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Institutionalizing Environmental Justice: Race, Place, and the National Environmental Policy Act

Keith K. Miyake
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Institutionalizing Environmental Justice:  
Race, Place, and the National Environmental Policy Act  

by  

Keith K. Miyake  

This manuscript has been read and accepted by the Graduate Faculty in Earth and Environmental Sciences in satisfaction of the dissertation requirement for the degree of Doctor of Philosophy.

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Chair of Examining Committee

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Date: ____________________
Cindi Katz
Executive Officer

Supervisory Committee

Rupal Oza
Tom Angotti

THE CITY UNIVERSITY OF NEW YORK
In this dissertation, I examine ways that the US National Environmental Policy Act of 1969 (NEPA) and its primary enforcement mechanism, the Environmental Impact Assessment (EIA) process, have reshaped the state as a site for racial and environmental conflict by institutionalizing a particular form of environmental justice within governmental decision making processes. Combining archival methods and legal analysis, I develop three case studies involving community struggles over the social production of space that each engage the EIA process to different effect. The case studies were selected based on what they reveal about the ways that the environmental justice framework intersects with and gets institutionalized within the EIA process. The first case study follows the conflict over a public housing project in New York City where race and class figured as environmental categories deployed in relation to desegregation efforts and fair housing policy. The second case study looks at a campaign to stop the construction of a prison in Delano, California, where the EIA process provided a legal platform for bridging environmental justice and prison abolition struggles. The final case study looks at an ongoing campaign against live-fire military training on land used for Native Hawaiian cultural and subsistence practices on the island of O‘ahu in Hawai‘i, where ecological concerns embedded within Native Hawaiian land use epistemologies provide a critical framework for resisting ongoing US militarization.

I develop the concept of the racial environmental state in order to explain how the EIA
process functions to simultaneously and interdependently maintain both racial capitalism and uneven productions of nature, while also providing institutionalized pathways for challenging and reshaping the state as a site of racial and environmental conflict. My case studies highlight the capacities and limitations of this particular state formation for social and environmental justice organizing. I detail ways that the NEPA legislation and the EIA process have institutionalized a specific type of environmental justice that renders racialized space and difference legible and governable within the purview of the contemporary capitalist state vis-à-vis environmental knowledge. My analyses reveal complex ways in which people rework racial and environmental meanings through their engagement with environmental policy, and in so doing, counterpose race and environment as articulated modes of resistance to the racist capitalist state.

Each of my case studies tells the story of a geographically specific conflict over the production of racialized space that is waged through a combination of legal actions and mass mobilizations around the EIA process. The concepts of race and environment operate in different ways within each case study, but in all three, the legal battle over the EIA process is tied up in struggles that deploy race and environment to articulate differing visions of place, as well as in conflicts over the state’s understandings of race and difference. While the specific stakes of each case differ in their spatial, scalar, temporal, and political particularities, they share a common struggle over placemaking waged through and against the state’s use of race and environment as linked concepts informing land use and infrastructure decisions. I conclude that through these struggles, the EIA process has institutionalized a particular form of environmental justice logics that maintain the legitimacy the racial environmental state through the incorporation of liberal forms of official antiracism, distributive justice, and neoliberal capitalist environmental relations. Ultimately, my research reveals that the development and institutionalization of the EIA process in the US provides institutional, legal, and political structures for governing racialized space and populations, and as a result, opens new possibilities and limitations for social and environmental justice activism and community organizing.
# Table of Contents

Abstract iv  
List of Tables viii  
List of Figures ix  
Acknowledgements x  

## 1 Introduction  
A Primer on Environmental Impact Assessment  
Theorizing EIA  
Environmental Justice and Urban Political Ecology  
The Racial Environmental State  
Methodology  
Organization  

## 2 White Flight and Pocket Ghettos as Environmental Impacts in New York’s Upper West Side  
Housing Conflict within The Upper West Side Renewal Area  
Racial “Tipping” and “Pocket Ghettos”  
Integrating Race and Class into NEPA  
Legacies of Strycker’s Bay and the Continuing Battle over Housing  

## 3 Police, Prisons, and Pollution: EIA as an Environmental Justice Organizing Strategy  
Transformations in California’s Central Valley  
The Delano Prisons  
Taking the CDC to Court  
Building a Movement to Abolish the PIC  

## 4 Sacred Environments: Resisting Militarization through Cultural and Ecological Preservation  
Live-Fire and Brush Fires  
Reaching a Settlement to Sustain the Fight  
“A Mosquito Biting a Rogue Elephant as it Crashes through the Forest”  

## 5 Conclusion  
The Institutionalization of Environmental Justice  


# TABLE OF CONTENTS

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>NEPA at 50: An Agenda for Future Research</td>
<td>180</td>
</tr>
<tr>
<td>Appendix A California State Prisons, 2016</td>
<td>185</td>
</tr>
<tr>
<td>Bibliography</td>
<td>187</td>
</tr>
</tbody>
</table>
**List of Tables**

1.1 Total EIAs Litigated and Injunctions Issued, 2008-2012  
10

2.1 Racial Composition of Seward Park Extension Urban Renewal Area Displacement and New Leases in *Otero v. NYCHA*  
54

2.2 Projected Racial Composition of Seward Park Extension Based on the Outcome of the *Otero v. NYCHA*  
56
# List of Figures

1.1 Simplified flowchart diagram of the EIA process 8

2.1 Overview Map of the West Side Urban Renewal Area (Source: Urban Renewal Board 1959) 44

2.2 Map of the West Side and Seward Park Expansion Urban Renewal Areas 45

2.3 Detail Map of the WSURA Showing Site 30 (Source: Urban Renewal Board 1959) 52

3.1 California State Prisons and Correctional Facilities, 2016 101

3.2 The City of Delano, CA and Its Three Correctional Facilities 103

4.1 Military installations on the Hawaiian Island of O‘ahu 138
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Before this project was a dissertation, it was a disorderly array of unformulated questions that nagged at the back of my mind throughout my previous career as an environmental engineer and whenever I thought about the environmental services industry in relation to my engagements with community organizing and social justice activism. It wasn’t until my second year of graduate school that the project started to take shape after my advisor, Ruth Wilson Gilmore encouraged me to just start writing and reassured me that my questions would become clearer and eventually coalesce around a coherent project. I am without words to adequately describe my thanks to Ruthie for everything she has taught me and all of the support she has shown me. When we met, the first day of her Race, Space, and Place course during her first semester at the Graduate Center, she completely intimidated me because just as students like to research their professors, Ruthie had done likewise and knew me even before I introduced myself. That auspicious introduction has been emblematic of our relationship because she always seems to know my mind before I do.
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1 Introduction

In 1969, US Senator Henry Jackson introduced a piece of legislation, a National Environmental Policy Act (NEPA), which he promoted as a necessary step in addressing what he termed the “growing environmental problems and crises the nation faces” (Jackson qtd. in Caldwell 1998, 1, emphasis added). The NEPA legislation was approved by Congress and signed into law on January 1, 1970 by President Richard Nixon. It was passed amid financial crises, widespread civil unrest, and general uncertainty about the future of US capitalism. The mainstream popularity of Rachel Carson’s bestselling book, Silent Spring, published in 1962, helped to fuel a growing mainstream environmentalism movement into a powerful political force whose precautionary—and at times alarmist—messages challenged the stability of industrial capitalism in the US. At the same time, the US was facing massive Vietnam War debt and a skyrocketing balance of payments, which eventually contributed to the collapse of the Bretton Woods system and the elimination of the gold standard. Along with the ongoing sociopolitical pressure from the Civil Rights and Anti-War Movements, the US government was in need of major political reforms to mediate civil unrest and ensure the future of Cold War Capitalism. In this context, NEPA emerged as an addendum to the series of social, economic, infrastructural, and environmental policies legislated under the banner of President Lyndon B. Johnson’s Great Society program. Importantly, this series of government reforms help set into motion the slow and contradiction-ridden decline of Keynesianism and the interventionist welfare state headlined by President Franklin Roosevelt’s New Deal, and set the stage for the rise of the neoliberal state, and as I describe further below, the racial environmental state. Ultimately, the institutional
arrangements that emerged from this state restructuring resulted in dramatic shifts in the mechanisms and rationalities of governance, with new dependencies on the logics of bio- and techno-scientific rationality, the liberalization of global finance regimes, and new forms of liberal antiracism and its cousin, covert racism (Bonilla-Silva 2001; Ong 2006).

