.

This article is not an attempt to systematically and comprehensively analyze California's energy deregulation. It instead focuses on the repercussions of crisis management, particularly as it relates to environmental justice.

There are implications for our society beyond energy policy in California's energy experiment, especially at a time of national crisis management to address the terrorist threat. Even in a state that prided itself on its progressiveness and demographic diversity, people of color were the first to suffer in a time of crisis. At the same time, democratic rights such as public participation in environmental decision-making were easily eroded. Even more alarming, after the crisis abated, governmental leaders empowered by emergency authority are now resisting giving up their new power. Now it appears that mistakes made in the crisis will have consequences far into the future.

II. CALIFORNIA'S DEREGULATION EXPERIMENT

California's deregulation scheme was superficially brilliant in design, though fatally flawed. The basic goal was to reduce prices.¹ While historically, one could question the need to fix a system that had dramatically reduced energy prices over one hundred years,² California's prices remained relatively high, and business in particular, welcomed the siren's call that competition could reduce prices still further.³

¹ See *California Public Utilities Commission, The California Public Utilities Commission Answers* <<http://www.cpuc.ca.gov/static/industry/electric/electric+restructuring/historical+information/faqs.htm>> (accessed Mar. 7, 2002).

² See Figure 1, Average residential price of electricity, 1892 to 1997 in Hirsh and Serchuk, *Power Switch, Will the Restructured Electric Utility System Help the Environment*, 41 *Environment* 7 at 4-9 (1999).

³ The California Public Utilities Commission ("CPUC") estimated that

California's deregulation was ushered in by the California Legislature through Assembly Bill 1890 on September 23, 1996⁴ and by the State's Public Utilities Commission (Preferred Policy Decision (D.95-12-063, as modified by D.96-01-009). Its primary feature was to have the sale and pricing of electricity deregulated.⁵ California's business would have direct access to generators of electricity. Prices were to be deregulated over a four-year period of time.⁶ To assure that competition would drive prices down, a substantial portion (at least 50%) of fossil fuel power generation (nuclear and hydroelectric were excluded) was ordered to be divested from regulated utilities. Further, to encourage new investment in new generation, anyone would be allowed to set up a power plant without a showing that it was needed, as under the old regulatory regime. At the same time, brokers would be allowed to purchase electricity and sell it retail to consumers or businesses directly. A power exchange, managed by a non-profit board, would conduct a market where electricity could be bought and sold. Except for direct access for business, long-term contracts were not allowed to foster competition.

In addition, to protect utility shareholders whose regulated capital investments may not have been appropriate for a deregulated market, a stranded assets account was created to repay utilities for assets that would be undervalued by the market.⁷ To fund the account, the legislature authorized a transition charge paid by ratepayers, based upon the assumption that the assets were worth about twenty-eight billion dollars. If the assets were sold and the proceeds were more than estimated, the excess amount would be returned to the account to the benefit of ratepayers.⁸

national electricity costs were 30-50% lower than California's prior to deregulation. CPUC, *How Electric Industry Change Affects You* <<http://www.cpuc.ca.gov/static/industry/electric/electric+restructuring/historical+information/plain.htm>> (accessed Feb. 18, 2002).

⁴ See Cal. Assembly 1890, 1995-1996 Reg. Sess. (Sept. 23, 1996) available online at <http://www.leginfo.ca.gov/pub/95-96/bill/asm/ab_1851-1900/ab_1890_bill_960924_chaptered.pdf> (accessed Mar. 7, 2002).

⁵ In fact California was not purely deregulated. Among other things, as discussed below, while the State's control receded, the federal government through the Federal Energy Regulatory Commission retained authority to regulate prices.

⁶ See Hirsch, *supra* n. 2.

⁷ Cal. Assembly 1890, 1995-1996 Reg. Sess. at §10(s).

⁸ *Id.* (outlining the charges associating the transition to a competitive generation market).

To protect ratepayers from these additional costs, a rate reduction of 10% and freeze were implemented until the market was created and prices were fully deregulated.⁹ The freeze was financed through the issuance of \$6.6 billion in bonds.¹⁰ To protect alternative generation suppliers (e.g., wind and solar) who could not initially compete in an open market, the legislature authorized transitional subsidies in the amount of \$540 million that would be phased out over a five-year period as the market was implemented.¹¹

Finally, to assure reliability, the Legislature created a non-profit Independent System Operator ("ISO"), governed by a board of utilities, brokers, consumers and businesses, to manage the grid.¹² The ISO would assure the day-to-day operations of the grid as well as oversee the maintenance and expansion of transmission systems.¹³ The utilities would still own and maintain the transmission systems under ISO oversight and be responsible to assure that electricity was distributed to businesses and homes, however, in order to receive their transition charges they had to submit control of their transmission systems to the ISO.¹⁴

Thus everyone won. Business and residents would have multiple sellers in a competitive market driving down prices. Utilities would have their stranded costs paid for by ratepayers and taxpayers. Residents would be assured that the payoff of stranded costs would not increase prices in the short-run and competition would control prices in the long run. Non-utility generators were assured they could get into the market without monopoly control from the old utilities and with little regulation. Brokers were free to buy and sell electricity.¹⁵ Alternative generators were given a cushion to ease transition into a market economy.

There were major flaws in this well-crafted program. First,

⁹ Cal. Assembly 1890, 1995-1996 Reg. Sess. at § 1(b)(2); *see also* Hirsch, *supra* n. 2.

¹⁰ *Id.* at § 8(3)(b) (noting that the total amount of rate reduction bonds should not exceed ten billion dollars).

¹¹ *Id.* at §10, Art. 381(c)(3) (describing funding for operation and development).

¹² *See generally* Cal. Assembly 1890, 1995-1996 Reg. Sess. (providing insight about the creation of ISO and its function).

¹³ *Id.* (listing general obligations and duties of the ISO).

¹⁴ *See Id.* at § 12 (referencing the control of the ISO over publicly owned utilities).

¹⁵ *Id.* at §10 (defining brokers' abilities).

there was a naïve assumption regarding the requirements for a functioning electricity market. Markets require efficiency to produce stable prices.¹⁶ Efficiency requires sufficient participants, sufficient products and ease in distributing products. The converse is that a small number of participants who have monopoly control over the distribution of products in a situation of scarcity can dramatically affect the market (market power).

In California, the margin between electrical supply and demand during peak demand hours is razor thin. Even with divestment, a small number of companies dominate power supply. By 1999 approximately two-thirds of private utility assets had been sold to private companies. Diversified, global, out-of-state-headquartered corporations (AES, Houston, Southern, NRG, Dynegy, and Duke) owned eighty-eight percent of these assets. Only seven percent was divested to a California company, Calpine—a San Jose based business focused on relatively clean energy technologies, combine-cycle natural gas and geothermal, though its output through construction of new power plants is rapidly expanding.¹⁷

Power supply is constrained by a congested transmission system that cannot efficiently deliver electricity from everywhere to everywhere in the state, let alone across the country. The result is that if one or more companies withhold electricity during peak hours, whether due to planned or unplanned maintenance or attempts to game the market, prices can skyrocket.

Secondly, there was a failure to fully grasp the impact of a dramatic change in electrical policy in a climate of regulated monopolies. Once it became apparent that California was heading towards deregulation, the utilities had no incentive to build power plants. At the same time, an outside company was faced with too much uncertainty until deregulation was hammered out in the legislature to commit to investing. The result was that few power-generating facilities were built in the decade before deregulation.

This problem would not have been an issue if conservation proceeded apace. But while deregulation provided subsidies to

¹⁶ See California Energy Commission, *Electric Generation Divestiture in California* <<http://www.energy.ca.gov/electricity/divestiture.html>> (accessed Jan. 28, 2000).

¹⁷ *Id.*

alternative companies, it removed the incentive for utilities to fund conservation efforts. Conservation spending took a nose-dive after deregulation. It eroded state commitments to demand side management ("DSM") even before its formal onset in 1998:

After the CPUC announcement in 1994 of the transition to restructuring, uncertainty about the future of DSM incentives led the utilities to dramatically cut DSM budgets. In 1996, AB 1890 set annual funding at this relatively lower level.¹⁸

Statewide funding for utility DSM programs peaked at \$500M in 1994, and was down to \$270 M by 1999. As a result, the California Energy Commission ("CEC") found "the contribution of energy efficiency programs to reduce demand continues to decline."¹⁹

The deregulation effort to protect, if not promote renewables was similarly flawed. Renewables already had taken a substantial blow from the onset of deregulation. Investors and operators saw little need to support such production based upon the expected price fall under deregulation that would make renewables uncompetitive. Deregulation statutes had allocated \$540 million for the transition period, less than two percent of the funds allocated to bail out the regulated utilities from their stranded costs. As stated by two key energy advisors to the Governor, Michael Kahn (Electricity Oversight Board chairman) and Loretta Lynch (CPUC chairperson):

In the AB 1890 negotiations, proponents of renewable energy supplies and energy efficiency won legislated funding for energy efficiency renewable resources. However, pursuing a competitive market structure, policy makers made funding for these programs a low priority. The current funding for these programs is almost 70% less than it was in the early 1980s.²⁰

The result was a process that discouraged the building of power generation, provided no incentives to improve the

¹⁸ CEC, *California Energy Outlook 2001* <www.energy.ca.gov/electricity/divestiture> (accessed Mar. 6, 2001).

¹⁹ *Id.*

²⁰ Michael Kahn and Loretta Lynch. *California's Electricity Options and Challenges: Report to Governor Gray Davis (Summer 2000)* at § 4; see also <http://www.cpuc.ca.gov/published/report/GOV_REPORT.htm#TopOfPage> (accessed Apr. 21 2002).

transmission system, dampened conservation and the development of alternative renewable sources, and allowed power generators to dramatically affect prices to their profit. Instead of a market, the pieces were in place to assure blackouts, not only at a peak demand period in the summer but in the dead of winter.

The one safeguard built into deregulation was the authority vested in the Federal Energy Regulatory Commission ("FERC") to assure reasonable prices.²¹ However, FERC was governed by a board that was ideologically fixed on the market solving all problems.²² FERC failed to control prices at peak periods until it was too late, guaranteeing an incentive for those whom intentionally or accidentally withheld power in those moments.²³

FERC actions underscored a fundamental misunderstanding about electricity. Electricity may be a commodity that ought to be suitable for a market, but it is also a necessity. Low-income elderly individuals on fixed incomes may die during the winter months if the elderly forego payment of their utility bills to save money for groceries. Small businesses may be bankrupt in a week if utility bills skyrocket. Unlike pencils or apples or tennis rackets, electricity may not be ignored or substituted for if prices skyrocket, providing a market control over volatility. Demand is inelastic, providing the opportunity for a dramatic increase in price if supply slackens.

Equally important, electricity being a necessity becomes a political issue. Politicians will not stand by, waiting for the market volatility to subside before acting. Electricity was thus ill suited for traditional and uncontrolled market economics. It is no wonder that California's brand of deregulation failed and government eventually stepped in to stop the hemorrhaging.

III. CALIFORNIA'S EMERGENCY RESPONSE

While the question of whether Governor Davis waited too long to respond is beyond the scope of this article, the main point is

²¹ See 16 U.S.C. § 824(e); see also *In Re California Power Exchange*, 245 F.3d 1110 (9th Cir. 2001).

²² See Marshall Wilson and Zachery Coile, *Start Digging, Energy Chief Tells State; He says new power plants, not prices caps are the answer*, The S.F. Chron. A3 (Apr. 12, 2001); see generally Lynda Gledhill and Robert Salladay, *Davis Threatens to Sue Regulators to Get Price Limits*, The S.F. Chron. A8 (May 30, 2001).

²³ See *San Diego Electric Co.*, FERC P61, 275 (May 25, 2001) (discussing FERC's eventual attempts to control prices).

that eventually he did respond. He responded by proclaiming pursuant to his authority under Government Code § 8550 *et seq.*, a state of emergency on January 17, 2001.²⁴ He soon followed with several executive orders.²⁵

The declaration of emergency and several of the Governor's executive orders required the rapid progression of power plant licensing. Indeed, once the Governor declares an emergency regarding energy supply, the Energy Commission has the authority to "authorize the construction and use of generating facilities under such terms and conditions as specified by the commission to protect the public interest."²⁶ Thus the Governor's declaration opened the door for disregarding all procedural and substantive safeguards in power plant licensing.

To address the possibility of price gouging, Governor Davis sought price caps and refunds at FERC and had his attorney general investigate the withholding of capacity at critical moments resulting in blackouts. To address a growth in the demand for electricity, Davis and the state legislature took various measures to provide incentives for conservation and launched a public information campaign. The Governor's Public Utilities Commission also ended the price freeze with new rates that not only provided additional revenues for utilities now facing bankruptcy, but also, provided an additional disincentive for wasteful usage of electricity. To address price volatility, his Department of Water Resources signed new long-term contracts at a price well below peak prices but way above historical prices.

All of these steps seem reasonable. However upon closer examination many of the steps are quite disturbing. The long-term contracts, for example, did not include any escape clause if prices radically changed. In fact, prices have come dramatically down, yet Californians must now pay for electricity that no one needs at prices way above market value.²⁷

However, particularly of concern in this article are the

²⁴ Governor Davis, *Executive Order D-40-01* <http://www.governor.ca.gov/govsite/msdocs/press_release/proc_EO_40.doc> (accessed Mar. 6, 2002).