The NEPA legislation fundamentally changed the administrative process for implementing government funded projects and programs that affected the physical environment (Caldwell 1998; Bartlett and Kurian 1999). It brought together roughly a century’s worth of fragmented and often conflicting environmental legislation in the US under an umbrella environmental policy that affects every federal government agency. The legislation consists of three primary parts. The first is a broad and vague statement that the government should “encourage a productive and enjoyable harmony between man and his environment” (42 USC §4321 Sec. 2) by placing a subjective value—without obligation—on activities and policies aimed at preserving healthy environmental conditions. The second part establishes a central environmental agency within the executive branch, the Committee on Environmental Quality (CEQ) to oversee and report on the country’s environmental quality. The third part is a statutory, or legal requirement for all federal agencies to evaluate the environmental impacts of “major Federal actions significantly affecting the quality of the human environment” (42 USC §4321, Sec. 102(c)). In practice, the first provision of the NEPA legislation has had little or no substantive impact on government operations (Lindstrom 2000). The CEQ established by the second provision has at times been effective in establishing environmental guidelines and policy, but is positioned in such a way that it has little enforcement power or oversight capacity (Taylor 1984). The third provision is by far the most important and enduring aspect of the NEPA legislation because it is the “action-forcing provision” (Caldwell 1998, 29) that substantiates and gives visibility to the environmental goals of the first part of the Act. This third provision establishes a requirement that all federally funded projects and actions undergo a systematic assessment of potential environmental consequences as part of the administrative evaluation and decision making process, known as the environmental impact assessment (EIA) process. Given the significance of the EIA process because of its widespread
CHAPTER 1. INTRODUCTION

impact on government agencies and actions, what are the implications of this aspect of the NEPA legislation to the role of environment in government generally? And more specifically, how might we understand the increased role of environment within government functions as a matter of environmental justice?

Since its initial deployment as a requirement of the NEPA legislation, the EIA process has been further incorporated into a broad class of public policies and state-centered environmental practices with two primary functions. The first is to introduce procedural requirements for state administrators and bureaucrats, planners, developers, and policymakers to systematically account for and assess broadly conceived environmental impacts into the decision making processes for large-scale development projects and programs. The second objective, arrived at through early political struggles in the US, is to allow for a modicum of transparency and public participation within that decision making process. This EIA process framework, as it has been adopted across the range of government functions and scales of governance, formalizes the precautionary principle of systematically assessing and weighing the potential benefits of a project or program against its potential risks or harms as a key component of liberal democratic governance, and aims to displace paternalistic and fragmented forms of governance.

As has become a normalized condition under neoliberal governance models in the latter part of the 20th century, the EIA process emphasizes scientific and liberal economic rationality, public participation, and deliberative decision making that render both space and the populations that inhabit them as legible and manageable under the purview of the liberal capitalist state (Ong 2006; Foucault 2007; Goldman 2001; Luke 1995). Viewing the EIA process in this way, as a mechanism of neoliberal governance and what some scholars have variously termed “environmental governmentality” (Luke 1995; Darier 1996), demands an understanding of how

---

1 In addition to its use in environmental policy, similarly structured “impact assessment” type policies have been developed to consider the potential impacts from other aspects of public administration, such as economic impact assessments, health impact assessments, social and cultural impact assessments, policy impact assessments, etc. See Taylor (1984).
CHAPTER 1. INTRODUCTION

the process came to be institutionalized as such. Furthermore, given the geographically specific ways that the state has historically used various forms of environmental controls to racially differentiate populations and dominate racially differentiated populations, what are the implications of the EIA process for the racial state? In turn, how does the EIA process’s pervasiveness within state institutions implicate environment and race as interconnected systems of knowledge and control? This dissertation aims to address these questions through case studies of conflicts involving the EIA process, with a particular focus on the implications of the EIA process on the environmental justice framework and the particular state form I see as most directly impacted by the EIA process, the racial environmental state.

This project is a legal and geographical history that examines some of the ways that the NEPA legislation and the EIA process have institutionalized a specific type of environmental justice that renders racialized space and difference legible and governable within the purview of the contemporary capitalist state. This history, told through three case studies, reveals that the development and institutionalization of the EIA process in the US provides new institutional, legal, and political structures for governing racialized space and populations, and as a result, opens new possibilities and limitations for social and environmental justice activism and community organizing. Each of the case studies tells the story of a geographically specific conflict over the production of racialized space that is waged through a combination of legal action and mass mobilization around the EIA process. While the specific stakes of each case differ in their spatial, temporal, and political particularities, they share a common struggle over placemaking waged through and against the state’s use of race and environment as linked concepts informing land use and infrastructure decisions.

Through the case studies, I address a number of questions that derive from my overarching questions about the EIA process. How do locally situated or culturally specific environmental epistemes articulate with social justice objectives across geopolitical scales? One of the novelties of the EIA process is that it requires that state agencies develop knowledge about a place and
populations through a range of social and physical sciences (Caldwell 1982). Through the public feedback mechanisms institutionalized within the EIA process, different forms of environmental knowledge and knowledge systems can be made legible to the state when concerned citizens incorporate them into their feedback regarding the potential impacts of a proposed project or action. These different ways of knowing and relating to the environment can expose new possibilities for alternate geographical conceptions of space and scale that exceed locally confined Cartesian understandings of environment. For example, the commonly understood concept of ecosystems can potentially unsettle a fetish for localized geographies because of the mobility and interconnectedness of ecological and biological entities and systems. Holding constant this process-based approach to interconnected systems of environment, the ecological model can be extended to social and economic systems to understand social-environmental systems in terms of the linkages between physical changes to the environment in one place whose impacts propagate unevenly across racially and economically differentiated communities and spaces (Katz 2001).