²⁵ Welcome to California <<http://www.governor.ca.gov>> (accessed Mar. 6, 2002) (listing recent executive orders through the press room link).

²⁶ Cal. Pub. Res. Code §25705 (West 2002).

²⁷ Mark Martin and Lynda Gledhill, *The Energy Crunch A Year Later; Paying the price of power: After the state spends billions, PG&E faces bankruptcy and rates soar, the cost of keeping the lights on hits home*, *The S.F. Chron.* A1 (Dec. 23, 2001).

emergency orders and legislation that was adopted and still in effect speeding up power plant licensing, even now as the crisis ebbs. The effect of these orders has been to bank California's energy portfolio upon privately owned natural gas-powered power plants,²⁸ disproportionately in communities of color. Siting decisions are further being made without meaningful public participation and with fewer environmental protections. As a result of the Governor's approach, California's energy future will be leveraged upon one source of polluting fuel, dominated by private companies still operating in a deregulated though not as free market.

IV. THE REAL REASON FOR BLACKOUTS

All of the evidence now available points to the underlying causes of blackouts in California. Energy assets that were available were offline and the rest could not efficiently distribute their electricity through inadequate transmission lines. The reasons for facilities being offline are in dispute—necessary maintenance being the main excuse that is offered by power companies. Whether the blackout occurred at a low demand time in December or a high demand in June, the issue was a mismatch of available supply and demand, not an absolute lack of supply:

The lights went out in the Bay Area in part because nine power plants were out of service, either for scheduled maintenance or repairs, or were operating at limited capacity. PG&E could not import enough power to make up for the lost generation because the region has limited transmission facilities over which to import power.²⁹

Indeed California recorded high prices even in the low demand month of December. December 2000 wholesale prices hit \$425.59, more than ten times the amount in the previous year, and about double the price just a few months before at the height of the hot summer months in August, when peak usage was

²⁸ See Roberta Mendonca, *Presentation—April 15, 1999 Santa Teresa Citizen Action Group* <http://www.energy.ca.gov/sitingcases/1999-04-15_public_adviser.html> (last updated July 19, 2001) (noting that prior to deregulation California had a diverse portfolio of energy sources: 30% natural gas, 21% coal, 23% large hydroelectric, 15% nuclear and 11% renewable).

²⁹ See 16 U.S.C. § 5.

about 20% greater.³⁰

What explains the December 2000 peak, when a Stage 3 alert was called? Power producers had taken 8,988 megawatts (MW) off-line, a substantial sum considering that peak usage at that time was about 31,200 MW.³¹ The total operational capacity of the three major utilities in California in 1999 was 41,749 MW.³² Whether it was due to so-called "planned maintenance", unplanned maintenance, or outright gaming of the system, the December prices and alert were more a result of the imbalance between supply and demand rather than the absolute inadequacy of supply.

Because the issue is related to an imbalance, not an absolute lack of supply, as well as transmission congestion, the solution is not simply increasing supply. Indeed, the December blackout demonstrates that a mismatch can occur even when potential supply is 50% greater than demand, including non-utilities and imports. The solution is control over supply, not the amount of supply, and the efficient distribution of electricity. It may not be just a coincidence that once the California Attorney General and the State Legislature began to put heavy investigative pressure on the withholding of capacity that the energy crisis began to abate.³³

Centralizing control in the state or in a regulated monopoly is one answer to the imbalance. California indeed had regulated monopolies before and returning to that regime was one choice not seriously considered by Governor Davis. Another approach is

³⁰ See Christian Berthelsen & Scott Winokur, *Soaring Electric Use More Fiction Than Fact; Chronicle investigation finds power companies manipulate data to excuse their towering rates*, The S.F. Chron. A1 (Mar. 11, 2001); see also CEC, *Wholesale Electricity Price Review (Dec. 2000)* <<http://www.energy.ca.gov/electricity/wepr/2000-12/index.html>> (accessed Mar. 7, 2002).

³¹ CEC, *Statewide Average Daily forced or Scheduled Megawatts Off-Line by Month* <http://www.energy.ca.gov/electricity/1999-2001_monthly_off_line.html> (accessed Feb. 14, 2002).

³² CEC, *1999 Operational Capacity of California's Three (Major) Investor-Owned Utilities* <http://www.energy.ca.gov/electricity/operational_capacity.html> (accessed Mar. 7, 2002).

³³ See George Skelton, *Lockyer Prefers Action over Talk in Power Crisis*, L.A. Times A3 (Apr. 2, 2001); see also Carl Ingram, *Senate Panel Lashes Out at 2 Energy firms; Hearings: Lawmakers hold Enron and Mirant in contempt for refusing to help in pricing probe*, L.A. Times A1 (June 29, 2001) (discussing the various efforts taken by the investigative committee to resolve the energy crisis in California).

to literally give power to the people, creating a climate where Californians put solar or wind power on their homes, governmental buildings and businesses so they are in control and electricity need not be distributed over transmission lines. Efforts to bolster efficiency and conservation also reduce the stranglehold of centralized power sources.

Amazingly Davis, for all of his bluster about illegal price activity by out of state companies, never seemed to consider any approach that would significantly divest or diversify generation from, as Governor Davis put it, "the pirate generators and power brokers who are gouging California consumers."³⁴ Davis in effect preserved the deregulated ownership of power capacity in centralized fossil fuel power plants.³⁵

The net result is that the same economic structure that contributed to the blackouts remains in effect. Private companies with incentives to raise prices to increase profits continue to control power generation in California. Power generation is dominated by centralized fossil fuel generators and transmission upgrades or capacity is on the back burner.

Further, to the extent increased prices were a result of volatility in natural gas prices,³⁶ Davis' approach only further exacerbates the potential problem. His executive orders that were directed toward speeding up power plant licensing could only benefit natural gas producers, as environmental laws now prohibit or discourage other sources of fossil fuel or nuclear power in California. These facilities already have distribution infrastructure in place that have been paid for by ratepayers for decades, and therefore have an advantage over other technologies such as decentralized solar or wind. Davis' token subsidies for alternatives pales in comparison to the inherent subsidies now in place for centralized fossil fuel electrical generation.

The biggest concern in this article is that the California response to the crisis led by Governor Davis had significant

³⁴ Thomas Hargrove, *Energy crisis edicts issued, Regulators 'soft-cap' prices; Davis furious*, Ventura County Star A1 (Ventura County, Cal.) (Dec. 16, 2000).