Building on the question of multiple ways of understanding the environment, how does the EIA process accommodate or foreclose competing environmental uses and values, and in turn, what does this mean for community organizers and activists aiming to use the EIA process as a point of intervention in state actions? The EIA process forces state agencies to weigh alternative possibilities for achieving a policy or infrastructure objective, and through this deliberative process, address the ways that each possibility, along with the preferred alternative, address a broad and continually growing set of statutory and institutional objectives, ranging from the protection of endangered species to minimizing the release of toxins to ensuring that lower-income communities and communities with larger non-white populations are not disproportionately impacted by harmful environmental conditions. Understanding the process through which agencies weigh their institutional objectives against these often competing obligations can reveal contradictions and fractures within the state that can present as opportunities for social justice organizers to intervene or act to shift the state’s priorities.
CHAPTER 1. INTRODUCTION

Through the case studies, I address these and other questions about the form and function of the EIA process. I conclude that the EIA framework fundamentally changes the method of racial and environmental statecraft, providing a mechanism and capacity for non-state actors to engage and alter the state capacities for placemaking. I argue that the development and institutionalization of the EIA process in the US fundamentally altered the ways in which space is governed in relation to racially and economically differentiated populations, resulting in new possibilities and limitations for social and environmental justice struggles through their engagement with and opposition to the capitalist racial environmental state. I demonstrate some of the ways that the development of EIA has resulted in an institutional scaffolding that provides a platform for political maneuvering through and against the capitalist racial state, and upon which a multiplicity of social justice struggles have gained purchase through an environmental justice framing. I contend that through these struggles, the EIA process has institutionalized a particular form of environmental justice logics that maintain the legitimacy the racial environmental state through the incorporation of liberal forms of official antiracism, distributive justice, and neoliberal capitalist environmental relations. The sections that follow expand on these concepts in general and as they are applied throughout this dissertation.

A Primer on Environmental Impact Assessment

In practice, the EIA process is an administrative procedure to determine and publicly disseminate the potential environmental outcomes of a proposed project or program (see Figure 1.1). The government agency in charge of the proposal, the lead agency, is responsible for overseeing and conducting the series of environmental reviews that comprise the EIA process, and ultimately, using the findings of those reviews to aid in their decision to proceed with the proposal or not. All federal agencies fall under the NEPA umbrella, meaning that the lead agency can be any organization from the Department of Justice to the Bureau of Land Management to the US Postal Service. In addition to the requirements for EIA under the NEPA legislation, similar legislation
exists at different scales of government and internationally. Most of the US states have “mini-NEPA” legislation that holds similar requirements for EIA for agencies within the state government as those under NEPA; in some cases, even municipalities have EIA requirements for publicly funded local projects. Internationally, most countries have their own EIA provisions at the national and/or local level, as does the European Union, and even the World Bank requires an EIA process for projects it funds. What follows is a brief description and theoretical analysis of the general EIA process as required by the NEPA legislation; it is similar in form and function to most other EIA requirements being as it was the original template that was later copied elsewhere.

The first step of the EIA process is an initial determination on the applicability or need for impact assessment. If the lead agency is unsure of the extent of potential environmental impacts, they will first conduct a preliminary Environmental Assessment (EA) to determine whether the impacts are likely to be significant or extensive. If the EA finds no significant impacts, the EIA process is essentially concluded. If the lead agency initially suspects that significant environmental impacts are likely, or the EA concludes similarly, then the lead agency is responsible for preparing a full Environmental Impact Statement (EIS), sometimes called an Environmental Impact Report (EIR). The EIS/EIR details the specific impacts of the proposed action on various aspects of the environment, using a combination of economical, biological, geological, ecological, anthropological, and sociological data and scientific analyses of those data. It is also supposed to describe remediation or mitigation steps that will be implemented, and compare the proposed action with possible alternative actions that might achieve similar objectives, including the “no action” alternative.

Upon completion of all the different studies to determine the environmental impacts of the proposed project or action, the lead agency publishes a “draft” version of the EIS/EIR, which is then distributed to other agencies that might have a stake in the findings. At the same time, the lead agency is responsible for publishing a notification of availability in the Federal Register, local and national news outlets, and other places where affected populations and the general
Figure 1.1. Simplified flowchart diagram of the EIA process
CHAPTER 1. INTRODUCTION

public might see it. The notice of availability marks the start of a public comment period that lasts a minimum of 45 days, during which time people can submit written feedback to the lead agency. At least one public hearing will also take place during the public comment period. The public hearing provides a space where people can give oral testimony that will be recorded as part of the public record (see below). At the conclusion of the public comment period, the lead agency is required to respond to and address every comment in a revised draft or final EIS/EIR. Once this revision is published, public notification is again given, triggering a 30-day waiting period before the agency can take any actions to finalize the EIA process and make their decision about how to proceed with their proposed action or project. The process concludes when the lead agency publishes a Record of Decision (ROD) stating their decision and providing a justification and rationalization for that decision.

After the lead agency issues its ROD, they have fulfilled their obligations under the NEPA legislation and they can proceed with the implementation phase of their proposal. However, in some cases the finalization of the EIA process is the point at which individuals or organizations mount legal challenges to the lead agency’s findings. At the very least, such lawsuits can result in implementation delays, injunctions, and in rare cases, project abandonment. In the period between 2008-2012, approximately 21% of the 498 cases that were litigated resulted in court-imposed injunctions prohibiting the agency from proceeding with their proposal until they produced a revised EIS (see Table 1.1).

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2For the period of 1970-1977, Serge Taylor (1984) estimated approximately 9% of proposed projects that required an EIS were subjected to lawsuits, with roughly 10,000 EISs being prepared versus 20,000-40,000 proposals not requiring a full EIS; of the 10,000 EISs, roughly half were drafts and the other half final EISs. Using a similar methodology to that employed by Taylor, a report issued by the US Government Accounting Office (2014) between 2008-2012, just over 40% of projects requiring an EIS were subject to lawsuits, however a much smaller percentage of projects during this period required full EISs, on the order of about 2% of all projects. Of the roughly 2,300 EISs published—again with a roughly even split between draft and final EISs—approximately 500 were subject to litigation according to the annual NEPA litigation surveys published by the Council on Environmental Quality (2016).
CHAPTER 1. INTRODUCTION

Table 1.1. Total EIAs Litigated and Injunctions Issued, 2008-2012

<table>
<thead>
<tr>
<th>Year</th>
<th>Cases Filed</th>
<th>Injunction-Remands</th>
<th>Percentage</th>
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<tbody>
<tr>
<td>2008</td>
<td>132</td>
<td>35</td>
<td>27%</td>
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<tr>
<td>2009</td>
<td>97</td>
<td>23</td>
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</tr>
<tr>
<td>2012</td>
<td>88</td>
<td>10</td>
<td>11%</td>
</tr>
<tr>
<td>Total</td>
<td>498</td>
<td>105</td>
<td>21%</td>
</tr>
</tbody>
</table>

The initial legislative aim for the EIA process was to aid in the internal decision making process for proposed large-scale projects and legislative actions, from things such as building a highway or a power plant to funding particular branches of scientific research (Caldwell 1998). The outcome of the EIA process is not a binding recommendation or decision about the proposed project or action, only an evaluation and decision about the proposal based on the pertinent information obtained through the process. The decision is intended to incorporate public feedback as well as input from technical experts and other government agencies. It further serves as a mechanism for the relative merits of a project to be weighed against its potential costs in terms of overall impact to the human environment, and in relation to other statutory or programmatic obligations of the lead agency. In this regard, the process theoretically fits within a sort of deliberative democracy framework that lends legitimacy to the state’s decision making process (Mouffe 1999; Wiklund 2005; Morgan 2012). In practice, however, the lead agency is often much more deliberate than deliberative, and the process serves more as a rubber stamp than as a platform for informed decision making, though the transparency and participatory aspects still function to provide legitimacy to the state.

---

As a mechanism of governance, the EIA process operates through the interconnected elements of administrative proceduralism and jurisprudence. Information gathering, scientific analyses, disclosure and public feedback, and administrative review all fall under the category of administrative proceduralism. They require planners, policy makers, and other state administrator to follow established sets of procedures in proposing and implementing new actions. The theory of governance behind this proceduralism is that informational inputs from a breadth of disciplines and plurality of sources lead to better administration of programs and more sound decisions. Jurisprudence provides a system of legal checks and balances to the proceduralism. Judicial review, as well as the threats of costly legal fees, lengthy delays, and establishing undesirable legal precedents, encourages thoroughness and prudence within the administrative process. The combined effect of these governance mechanisms is a structured yet flexible framework for enabling and democratically legitimizing state-led environmental change and productions of space. Understanding how the procedural and juridical elements of the EIA process operate in relation to conflicts over the production of racialized space thus becomes an important aspect of uncovering changes that the NEPA legislation brought to the racial environmental state, and how it functions as a platform for social and environmental justice.

Public Disclosure and Public Feedback

One aspect of the EIA process that intends to serve a deliberative governmental function is the public feedback process, yet this was not initially the case. The legislative intention behind the EIA requirement within the NEPA legislation was for it to be used as an *internal* decision making tool, however the actual implementation of EIA in the US resulted in the environmental review process becoming a major political opening for *external* pressure on, and scrutiny of, the governmental decision making process (Caldwell 1998). The NEPA legislation does not explicitly call for public feedback or notification, but CEQ guidelines and President Richard Nixon’s Executive Order 11514, signed on March 5, 1970, called on Federal agencies as well as State and
CHAPTER 1. INTRODUCTION

local agencies to publicly disclose the findings of the EIA process and to solicit public feedback. Nixon’s Order directs Federal agencies to:

- Develop procedures to ensure the fullest practicable provision of timely public information and understanding of Federal plans and programs with environmental impact in order to obtain the views of interested parties. These procedures shall include, whenever appropriate, provision for public hearings, and shall provide the public with relevant information, including information on alternative courses of action. Federal agencies shall also encourage State and local agencies to adopt similar procedures for informing the public concerning their activities affecting the quality of the environment. (Nixon 1970)

Most forms of EIA implemented throughout the world have similar disclosure and feedback requirements, making these aspects of the EIA process one of the most widely recognized components of environmental policy in the world (Wood 1995). Public disclosure and feedback is not unique to the EIA process; it has long been used in urban planning, for example, in the US the Standard State Zoning Enabling Act of 1926 called for public notice and hearings.4 What is

4See Advisory Committee on Zoning Appointed by Secretary Hoover (1926). Regarding the method of enacting zoning regulations within a municipality, the Act reads: “no such regulation, restriction, or boundary shall become effective until after a public hearing in relation thereto, at which parties in interest and citizens shall have an opportunity to be heard. At least 15 days notice of the time and place of such hearing shall be published in an official paper, or a paper of general circulation, in such municipality” (7). In a footnote, the Act further expands upon the justification for public hearings as such: “It is thought wise to require by statute that there must be a public hearing before a zoning ordinance becomes effective. There should be, as a matter of policy, many such hearings” (7, note 27). As a more direct link to the EIA process where there is a lead agency that oversees the process, the Act calls for the local legislative body to appoint a zoning commission that “shall make a preliminary report and hold public hearings thereon before submitting its final report, and such legislative body shall not hold its public hearings or take action until it has received the final report of such commission” (9). Another footnote strikes at the heart of the EIA process: “This is a proper safeguard against hasty or ill-considered action. It should be carefully noted that this is in no sense a delegation of its powers by the local legislative body to the zoning commission. The legislative body may still reverse the recommendations of the zoning commission” (9, note 40). Finally, as a measure to circumvent constitutional equal protection conflicts, another footnote makes explicit: “This permits any person to be heard, and not merely property owners whose property interests may be adversely affected by the proposed ordinance. It is right that every citizen should be able to make his voice heard and protect against
significant about the NEPA legislation and its specific instantiation of the EIA process is the coverage the Act carries across the breadth of Federal activities and the flexibility of the concept of the “human environment” that allows it to encompass such a diversity of spatial, social, ecological, economic, and political arenas that might not have been originally considered by the lead agency. In this way, agencies can be compelled through the public feedback process and juridical enforcement to consider culturally, racially, and geographically specific environmental impacts otherwise fall outside of the state’s purview and beyond the original legislative intent behind NEPA.

As part of the public disclosure process, and to minimize the likelihood of a lawsuit, the lead agency is required to elicit public feedback at each major step within the EIA process in which new findings or decisions are reached (see Figure 1.1). Over the course of the EIA process, the lead agency will arrange a series of public informational, scoping, and feedback hearings where they present the proposed project, describe potential areas of environmental impact and mitigation measures, discuss their findings, and then record comments from those in attendance. Comments can be in support or opposition to the proposed action, and can be simultaneously submitted as written comments. Members of the public can additionally submit written comments with greater detail and supporting documentation directly to the lead agency. Comments and feedback can range from simple letters of support or opposition, to requests for consideration of additional environmental factors or data, to lengthy point-by-point critiques that interrogate the lead agency’s assumptions or findings. All comments submitted in either written or oral form are documented by the lead agency and included in the formal record, usually meaning they will be published in an appendix of the final impact statement, along with the lead agency’s written response to each point within each comment. This is due to early court decisions brought under the NEPA legislation that clarified the lead agency’s obligation not only to make public notification and seek public comment, but to take these comments into consideration when any ordinance that might be detrimental to the best interest of the city” (p. 7, note 28)
CHAPTER 1. INTRODUCTION

drafting final impact statements (Anderson 1973).

A lead agency’s responsibility to respond to comments does not imply an obligation to remedy the underlying aspects of environmental impact; their only obligation is to address the issues raised in the comments through impact analysis. In other words, a comment that opposes the project because the EIS failed to address one particular impact can be addressed by the lead agency in the final EIS by simply adding an analysis of that impact and stating how their analysis and decision making process considers that area of impact. The agency’s failure to address all of the comments thoroughly makes them liable for a lawsuit on the basis of the inadequacy of the EIS. Therefore, it is often the case that in response to the comments received during public feedback periods, the lead agency will make substantial additions or modifications to their environmental analyses or project proposal, and in some cases, propose additional mitigation measures as a counter to negative environmental impacts. Thus, the public feedback mechanisms of the EIA process can sometimes shape both the decision making process, and ultimately, environmental outcomes.

On the one hand, this public intervention into the EIA process has enabled communities and public interest groups to delay or stop thousands of proposed projects from being implemented, largely due to procedural missteps or the inadequacy of EIA findings (Taylor 1984). But on the other hand, this aspect of EIA has resulted in the further institutionalization of diverse environmental knowledges within the review process, as has been the case with the logics of environmental justice, which potentially diminishes the radical or at least disruptive capacities of those knowledges. Once the state has institutionalized a particular way of knowing or relating to the environment within the EIA process or EIA guidelines, agencies make it a point to factor those considerations into their investigation and analysis. Because the EIA process has been rendered through case law as a merely procedural requirement, the state has no further mandate to factor those analyses into its decision making process other than to state that they have been considered as such. Furthermore, as the scope and scale of the EIA process has grown to accommodate an
ever increasing diversity of environmental knowledges and potential impact categories, the reports have likewise grown in length, complexity, and the degree of techno-scientific expertise required to interpret and evaluate them. This in turn precludes many people from participating in the public feedback process because of the incomprehensibility of the reports to lay persons.