³⁵ See Bernadette Tansey, *The Energy Crunch; A Year Later; Deregulation (sort of) lives on in state; Future contours of electricity system still subject to changes*, The S.F. Chron. A1 (Dec. 25, 2001) (reporting the continued reliance on deregulated private sources of energy).

³⁶ See Martin, *supra* n. 27 (quoting the following "soaring natural gas prices, a dearth of hydroelectric power from the Northwest and scores of power plants shuttered for maintenance created the unstable market").

consequences for environmental justice. Because he undermines environmental justice for the sake of a policy that fails to address the underlying problems of the crisis, he makes more dramatic the fragile nature of this new doctrine in a time of crisis.

V. CALIFORNIA'S CRISIS MANAGEMENT AND ENVIRONMENTAL JUSTICE

Environmental justice has evolved as a policy doctrine in law beginning with President Clinton's Executive Order 12898 of February 11, 1994.³⁷ The accompanying Memorandum,³⁸ suggested implementing the Order through enforcement of two key statutes, the National Environmental Policy Act ("NEPA")³⁹ and Title VI of the Civil Rights Act of 1964.⁴⁰ Soon thereafter, the Council on Environmental Quality issued its Environmental Justice Guidance Under the National Environmental Policy Act.⁴¹ The United States Environmental Protection Agency ("USEPA") followed in April 1998 with its *Final Guidance for Incorporating Environmental Justice Concerns in EPA's NEPA Compliance Analysis*.⁴²

USEPA took the lead among federal agencies in proposing specific guidelines for implementing Title VI of the Civil Rights Act as a key strategy for establishing environmental justice. In 2000, it adopted two related documents detailing how it would evaluate Title VI complaints—the *Draft Revised Guidance for Investigating Title VI Administrative Complaints Challenging Permits (Draft revised Investigation Guidance)* and its *Draft Title VI Guidance for EPA Assistance Recipients Administering Environmental Permitting Programs (Draft Recipient Guidance)*.⁴³

³⁷ See 59 Fed. Reg. 7629 (Feb. 16, 1994).

³⁸ See William J. Clinton, Executive Order 12998- *Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations*, 30 Wkly. Comp. Pres. Doc. 279 (Feb. 11, 1994).

³⁹ 42 U.S.C. §§ 4321-4345 (1994).

⁴⁰ 42 U.S.C. § 2000 (d).

⁴¹ See Council on Environmental Quality, Environmental Justice Guidance Under the National Environmental Policy Act (Dec. 10, 1997) <<http://ceq.eh.doe.gov/nepa/regs/ej/ej.pdf>> (accessed Mar. 5, 2002).

⁴² U.S. EPA, *Guidance for Incorporating Environmental Justice Concerns in EPA's NEPA Compliance Analysis (1998)* (stating that the primary goal of NEPA is to make certain that federal agencies while in pursuit of their missions do not fail to consider the effects of their actions on the environment).

⁴³ U.S. EPA, *Draft Title VI Guidance for EPA Assistance Recipients Administering Environmental Permitting Programs (Draft Recipient Guidance)*

California, in response to these federal initiatives, soon followed with its own environmental justice statute. Governor Davis signed legislation adopting a California environmental justice policy on October 6, 1999. The Solis bill provided in part:

"[E]nvironmental justice" means the fair treatment of people of all races, cultures, and incomes with respect to the development, adoption, implementation, and enforcement of environmental laws, regulations, and policies."⁴⁴

A key principle in environmental justice is public participation. In 1991, the seminal First National People of Color Environmental Leadership Summit in Washington D.C. included as one of its principles of environmental justice "the right to participate as equal partners at every level of decision-making including needs assessment, planning, implementation, enforcement and evaluation."⁴⁵

The Executive Order and the accompanying Memorandum emphasized public participation. The Order at § 1-103 required each federal agency to develop as part of its environmental strategy "public participation practices" that "ensure greater public participation."⁴⁶ The Memorandum called for each federal agency to "provide opportunities for community input in the NEPA process... including improving the accessibility of meetings, crucial documents, and notices."⁴⁷

The EPA has given particular emphasis to public participation, to the extent that a Title VI violation could be found on public participation grounds alone.⁴⁸ The EPA has even proposed

and Draft Revised Guidance for Investigating Title VI Administrative Complaints Challenging Permits (Draft Revised Investigation Guidance), 65 Fed. Reg. 39650-39654 (June 27, 2000) (explaining the purpose of the documents for clarifying Title VI compliance requirements for citizens and agencies).

⁴⁴ Cal. Govt. Code § 65040.12 (e).

⁴⁵ Race, Poverty and the Environment, Fall 1991 at 31-32 <<http://www.urbanhabitatprogram.org/publications.htm>> (accessed Mar. 7, 2002); *see also* <<http://www.webofcreation.org/education/policystatements/color.htm>> (accessed Mar. 7, 2002).

⁴⁶ *See* USDA Forest Service, *Federal Actions to Address Environmental Justice In Minority Populations and Low-Income Populations* <<http://www.fs.fed.us/land/envjust.html>> (accessed Mar. 7, 2002).

⁴⁷ *Id.*

⁴⁸ *See* 65 Fed. Reg. at 39658 (ensuring that the public, who will be ultimately impacted by the agency decisions, are involved early on in the process so that

revising its public involvement policy for the first time in 19 years in response to environmental justice concerns.⁴⁹

California also emphasized public participation. The California EPA ("Cal EPA") is required to assure fair treatment in all of its activities, including taking steps to "[e]nsure greater public participation in the Agency's development, adoption, and implementation of environmental regulations and policies."⁵⁰

Prior to the energy crisis, the CEC first addressed environmental justice in a case involving the siting of a new power plant in Bayview-Hunters Point in 1996.⁵¹ While the Commission rejected the environmental justice challenge on the substantive merits, it accepted that it was obligated to comply with Title VI of the Civil Rights Act as an agency partially funded by federal money.⁵² Subsequently the staff has generated an internal policy for addressing environmental justice concerns.⁵³

Governor Davis implemented his initiative to increase generation by demolishing public participation in facility siting. Normally, the CEC engages in at least a yearlong process before a power plant can be sited.⁵⁴ In the usual contested case the Commission takes at least eighteen months or longer.⁵⁵

Power plants potentially impact all environmental media, air, water and soil, and therefore require a complex and comprehensive environmental analysis. Power plants are complicated machines that need to be assessed as to land use requirements, seismic safety, hazardous materials use and waste discharge, public health, impact to aquatic or land based flora

their concerns are properly addressed) [hereinafter "Draft Recipient Guidance"].

⁴⁹ *Id.* at 82335-82345.

⁵⁰ See Cal EPA, *PRC 72000(c) Mission for Programs, Policies and Standards* <<http://www.arb.ca.gov/bluebook/BB01/PRC/72000.htm>> (accessed Jan. 10, 2002).

⁵¹ CEC, *S.F. Energy Company Cogeneration Project, Application for certification* (94-AFC-1) (1994).

⁵² Alan Ramo, *Hunters Point: Energy Development Meets Environmental Justice*, *Environmental Law News*, Vol. 5, No. 1, State Bar of California Environmental Law Section at 28 (Spring 1996).

⁵³ See CEC, *Staff Approach to Environmental Justice for Power Plant Licensing Cases* <http://www.energy.ca.gov/env-justice/staff_env_justice_approach.html> (updated Apr. 12, 2002).

⁵⁴ Cal. Pub.Res. Code § 25540.6.

⁵⁵ An example of a case exceeding 12 months is the *Potrero Power Plant Project* (00-AFC-4) at <<http://www.energy.ca.gov/sitingcases/potrero/index.html>> (accessed Feb. 14, 2002).

and fauna, among other issues.⁵⁶ The process is thus approved under state law to be a certified program equivalent to an environmental impact report process under the California Environmental Quality Act ("CEQA"), and similar to a NEPA Environmental Impact Statement.⁵⁷

The normal twelve-month process includes at least six months of discovery, including information requests (interrogatories) from all parties. The Commission staff is expected to produce a preliminary and final staff assessment that resembles an environmental impact report over a seven-month period. At least three months are devoted to analyzing the assessments, preparing testimony and conducting an evidentiary hearing. Normally the Commission within the next two months would produce a proposed decision, which would mimic an environmental impact report, allow a thirty-day comment period, and then issue a final decision.⁵⁸

Soon after the crisis began, the State Legislature passed legislation creating a six-month process pursuant to AB 970, presumably for facilities that do not potentially cause adverse environmental impacts, much like a negative declaration under CEQA or a Finding of No Significant Impact under NEPA. Six months is brutally short for a power plant review. Apparently, it was not short enough. Thus, the legislature in AB 970 and later in SB 28X, adopted a four-month procedure for simple cycle power plants requiring a finding of no impacts and that they be in service within the year 2002.⁵⁹ Even then, the Governor wanted to speed up the time for peaking power plants.⁶⁰ The Energy Commission, under the authority of the Governor's executive order, adopted a twenty-one day procedure for peaker

⁵⁶ See Draft Recipient Guidance, *supra* n. 43.

⁵⁷ See Cal. Pub. Res. Code § 25541.5; see also *Mountain Lion Foundation vs. Fish and Game Com.*, 16 Cal. 4th 105 for certified program requirements.

⁵⁸ See Model Timeline in CEC, Public Adviser's Presentation on Siting Process at <http://www.energy.ca.gov/sitingcases/1999-04-15_public_adviser.html> (accessed Feb. 27, 2002).

⁵⁹ See Cal. Pub. Res. Code §§ 25550, 25550.5, 25552; see also 20 Cal. Admin. Code Title 20, § 2021 (2002).

⁶⁰ "Peaker power plants are usually employed to produce power during the peak demand period of the day or when there is not enough energy available in the state's energy system to meet statewide demand. Simple-cycle peaker plants are typically twice as polluting as combined cycle baseload plants." *POWER Against the PEOPLE? Moving Beyond Crisis Planning in California Energy*, A Report of the Latino Issues Forum, November 2001 at 2 <<http://www.lif.org>> (accessed Mar. 6, 2002).

power plants on line by September 30, 2001.⁶¹

Six months is considerably short for the public to participate. The CEC staff must submit its preliminary environmental analysis within seventy-five days. The staff must then submit its final report within forty-five days, presumably after noticing a workshop, holding it, obtaining and reviewing public comments and then preparing a report. Other public agencies must comment within twenty-five days of receiving the staff's initial report. That leaves fifteen days for everyone to prepare for evidentiary hearings, whom have little room for more than a day of hearings. Twenty days thereafter, the Commission must issue its proposed decision. No later than fifteen days, comments are due on the proposed decision and fifteen days thereafter the Commission must make a final decision.

A four-month process makes a six-month process seem leisurely. To qualify for the four-month procedure, a facility must be a simple cycle natural gas facility, be online and operational by December 31, 2002, use BACT to control air emissions, not have significant adverse public health or environmental impacts, not be a major stationary source, and not convert to a combined cycle or cogeneration facility within three years, among other requirements.⁶²

These restrictions make the four-month process somewhat more reasonable, unless one believes a facility does not qualify and wants to dispute the application. At that point, for a power plant licensing process, administrative review proceeds at a breakneck pace. Under the four-month procedure, the staff normally makes a recommendation as to whether the facility is qualified for a four-month review within fifteen days, with a hearing normally held about ten days later. Thus, the staff's environmental assessment is not even filed until thirty-five days later. Within the next ten days, the staff holds a public workshop

⁶¹ See CEC, *California Emergency Siting Peaker Power Plant Permitting* <<http://www.energy.ca.gov/sitingcases/peakers>> (updated Dec. 19, 2001). Executive Order D-28-01 Mar. 2001 authorized the Energy Commission to waive all timelines for facilities covered by D-22-01, D-24-01 and D-25-01 and specifically authorized emergency procedures for peakers able to be online by September 30, 2001, setting the stage for the 21 day process ordered by the Energy Commission. D-40-01 issued on June 11, 2001, authorized facilities to operate beyond any state permit limit if necessary and if a mitigation payment was paid to the State.

⁶² See *infra* Section VI regarding the attempt by the Energy Commission to jettison these restrictions on the four-month process.

and ten days after that, evidentiary hearings begin before the Commission. Twenty days later the Commission proposes a decision and ten days thereafter the Commission makes a final decision.⁶³

The twenty-one day process was truly devoid of any pretense of meaningful participation. Under that process, a public hearing could occur within two days of a public notice regarding the project. Other public agencies are given only two weeks to comment on the proposal. The CEC staff may have as little as two days to develop their own analysis after that, with the commission issuing a final decision without any comment period as short as two days later.⁶⁴

Any member of the public participating in these kinds of intensive regulatory proceedings will barely have enough time to thoroughly review each document, solicit and obtain expert assistance, prepare comments or testimony, and then participate in a hearing in any kind of meaningful matter. Timing is critical for public participation. The EPA in its Recipient Guidance calls for early public involvement, even before the permitting process formally begins.⁶⁵ The EPA has also noted that not only must public participation begin early, it must be allowed to occur with sufficient time to make comments effective and meaningful, including thirty days for comment on documents and forty-five days where there is a public hearing, extending to sixty days or more for complex documents or projects.⁶⁶

General California public participation guidelines are consistent with the proposed federal guidelines. Comment periods on negative declarations (equivalent to a Finding of No Significant Impact under NEPA) issued by state agencies are to last at least thirty days. For a draft environmental impact report, state agencies usually allow for forty-five days.⁶⁷ These guidelines are applicable to agencies implementing CEQA such

⁶³ See CEC, *4-Month Power Plant Licensing Process Workshop for CPA Bidders*, September 28, 2001 at 19 <http://www.energy.ca.gov/sitingcases/4-month_process/2001-09-28> (RICHINSPRESENT.PDF) <<http://www.energy.ca.gov/sitingcases/2001-05-31>> (LICENSE_SCHEDULE.PDF) (accessed Feb. 27, 2002).