Although the public feedback mechanisms within the EIA process can sometimes help reshape proposed projects or programs, they are less effective as a means for redirecting or reshaping the underlying policy-based functional objectives of the proposed actions. Put another way, public feedback might encourage the lead agency to take measures to minimize the air, water, soil, and energy impacts of an infrastructure project, or even to select a different alternative to that originally proposed, but it is unlikely that public feedback in the EIA process will have any impact on the lead agency’s underlying goal to implement a project that satisfies the same programmatic goal as their original proposal. Written and oral comments submitted to the lead agency are typically treated in a pro forma manner, with the lead agency respectfully noting the comment in the record, then responding by saying the comment is unlikely to alter their ultimate decision. Although final decisions about funding and implementing a proposed action are made after an affirmative outcome from the EIA process, the proposal is likely to have sufficient political will behind it to see it through long before the EIA process formally commences.

**Litigation under NEPA**

The two main ways that people and organizations have used NEPA and the EIA process to intervene in proposed projects and programs are through its public feedback mechanisms and through the use of judicial review (see Figure 1.1). In addition to the public disclosure and feedback aspects of the EIA process described above, the legal basis for judicial intervention lies in the US Administrative Procedures Act of 1946 (APA), which provides judicially reviewable guidelines for public transparency throughout the decision making process. This means that the lead agency is responsible for researching, documenting, and publicly reporting the decision
CHAPTER 1. INTRODUCTION

making process (see Fogleman 1990). Individual citizens and organizations can challenge the lead agency’s adherence to the NEPA requirements under the APA if they believe the lead agency failed in its responsibilities, or made decisions that appear “arbitrary or capricious” (Fogleman 1990).

Like with public feedback, the NEPA legislation does not contain an explicit provision for judicial review of the EIA process. Early NEPA cases established a legal precedent that allows courts to review the EIA process either under the APA or under the NEPA legislation directly (Anderson 1973; Fogleman 1990). The APA provides a legal basis for challenging the lead agency’s actions through judicial review of the documentation, process, and decision making procedures followed by the lead agency. If, after filing comments through the EIA process, individuals or organizations believe their concerns have not been adequately addressed in subsequent steps along the EIA process, or if they feel that a lack of immediate judicial intervention would in some way cause them direct injury, those individuals or organizations have the right to file a lawsuit against the lead agency in civil court. Such lawsuits typically occur at one of two major points in the EIA process: either after the lead agency approves an EA that declares the proposed project will have little or no adverse environmental impacts, resulting in the issuance of a Finding of No Significant Impact (FONSI); or after the issuance of one of the EIA reports, from the notice of intent and scoping documents, through draft EISs, and up to the final EIS or the Record of Decision. In the former circumstances, a lawsuit will typically request that the court require the lead agency to prepare a full EIS. In the latter circumstances, the lawsuit will request the court require a revision or amendment to the EIS that addresses the claimed deficiencies. In either case, the parties initiating the litigation will typically ask the court to issue an injunction, or court order prohibiting the lead agency from taking further steps in implementing the project, until the requirements of the NEPA legislation are sufficiently met.

Numerous legal issues enter into consideration within NEPA cases, such as whether or not those bringing the lawsuit have a right or protected interest that allows them to sue the lead
CHAPTER 1. INTRODUCTION

agency, whether a particular case is reviewable or within the jurisdiction of the court, and the types of relief that can be requested of the court (Fogleman 1990; Czarnezki 2006). Each of these topics come under consideration within my case studies and are discussed in greater detail in the context of those cases. Because most NEPA litigation involves a request for the court to compel the lead agency to consider environmental impacts not adequately addressed in their analyses, it is not uncommon for cases to come before the same court numerous times as the lead agency iteratively addresses concerns in its EIS revisions (Fogleman 1990). Ultimately, so long as the lead agency adheres to its procedural obligations, and barring a situation in which an irreparable harm might ensue, the lead agency typically has the upper hand in NEPA litigation because the requirements for the EIA process are merely procedural. So even if an injunction is issued that prohibits the lead agency from proceeding with the implementation of its proposed action, in most cases, the lead agency can get the injunction lifted once it satisfactorily fulfills its NEPA obligations, which in most cases means additional environmental impact studies or analyses.

Reviews of NEPA cases in the courts reveal that the judiciary has been particularly accommodating of the state in NEPA cases; indeed, the Federal government has a perfect record in winning Supreme Court rulings dealing with NEPA (MacMillan 2005; Lazarus 2012). This statistic, however, does not account for the numerous injunctions granted en-route to decisions in the government’s favor, the cases in which settlements were reached outside of court rulings where the parties reached a compromise, or cases where the suit was dropped either because the government decided to abandon the proposal or because the proposal was amended in such a way that it negated the need for judicial intervention.

The nearly half-century of case law under the NEPA legislation has dramatically changed the scope, scale, applicability, and process of the EIA requirement. For example, numerous cases where courts ruled in the government’s favor contributed to the narrowing in scope of NEPA applicability and the defanging of NEPA’s substantive goals (see Lindstrom 2000). The narrowing of NEPA’s applicability means that courts ruled that some types of environmental impacts, such as
hypothetical impacts or psychological impacts, were beyond the requisite scope of the EIA process (Fogleman 1990). As discussed in Chapter 2, NEPA was defanged through cases in which the court ruled that the substantive goals of the NEPA legislation—the protection of the human environment—were effectively unenforceable, and so long as the lead agency adequately identified and weighed the environmental impacts of their proposed actions, then any well-reasoned decision regarding that proposal was beyond the juridical reach of the courts. These and other changes to the EIA process that have resulted from case law precedents point to the power of litigation in shaping the administrative procedures of state action, revealing the potential malleability as well as resilience of state institutions to conflict and external pressures. This adaptability of the state vis-à-vis law precisely pinpoints how the EIA process, and its ability to institutionalize and diffuse potential points of racial and environmental crisis within the state, operates as such an effective mechanism for governance within contemporary racial capitalism. Nikos Poulantzas (2014) explains it as follows:

> It is precisely through a system of general, abstract and formal rules that law regulates the exercise of power by the state apparatuses, as well as access to these apparatuses themselves. Within a specific form of domination, this legal system controls the process whereby power is apportioned to the various classes and, above all, the distinct fractions of the bourgeoisie that make up a power-bloc. By thus giving order to their mutual relations within the State, it allows a changed balance of forces in the ruling alliance to find expression at state level without provoking upheavals. Capitalist law, as it were, damps down and channels political crises, in such a way that they do not lead to crises of the State itself. More generally, capitalist law appears as the necessary form of a State that has to maintain relative autonomy of the fractions of a power-bloc in order to organize their unity under the hegemony of a given class or fraction. This compulsion is further bound up with the State’s relative separation from the relations of production - that is to say, with the fact that agents of the economically dominant class (the bourgeoisie) do not directly coincide with the occupiers and agents of the State. (91)

The NEPA legislation provides new mechanisms, both legal and procedural, for asserting and
assigning power over the utilization of natural resources and the production of the built environment. It does this in a manner that maintains the hegemony of capitalist environmental relations through the legitimacy and consent garnered through its institutionalization of liberal forms of transparency and public participation. Yet the legal contours of both the racial environmental state and the NEPA process are themselves malleable and evolve over time through the accretion of legal precedents, the addition and modification of official guidance regulations, and intersections with other areas of public policy. This malleability allows the racial environmental state to adapt to and mediate conflicts within and against the state, and thus diffuse crises of the state’s legitimacy to effectively govern space and the built environment.