⁶⁴ See CEC, *California Emergency Power Plant Permitting*, Table III <http://www.energy.ca.gov/sitingcases/peakers/documents/2001-03-15_EMERGENCY_MEMO.PDF> (last updated Mar. 13, 2002).

⁶⁵ See Cal. Govt. Code § 39658.

⁶⁶ See Goal 4(e) in U.S. EPA, *Draft Public Involvement Policy*, 65 Fed. Reg. 82335, 82342 (Dec. 28, 2000).

⁶⁷ 14 C.C.R. 15073(a), 15105.

as the CEC.

Under these guidelines, the CEC's process flunks. Under all of the processes, the public is excluded until an application for certification is filed. The twenty-one day process does not pretend to meet even the minimal requirements of a thirty-day comment period, let alone the forty-five days when there is a hearing. In the four-month process, hearings on a project's eligibility for this speeded up process, evidentiary hearings on the merits of the project, and hearings on the Commission's proposed decision are all within thirty days of key documents being released for public comment or review. The Commission requires comments on its proposed decision within ten days before a hearing, and a decision is issued ten days thereafter.

The six-month process is little better. Evidentiary hearings are held within ten days of the filing of the final staff assessment. A hearing on the Commission's Proposed Decision is held within ten days of its release to the public.

Only the twelve-month process begins to allow sufficient time for public participation. Even then, evidentiary hearings are normally within thirty days of the final staff assessment release, not forty-five days as suggested by the US EPA in its Draft Public Involvement Policy. A hearing on the Commission's proposed decision is held within fifteen days.

Public participation, even if given all the time needed, is not sufficient to provide environmental justice if it is not meaningful. If the decision-makers are a stacked deck, controlled by politics as opposed to law and science, those without traditional political power will lose out, further exacerbating environmental injustice.

In California, the CEC is a body appointed by the Governor. Governor Davis actively interceded when it appeared a power plant proposal was in jeopardy. In San Jose, the City Council at one point voted to oppose a new CalPine power plant. Governor Davis soon called for its passage, and eventually the City Council acceded to the Governor's pressure. Within the Commission, the San Jose Mercury reported that staff analysts' reports were rewritten, and those analysts who would not allow their testimony to be changed were taken off the project. The CEC then approved the project.⁶⁸

⁶⁸ See Levey, *Calpine wins approval for new project*, San Jose Mercury News, Sept. 25, 2001; Wilson, *San Jose Council Gives Green Light to generating plant; VOTE REVERSAL: Officials Pressured to OK project*, The S.F. Chron. A1 (June 6, 2001); see also Levey, *Officials rejected Calpine criticism: Commission*

Recently, in another case, the CEC Chair defended his agency's consideration of an expansion of a power plant in a low income, predominantly African-American community in San Francisco before an angry workshop audience. He stated, "[O]ne of the great benefits of new power plants statewide is that we're going to shut down the old polluting power plants" and "we're for modern efficient power plants."⁶⁹ Since the Commission was not proposing to shut down the older power plants in the community but merely expand an existing facility, community members attending the workshop were not pleased, to say the least.

The Commission also attempted to curtail what had been extensive rights by members of the public to intervene as a party in siting cases.⁷⁰ Originally the Commission proposed to make evidentiary hearings discretionary and allow the Commission's presiding member to rigidly control an intervenor's right to present evidence and examine or cross-examine witnesses. These modifications would put the rights of interveners at *the discretion* of the presiding member of the siting case.⁷¹ That effort now appears to have been beaten back after a large coalition of community groups protested in comments and at a hearing. It demonstrates, however, the inclination of the Commission to curtail public participation, even without any evidence that procedural due process safeguards had improperly denied even one MW of capacity to the State.

Community groups have nevertheless been successfully asserting environmental justice challenges, but only over the resistance of state authorities. In not one case has the Commission agreed, except when the South Coast Air Quality Management District refused to give a permit to a large uncontrolled peaker plant in the middle of a proposed park area.⁷² Community groups have had to sidestep the Commission,

pushed for positive report, San Jose Mercury News (Apr. 14, 2001).

⁶⁹ See August 13, 2001—Potrero Power Plant Project Committee Conference Transcript. (Adobe Acrobat PDF file, 155 pages, 196 kilobytes) RT 37, 38 <<http://www.energy.ca.gov/sitingcases/potrero/documents/index.html>> (accessed Mar. 7, 2002).

⁷⁰ Under 20 C.C.R. § 1712(a) (stating that "any person may petition to intervene" in a siting case).

⁷¹ See

Docket	Number	01-SIT-1
--------	--------	----------

 <<http://www.energy.ca.gov/siting/rulemaking/documents/index.html>> (accessed Mar. 7, 2002).

⁷² La Jolla Baldwin Peaking Project (01-EP-11); see also the list of withdrawn projects at <<http://www.energy.ca.gov/sitingcases/withdrawn.html>> (accessed Jan. 4, 2002).

reaching out to city governments or, in one case, using a referendum.⁷³ In San Francisco, an ordinance was adopted preventing the City from approving or agreeing to facilitate a fossil fuel power plant unless it reduced pollution, replaced older more polluting facilities and provided community mitigation.⁷⁴ Nevertheless, eleven twenty-one day peaker process facilities and fourteen twelve-month power plants have been approved since 1999.

VI. PEAKER PLANTS: A FOCUS OF ENVIRONMENTAL INJUSTICE

The most pernicious element of the effort to expand fossil fuel capacity in California is the reliance upon so-called peaker plants. These simple cycle power plants often have little or no pollution controls. Some plants already in existence, including those proposed for expanded operations, burn other fuels such as distillate oil, which is far more polluting than natural gas.

The Davis administration utilized these smaller plants to quickly upgrade capacity, either by building new ones or freeing existing ones from permits that limited their operations, due to their lack of controls and excessive pollution. Under Davis' executive orders, the Commission succeeded in implementing the twenty-one day review process for peakers that could be online by September 30, 2001. An attempt to further ease the restrictions for other peakers under the emergency four-month process was reversed only after a rapid mobilization by community organizations and larger environmental organizations.⁷⁵

The ISO, at the urging of the administration, also proposed that older peakers that burn distillate oil be freed from permit restrictions on hours of operations. For example, the ISO directed the Mirant company to operate its peakers located at its San Francisco Potrero power plant whenever requested by the ISO, or whenever necessary for Mirant to fulfill any contractual obligations for electricity. The peakers together totaled 150 MW

⁷³ See Soller, *The State, the New Nimbys Are Taking Back Their Backyards—and Their Air*, 6 L.A. Times M6 (Mar. 18, 2001).

⁷⁴ S.F., Cal., Human Health and Environmental Protections for New Electric Generation, Ordinance 124-01 (May 29, 2001)

⁷⁵ *State Ends Fast Tracking for Some Power Plants*, Ventura County Star A18 (Dec. 6, 2001); see also CEC, *Final Staff Draft Resolution* <http://www.energy.ca.gov/sitingcases/4-month_process/2001-12-05_draftresolution.html> (accessed Mar. 7, 2002) (rescinding resolution 01-1017-02 and subjecting all power plants to review in accord with the California Environmental Quality Act).

with permits that allowed them to be operated for 877 hours, no more than about one month over a year.

The permit requirements, however, were incorporated into a federal Title V permit issued pursuant to the Federal Clean Air Act based upon limitations on hours of operations in the federally approved State Implementation Plan. That is, these were federal requirements. The US EPA and the local Bay Area Air Quality Management District ("BAAQMD") tried to immunize the violation by signing administrative enforcement agreements calling for mitigation payments in lieu of compliance. However, even FERC eventually balked at the idea that an ISO could direct a company to violate its federal permit.⁷⁶

Further exacerbating the problem, Mirant's units were near a predominantly low-income African-American community. Once the US EPA, the BAAQMD and Mirant announced the enforcement agreements to the public after they were a fait accompli, community organizations were outraged. As soon as the permit limits were exceeded, three of these groups sued.⁷⁷

Mirant soon agreed to stop operating in violation of its permit and signed a proposed consent decree requiring it to comply with Mirant's permit. However, even then, the Davis administration would not relent. Its Air Resources Board ("ARB"), in an unusual maneuver for an air pollution agency, tried at the last minute to delay entry of the consent decree that only enforced the company's permit air pollution limits. The ARB claimed to be concerned with reliability issues; however, the federal judge was not persuaded and eventually entered the decree.⁷⁸

Potrero's situation is unfortunately representative of a pattern in California, according to a recent study by the Latino Issues Forum, entitled "POWER Against the PEOPLE: Moving Beyond Crisis Planning in California Energy."⁷⁹ The study looked at eighteen planned or approved power plants, mostly peakers (seventeen) in California since deregulation. The study

⁷⁶ San Diego Gas & Electric Company (2001) 96 F.E.R.C. P 61,117 (Mirant Request for Clarification).

⁷⁷ *Bayview Hunters Point Community Advocates et al. v. Mirant Potrero LLC et al.*, (N.D. Cal. 2001) Case No. 01-cv-02348; see also Gordon, *Potrero Hill Power Plant Hit By 2 Lawsuits; Neighbors City Ask Court To Cut Back Hours of Operation*, The S.F. Chron. A13 (June 20, 2001).

⁷⁸ See court docket through PACER database at <<http://pacer.cand.uscourts.gov/>> (accessed Mar. 6, 2002).

⁷⁹ See Ramo *supra* n. 52 (stating that power plants in California are often sited in neighborhood populated by minorities).

demonstrated that these facilities are being disproportionately sited in communities of color. Two-thirds of the plants contained fifty percent or more people of color within a six-mile radius from the plant. Latinos were highly over-represented, followed by Blacks.⁸⁰

While there may be many plausible reasons for disproportionate siting, such as the location of existing facilities such as switchyards and natural gas pipelines, land use zoning, or the location of open space suitable for a large power plant, the whole approach is questionable given studies suggesting there may be alternatives beyond fossil fuel. For example, Communities for a Better Environment ("CBE") recently analyzed energy needs in San Francisco, isolated on a peninsula with only one transmission corridor available, and determined that fossil fuel could actually be reduced from the current proposed 903 MW to as few as 167 MW if the transmission system was upgraded and solar, efficiency, wind and other green alternatives were pursued.⁸¹ Professor Karina Garbesi of Hayward State University in California, in a report prepared for community groups commenting on Mirant's Potrero power plant licensing in San Francisco, demonstrated that even in fog shrouded San Francisco there was a potential of at least 240 to 600 MW from a commitment to solar power and another 300 MW could result from incorporating efficiency in construction.⁸²

The Davis administration never seriously pursued these alternatives. To make renewables, a viable option required reversing the impact of deregulation, including a substantial commitment of state subsidies. The Legislature, in 2000, finally authorized a substantial commitment to conservation efforts for one year in the amount of \$909 million dollars. However, these emergency appropriations do not include any future commitments to DSM, which averaged \$500 million dollars a

⁸⁰ *Id.* at 10 (featuring statistics which support finding that power plants are located in minority neighborhoods).

⁸¹ Communities for a Better Environment, *Power & Justice: Electricity, environment, race, class and health in San Francisco, California*, November, 2001 <<http://www.cbecal.org/publications/powerjustice.htm>> (accessed Mar. 6, 2002).

⁸² Karina Garbesi and Emily Bartholmew, *The Potential for Solar Electricity Generation in San Francisco* (June 1, 2001); see also Green and Garbesi, *The Potential to Reduce the City of San Francisco's Electricity Demand Through Implementation of Commercially Available Energy Efficient Technologies*, July 1, 2001 <<http://www.Californiasolar.center/pdfs/sfpv.pdf>> (accessed Mar. 6, 2002).

year. It will take that kind of continued commitment to achieve the potential suggested in the Garbesi studies on a statewide basis. Furthermore, the utilities in a competitive market have an incentive to sell as much electricity as possible, destroying the prior incentive to support efficiency. Thus \$72M in funds allocated for utility DSM programs was left unspent in 1998 and 1999.⁸³

The Legislature on September 30, 2000, also passed AB 995 and SB 1194 authorizing an additional expenditure of \$675M from 2002 through 2007 for renewable energy sources. This measure will not increase the amount of support per year provided in the original deregulation statutes. However, it does allocate more funding to new capacity. In addition, the legislature also adopted AB 29, which included \$95 million over two years as an incentive, a short-term increase of 33% over a two-year period.