Environmental Epistemologies and Institutionalizing Environmental Justice

Through the EIA process, the NEPA legislation establishes a malleable framework for state sanctioned understandings of the environment. It calls for the interdisciplinary and integrative use of both the physical and social sciences, with the key recognition that the content of those sciences would change over time, resulting in uncertainty and change in the bases of environmental planning and decision-making (Caldwell 1998, 56). But the legitimacy of the EIA process, and hence that of the state, is heavily dependent on the comprehensiveness and robustness of the scientific inquiry used to evaluate the environmental impacts of proposed projects or actions. Therefore, it is in the interest of state actors to utilize a robust set of scientific approaches to qualify their findings and to reveal selective biases toward different aspects of the environment. However, the environmental knowledges that substantiate these scientific approaches to impact assessment are prone to ontological and epistemological ruptures. This is especially the case because of the public feedback mechanisms institutionalized within the EIA process that allow for environmental claims to be made against the state from outside the institutional boundaries of dominant scientific communities such as those within universities, private consultancies, and other state funded institutions.
By requiring bureaucrats to think through the environmental consequences of their actions, EIA produces a number of political ruptures horizontally across the branches of federal government, and vertically through scaled hierarchies of government (Taylor 1984). One of the novelties of the EIA process lies in its requirements for the incorporation of a range of specific types of knowledge and information into administrative procedures. Lynton Caldwell provides an insightful analysis of the policy role served by the incorporation of diverse knowledges within the EIA process:

EIA and the integrated interdisciplinary approach to policy that NEPA requires implies syncretic thinking that does not comport well with predetermined political objectives which characteristically have been based on single-track perceptions of reality…Syncretic thinking, which often leads to synergistic conclusions, is an unusual quality; it is rarely encouraged or encountered anywhere. It seeks a whole that may be significantly different and more revealing than a mere summation of the parts. (Caldwell 1989, 11)

The EIA process forces public administrators to think beyond the confines of their agency or departmental roles, and thus adds new impediments, or procedural checks, to the implementation of new programs and projects. This process gives rise to tensions between different government agencies with different agendas and which operate at different scales of government, such as state or local priorities that conflict with federal policies. It also opens the door to conflicts over the definition of “the environment,” what constitutes environmental impacts, and perhaps most importantly, the value assigned to those impacts, where the concept of value represents a diverse set of epistemological conceptions of outcomes, uses, or impacts. In practice, these ruptures within the workings of government have also resulted in opportunities for non-government entities to intervene into the political processes relating to a range of policy and infrastructure undertakings with justifications that I argue far exceed the environmentalist intentions of NEPA’s architects (Caldwell 1998). But the same political openings produced through the EIA process that have allowed for public intervention into government processes have also been subject to juridical and legislative reworking in ways that foreclose some its more
radical possibilities. So just as important as understanding the possibilities EIA produces is the need to work through the contradictions within EIA and the state institutions responsible for employing it in order to better understand it as a site for engaging structural social change.

The process of developing impact statements and the public feedback mechanisms are institutionalized moments when different forms of racialized environmental epistemologies enter the political purview of the state through struggles over land and the environment. By this I am referring to the geographically and culturally specific ways of understanding, knowing, and relating to the environment as a complex system of social processes and institutional structures that contribute to both sustaining life and prematurely ending it through the racially differentiated production of environmental harms and benefits (Cole and Foster 2001; Forsyth 2003). In some regards these ways of understanding the environment exceed the environmentalist intentions of NEPA’s architects, whose focus was primarily on the human impacts on ecosystems, yet part of the novelty of the EIA process is that its structure seems to encourage these types of epistemological ruptures within the mechanisms of state centered decision-making (Caldwell 1998). Environmental epistemologies are often place specific and grounded in the particular material conditions of racially and culturally differentiated space. Because the EIA process has, both through design and through conflicts over its form and function (see Chapter 2), come to incorporate a range of environmental epistemologies, it functions as a mechanism through which the state employs and deploys environmental-geographical knowledge as a means of control and domination within racially and culturally differentiated space (Said 1979; Dalby and Ó Tuathail 1996). As I explore throughout this dissertation, resistance to this state power, and alternatively, working to reclaim or redirect particular instantiations of this power, occurs at both the local level and a more macro-policy/legal level (Routledge 1996). Understanding the geographical workings of the former provides insights into the how and why of the latter.

The reason for focusing on NEPA and the EIA process is that their institutionalization has resulted in a complex state apparatus consisting of infrastructure, discourses, and practices that
combine racial and environmental knowledges to govern space in ways that contribute to uneven productions of space and nature (Smith 1984). They provided a scaffolding and testbed for the institutionalization of sanitized environmental justice ideas that potentially disrupt the radical possibilities of the environmental justice movement. Yet for these same reasons, the NEPA legislation and the EIA process are riddled with contradictions that provide openings for resistance to hegemonic orderings of the environment under racist and capitalist regimes of accumulation and domination. Opening the door to alternate environmental epistemologies means that the EIA process functions as a site of contestation over racial and environmental knowledges and the production of space. At times, EIA is a fruitful site of resistance to capitalist forms of development because it enables the articulation of non- and anti-capitalistic environmental use values through its framework of environmental knowledge. At the same time, the EIA apparatus is able to synthesize these oppositional forces and rearticulate them as state sanctioned forms of “antiracist” knowledge that work to legitimize the capitalist racial state. But in so doing, racial and environmental meanings are transformed and metabolized differently within the state’s apparatuses, constantly revealing new possibilities for resistance and social change across geographical space and scales.

**Theorizing EIA**

Despite considerable scholarship on the relevance, effectiveness, practice, implementation, and legal ramifications of EIA, only a small fraction of the literature theorizes EIA as an object of study (Lawrence 1997; Bartlett and Kurian 1999). Being that the institutionalization of EIA opened up a huge demand for environmental professionals and the production of environmental knowledge to meet the requirements of EIA procedures, this tendency in EIA scholarship should not come as a surprise. But what is somewhat surprising is that among the small but growing body of scholarship that builds theory around EIA, relatively little attention has been paid to the political implications of EIA beyond its role in environmental protection or the political processes
CHAPTER 1. INTRODUCTION

leading to that same end, with most attention being paid, understandably, to environmental-as-ecological outcomes.

First worth noting is the considerable scholarship theorizing both the NEPA legislation and the EIA process by Lynton K. Caldwell. Regarding the former, Caldwell holds that despite the ways that courts have interpreted the Act as lacking enforceable substance, the vision and values embedded within it, and the EIA process intended to enforce them, should be viewed as forward-looking, value-driven legislation whose potential has yet to be fully realized (1998). Of course, Caldwell’s vision should be read with the understanding that he was one of the policy consultants brought in by the US Senate Interior Committee to assist in formulating and drafting the legislation (Caldwell 1998). He thus has a personal stake in recuperating the vision for the NEPA legislation and EIA process from those who would dismiss its substantive values. While Caldwell stridently argued for understanding EIA in light of its historical context and development under the NEPA legislation, he also contributed scholarship about the process more generally as a mechanism of administrative reform, particularly with regard to its important role in promoting the incorporation of environmental sciences and rational planning principles within government administration (Caldwell 1982; Caldwell 1989; Caldwell 1990).

Robert V. Bartlett, one of Caldwell’s former students, has also written extensively on the theory of the EIA process. Bartlett, like Caldwell, theorized EIA from a political science and public policy administration perspective. In a summative review of policy analyses of the EIA process, Bartlett and Priya Kurian (1999) put forth a six-part model for understanding the policy and governance mechanisms of EIA: information processing (a mechanism for gathering and processing information); symbolic politics (a rubber stamp formality with more symbolic than substantive political value); political economic (a mechanism for evaluating risk and externalities affecting market relations); organizational politics (a mechanism that restructures organizational hierarchies and institutional power structures); pluralist politics (a path for non-state actors to influence discrete institutional decisions as well as broader organizational changes);
institutionalist model (a mechanism that transforms the processes and constraints of institutions, and thus political activity). Both Caldwell and Bartlett worked across these six areas of analysis, while focusing their attention most closely on the effectiveness and ramifications of the EIA process on institutional change (Bartlett and Kurian 1999; Bartlett and Baber 1989).

One of the most detailed and widely cited theoretical explorations of the EIA process was developed by Serge Taylor (1984), in which he combines institutional, organizational, and pluralistic models described by Taylor to analyze the overall role of the EIA process in government function and political action. Taylor uses the scientific model of knowledge production as an analogy for understanding the different mechanisms and processes of EIA, including exploratory work, data collection and analysis, iteration and validation, oppositional peer-review, complications around expertise and uncertainty, and established norms for practice. He focuses in particular on the ways that opposition between internal and external functions as a political force shaping institutional and organizational change, leading to shifts in the normative qualities of EIA in much the way that theoretical paradigm shifts occur in scientific communities (see also Popper 2002 [1963]). Building on Taylor’s and Caldwell’s work, a number of additional scholars have developed analyses of the EIA process that eschew a value-free view of the scientific process, and instead look at the confrontational, deliberative, and value-laden mediation between science and policy (Owens, Rayner, and Bina 2004; Cashmore 2004; Cashmore, Bond, and Cobb 2008; Cashmore et al. 2004).

In addition to the literature dealing with the political mechanisms of the EIA process, a growing number of scholars have begun examining the historical and structural entanglements of the EIA process with neoliberal forms of governance. In general, these scholars are concerned with the development of new political subjects/subjectivities and their attendant articulations of embedded “local” (counter-hegemonic) knowledge and what has been termed “eco-governmentality” or “environmentality” in reference to the apparatuses, processes, and organizations of power that have resulted in the governmentalization of the environment, ecology,
and biosystems more generally (Espeland 1994; Rutherford 1999; Rutherford 2007; Robbins
2000; Luke 1995; Goldman 2001; Agrawal et al. 2005; Cashmore et al. 2010). Within this
literature, Rutherford (1999) provides a short but highly relevant analysis of EIA as a new form of
biopower that operates simultaneously through juridical and self-regulating forms of
governmental rationalities. Additionally, Agrawal et al. (2005) uses the idea of biopolitics to
explore the specific technologies of government that produce both human and non-human
environmental subjects as the focus of government that operate at and between scales from the
individual to the state.

Interestingly, the same Lynton Caldwell who helped draft the NEPA legislation used the
same term “biopolitics” in a similar yet different way than its use famously popularized by Michel
Foucault in his Collège de France lectures in 1976, and Caldwell’s use of the term sheds light on
the formative ideas about science and politics that he would later contribute to the NEPA
legislation. Indeed, twelve years before Foucault began exploring the concept of “a ‘biopolitics’
of the human race” (2003, 243), Caldwell (1973) deployed the term in a paper published by The
Yale Review in 1964, used as a reference to the wielding of the continuously growing body of bio-
and techno-scientific knowledge systems deployed within political and ethical frameworks to
address the impacts of such knowledge and technologies on society. Caldwell used the term to
describe a framework and proposed course of political action to “reconcile biological facts and
popular values—notably ethical values—in the formulation of public policies” (1973, 24).

It is interesting to think about Foucault in conversation with Caldwell because their
different approaches to a common political theme reveals continuities and ruptures in each of their
logics. There are a number of very close parallels between the two scholars’ theories of
biopolitics and its impacts on government and populations. Also indicative of a similar materialist
context to their writings is the use of identical biological science examples of a necessity for
biopolitical intervention in areas such as nuclear weapons, the post-War population explosion, and

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5See also Foucault (2007).
CHAPTER 1. INTRODUCTION

anthropogenic environmental changes (Caldwell 1973, 26–27; Foucault 2003, 244–45). These similarities are also indicative of common sociocultural and political economic tropes, at least in the U.S. and Western Europe, that help to situate the scholarship and delineate the contours of the state from which EIA and other political projects emerged. More to the point of theorizing the EIA process, Foucault provides a precise set of methods and framing questions for thinking about the operation of governmentalized biopolitics in practice, as Agrawal, Rutherford, and others have demonstrated in applying Foucault’s theories of governmentality and biopolitics to the EIA process. While I do not explicitly engage Foucault’s or Caldwell’s theories of biopolitics in my case studies, I am certainly influenced by Caldwell’s proposition of critically reflecting on the role of bio- and techno-scientific knowledge in shaping the contours of racial and environmental logics within the operation of the state, as well as the implications of this incorporation of knowledge in shaping the function of government and the relationship between government, space, and geographically and racially differentiated populations.

Environmental Justice and Urban Political Ecology

My analysis of the EIA process is situated at the nexus of environmental policy, environmental justice, and social justice more broadly. As an object of study, the EIA process provides me with a point of entry into thinking more expansively about the political capacities of the racial environmental state as a set of policies, laws, institutions, and practices that shape and respond to geographical struggles over place (see below). The project draws inspiration from and builds upon the environmental justice framework for engaged scholarship and activism. The environmental justice framework provides a particularly powerful lens through which to consider the EIA process because the framework is rooted in political struggles that articulate across, or bring together, multiple forms of domination and resistance through the analytics of race, class, gender, and ecological destruction (Hall 1980; Bullard 1990; Pulido 1996b; Pulido and Peña 1998; Cole and Foster 2001; Gilmore 2008). This framework is complemented by the urban
CHAPTER 1. INTRODUCTION

political ecology (UPE) literature, which has developed a robust set of theoretical and empirical tools for analyzing human-environment relationships through the lens of critical urban political economy (Keil 2003; Heynen, Kaika, and Swyngedouw 2006).

One of the most significant epistemological ruptures within the state’s purview of environmental knowledge resulted from political mobilizations for environmental justice based on the ontological claim of state sanctioned environmental racism. Environmental racism is the term developed in the 1980s to describe the uneven spatial distribution of environmental harms and benefits with regard to racially and ethnically differentiated populations (Bullard 1990; Mohai and Bryant 1992; Cole and Foster 2001). Environmental justice activism brought to the fore the ontological position that environmental conditions are geographically inextricable from the production of racially differentiated space through processes of uneven capitalist development (Bullard (1994); Pulido (2000)]. These claims worked within a US-centered context to shift the focus of both the practice and official state discourses about the racialized dimensions of environmental issues and state practices more broadly.

The environmental justice framework emerged in the 1980s out of a social justice movement to uncover and remedy human negative health and quality of life impacts that disproportionately affected politically, racially, and economically marginalized communities due to the uneven distribution of environmental harms and benefits—the material effects of structural environmental racisms (Cole and Foster 2001). The environmental justice movement traces its lineage to the Civil Rights Movement organizing that took place throughout the US from the 1950s through the 1970s, and to the environmentalism and anti-toxics movements that started in the 1950s and continued into the late 1970s (Cole and Foster 2001). Civil Rights Movement leaders combined their experience in direct-action and mainstream political organizing with critiques of the social and economic structures underpinning racial segregation and oppression to effectively mobilize communities of color in struggles against the environmental problems affecting their neighborhoods (Bullard 1993; Taylor 2000; Cole and Foster 2001; Keil 2003).
CHAPTER 1. INTRODUCTION

The communities that turned to an environmental justice framework to articulate their struggles for social justice framed their arguments against environmental racism through discourses of structural racism and patriarchy, emphasizing uneven impacts to communities that were largely ignored by the mainstream, white middle-class environmentalism movement that was premised primarily on preservation and conservation (Pulido 1998; Buckingham and Kulcur 2009). Joining in this struggle were some of the more radical organizers and scholars from the anti-toxics branch of the mainstream environmentalism movement. Their analyses contributed the identification of corporate power and the structuring of the global political economy through the production of surplus value, as the driving forces behind the uneven production of toxics (Cole and Foster 2001). The convergence of these two camps in the 1980s led to the establishment of a coherent environmental justice framework that claimed uneven environmental conditions were a product of environmental racism structured through the capitalist political economy. What eventually emerged was an environmental justice framework that takes seriously the objective of social justice requires thinking about environmental justice in terms of scholarship and praxis that counter-articulates various modes of social justice struggle in opposition to the historically and geographically specific modes of dominance that structure society, such as racism, sexism, and capitalism (Hall 1980; Gilmore 2002; Pellow and Brulle 2005; Kurtz 2009; Pellow 2009).