However, as discussed above, these short-term measures remain relatively modest compared to the historic subsidy given to fossil fuel generation and the far more significant amount for stranded costs, and thus cannot offset the push towards new fossil fuel capacity supported by California. The bottom line is that Davis' crisis management approach has made California's new generation capacity primarily natural gas.⁸⁴ California provided some support for renewables and conservation, however the program as a whole has disproportionately pushed centralized fossil fueled power plants into communities of color.

VII. LESSONS FROM CALIFORNIA'S EXPERIENCE WITH ENERGY CRISIS MANAGEMENT

It is striking that within one year of adopting an environmental justice policy, California officials quickly overlooked environmental justice as soon as there was a crisis. It is not as if the Legislature had not expressed its views regarding the need to incorporate environmental justice in energy siting regardless of this fact for instance in California Public Resources Codes sections 25550 (g) and 25550.5(g).⁸⁵ Yet disproportionate

⁸³ See Cal. Assembly 1890, 1995-1996 Reg. Sess.

⁸⁴ A list of new power plants approved since 1999 by the CEC is at <<http://www.energy.ca.gov/sitingcases/approved.html>> (accessed Mar. 7, 2002).

⁸⁵ See CAL Pub. Res. §25550 (g) (stating that: "With respect to a thermal power plant and related facilities reviewed under the process established by this chapter, it shall be shown that the thermal power plant and related

siting with inadequate public participation processes became the norm.

Furthermore, California's energy crisis policy makers did not include representatives of the communities most impacted. California's chief energy advisors themselves criticized the ISO for its dominance by industry interests:

Many board members sell power or own generation facilities and therefore have an interest in keeping prices high. None of them has a duty to serve the California public interest. The ISO board is also self-perpetuating: it appoints its own members, subject only to approval by the EOB and the FERC.⁸⁶

In fact, many of Governor Davis' closest advisors were from the energy industry, investing in fossil fuel companies while determining where the state should obtain its energy.⁸⁷ It is not therefore surprising that the crisis policy relied upon fossil fuel power plants that were disproportionately sited in communities of color.

Another social dynamic may have been at play. Whether unconsciously,⁸⁸ negligently,⁸⁹ or through the "paths" or "scripts" of institutional racism.⁹⁰ Racism can work without intention or through callous neglect.⁹¹ Thus federal civil rights law bans not only intentional discrimination by statute, but through regulation, unintentional discrimination whose impact is

facilities complies with all regulations adopted by the commission that ensure that an application addresses disproportionate impacts in a manner consistent with Section 65040.12 of the Government Code." Section 25550.5 (g) applicability to repowering an existing facility is similar).

⁸⁶ See Cal. Assembly 1890, 1995-1996 Reg. Sess. at § 5.

⁸⁷ See Nissenbaum, *Another Adviser Linked to Possible Conflict; Davis Asks Watchdog Agency to Investigate*, San Jose Mercury News, Aug. 25, 2001, State and Regional News (discussing Davis' request that the California Fair Political Practices Commission investigate conflicts of interest for 11 members of its energy team after Davis had fired 5 members who owned stock in power companies); see also *State Officials Ethics in Question*, San Jose Mercury News, Aug. 15, 2001, State and Regional News (discussing potential conflicts of interest of Chair of Energy Commission and others).

⁸⁸ See Lawrence, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 Stan. L. Rev. 317 (1987) (showing that institutional racism is even present in a kindergarten classroom).

⁸⁹ Oppenheimer, *Negligent Discrimination*, 141 U.Pa. L. Rev. 899 (1993).

⁹⁰ Lopez, *Institutional Racism: Judicial Conduct and a New Theory of Racial Discrimination*, 109 Yale L. J. 1717 (2000).

⁹¹ See discussion of unconscious racism as a more typical source of environmental racism in today's society in Evans, *Challenging the Racism in Environmental Racism: Redefining the Concept of Intent*, 40 Ariz. L. Rev. 1219 (1998).

disparate and unwarranted.⁹² The USEPA therefore recommends staff training as a key activity to assure compliance with Title VI.⁹³

The failure of California's energy planning to avoid disproportionate siting of fossil fuel plants or the erosion of public participation rights suggests that environmental justice was not a key concern of decision-makers. Explicit statutory policies were insufficient, as were any disincentives from potential lawsuits, which now seem limited to only the most blatant acts of intentional discrimination.⁹⁴

Beyond environmental justice, California's energy crisis makes clear other perils of crisis management. Once emergency powers are granted to government, it is difficult to take them away. Governor Davis and his administration are now resisting calling an end to the crisis, even though the State Senate, the CEC and widespread media have declared an end to the crisis.⁹⁵ The emergency order is still in effect and will remain so unless there is a change of heart in the administration.

Further, the decisions made in a crisis may outlast the crisis. Unless there is an escape clause or sunset provision, one may have to tolerate these decisions for a long time. California is now begging for people to buy electricity so that electricity contracted for at relatively high prices (though below peak prices) can be somewhat reimbursed.⁹⁶ It is increasingly dependent upon natural gas, a source of serious price fluctuations, and mired in centralized fossil fuel generation owned by out of state generators.

VIII. CONCLUSION

During California's energy crisis, the administration and legislature erred in eviscerating environmental justice and

⁹² See generally 40 C.F.R. § 7.35(b) (showing Title VI regulations); see also Mank, *Title VI, The Law of Environmental Justice* Ch. 2 (M. Gerrard, ed. 1999).

⁹³ See 59 Fed. Reg. 7629 at 39657 (showing Draft Recipient Guidance).

⁹⁴ See *Alexander v. Sandoval*, 532 U.S. 275 (2001); *S. Camden Citizens in Action v. N.J. Dep't of Env'tl. Prot.*, 274 F.3d 771 (3rd Cir. 2001); 2001 U.S. App. LEXIS 26822; *Washington v. Davis*, 426 U.S. 229 (1976).

⁹⁵ Lynda Gledhill, *Crisis Dims, But Davis' Powers Longer; Legislators, Environmentalists Say Broad Authority Invites Abuse*, The S.F. Chron. A1 (Dec. 3, 2001).

⁹⁶ Mark Martin and Lynda Gledhill, *A Year Later; Paying the Price of Power: After the State Spends Billions, PG&E Faces Bankruptcy and Rates Soar, the Cost of Keeping the Lights on Hits Home*, The S.F. Chron. A1 (Dec. 23, 2001).

maintaining a privatized energy system still capable of disruption. Centralized fossil fuel power plants were disproportionately sited in communities of color without adequate public participation as transmission upgrades and green alternatives were downplayed. Emergency actions and powers were adopted without sufficient guarantees they would expire once the crisis abated. Government prior to a crisis needs to assure that environmental justice becomes an explicit and conscious responsibility of policy makers, and once the crisis begins, that emergency actions and policies maintain this commitment and incorporate sunset provisions or escape clauses.