In contrast with the dominant ecological understandings of the environment, the environmental justice framework presents a radically different way of understanding the environment through the lens of structural racism and the political economy that proved to be just as contentious as it was politically powerful. In the first half of the 1990s, a number of scholars began interrogating environmental justice claims and challenged its basis of environmental racism. They employed a variety of quantitative methodologies to empirically “prove” that claims of environmental racism were merely the spatialized outcomes of market forces, civic participation, and static notions of class difference, and not a result of racist practices (Been 1992; Been 1994; Anderton et al. 1994; Cutter 1995; cf. Pulido 1996c). As a radical intervention intended to recuperate the concept of environmental racism from the throes of liberal
environmental justice scholarship predominating in the 1990s, Laura Pulido (2000), building on the work of one of the most influential environmental justice scholars, Robert Bullard, introduced a conceptual framework and model for environmental justice scholarship that defines social justice as its objective rather than as a purportedly value-free question, and asserts environmental racism as a de facto result of centuries of geographically driven structural racism (see also Bullard 1990; Bullard 2001; Pulido and Peña 1998).

Countering scholars who held environmental justice as a question driven by intentionality and personal choice, Pulido and others pointed out the embedded racism in studying environmental racism purely based on distributive measures of uneven environmental landscapes by pointing out the fetishism and essentialism of viewing race as a static concept and racism as discretely embodied acts of malevolence. Drawing on critical race theory and critical whiteness studies, Pulido and others instead argued for the importance of understanding racism in terms of the shifting forms of domination produced by and supportive of spatial practices rooted in forms of difference that are fundamental to the maintenance of the capitalist racial state (see also Harris 1993; Omi and Winant 1994; Lipsitz 1995 Goldberg (2002); Kurtz 2009). Furthermore, Pulido argues that the lack of critical understandings of racism within geographic and environmental justice research reflect and reinforce broader systems of white supremacy within the discipline, and which serve to alienate environmental justice scholarship from environmental justice praxis, or engaged political struggles (Pulido 2002; Cole and Foster 2001; Kurtz 2009). Therefore, environmental justice scholarship that takes seriously the objective of social justice requires thinking about environmental justice in terms of scholarship and praxis that articulates various modes of social justice struggle in opposition to the historically and geographically specific modes of dominance that structure society, such as racism, sexism, and capitalism (Hall 1980; Gilmore 2002; Pellow and Brulle 2005; Kurtz 2009; Pellow 2009).

Throughout these debates over the theoretical basis of environmental justice scholarship, environmental justice activists were successfully employing these theoretical positions in locally,
regionally, and nationally organized struggles for environmental justice over issues such as healthy working, living, and learning environments; access to clean air and water; housing access; indigenous land rights; clean and accessible public transportation and public spaces; prison conditions and policing practices; and other forms of spatially situated social and economic justice (e.g., Bullard 1993; Pulido 1996a; Burgos and Pulido 1998; Taylor 2000; Sze 2007; Gilmore 2008). Through grassroots organizing and juridical challenges to siting decisions, which often came through the EIA process, environmental justice activists were able to gain state recognition of epistemologies that saw the environment not just in terms of its ecological functions, but also in terms of the myriad ways that environments enable or inhibit the racialized and gendered terrains of social reproduction (Pulido and Peña 1998; Braz and Gilmore 2006). Thus, the structural mechanisms and infrastructures of EIA provided an institutional capacity and site of convergence for mobilizing resistance to environmentally racist practices and then incorporating environmentally anti-racist knowledges into the state logics of environmental decision-making.

Complementing the environmental justice framework guiding my research are the theoretical tools and methods developed in urban political ecology (UPE) scholarship. There is a great deal of overlap between the two literatures in their critical engagements with the uneven production of social natures (Smith 1984; Castree and Braun 1998). Where the environmental justice framework guides my thinking, Marxist UPE provides the theoretical and methodological nuts and bolts that bring together my arguments about the material and discursive geographies of EIA in relation to the structural production of socio-environmental change (Swyngedouw and Heynen 2003). UPE employs historical materialist approaches to the spatial and scalar politics, as well as the specific urban political economic conditions, of uneven urban development vis-à-vis capitalist productions and metabolisms of nature (Smith 1984; Castree and Braun 1998; Keil 2003; Swyngedouw and Heynen 2003; Peet and Watts 2004; Heynen, Kaika, and Swyngedouw 2006).

Some UPE scholars have criticized the environmental justice literature and its geographically and historically specific forms of political praxis for taking a “liberal and, hence,
CHAPTER 1. INTRODUCTION

distributional perspective on justice” (Swyngedouw and Heynen 2003, 910). However, I contend that the environmental justice framework offered by Pulido and others, as described above, preempts this critique and provides the lens through which to dialectically approach the contradictions within the environmentally racist capitalist state. That is, uneven racial geographies and uneven development are inseparable spatial practices that are fundamental to the maintenance of the capitalist racial state. As I describe below, this position is further evidenced by documented environmental justice struggles that demonstrate the expansive analytical and political possibilities offered by this framework for radical analyses that far exceed the limitations of racial liberalism and distributional justice (Schlosberg 2007; Melamed 2011).

My analysis of EIA stems in part from the epistemological and ontological expansion of knowledge produced through EIA with regard to conceptions of the environment, particularly those that venture beyond nature and ecology. Both the UPE and environmental justice literatures provide insights into the processes and practices that have supported these discursive shifts in environmental knowledges. For example, Gezon and Paulson (2005) provide examples of epistemological ruptures that shift the terms of debate when interrogating ecological processes in terms of the actors and subjects of environmental knowledge. More closely related to the political processes shaping my research, the environmental justice movement has been particularly effective in shifting environmental discourses to frame all spaces where social reproduction occurs—spaces for living, working, learning, and playing—as functionally inseparable from the ecological aspects of the environment (Pulido and Peña 1998). Finally, there are those instances where safe environments—in the sense that they don’t produce “group-differentiated vulnerabilities to premature death” (Gilmore 2007, 28)—are articulated as safe from state institutions of racial domination and violence such as policing practices and the prison industrial complex (Braz and Gilmore 2006; Gilmore 2008).
CHAPTER 1. INTRODUCTION

The Racial Environmental State

Race and environment have a long history as overlapping and mutually constituting structures of domination within state formations. For example, between the end of Reconstruction and the Civil Rights Act of 1964, Jim Crow laws, as well as other state-sanctioned mechanisms such as mortgage discrimination and redlining, resulted in uneven development characterized by deeply seated racial segregation, in terms of populations, resources, and productive capacity. Throughout this history, which is certainly not unique to the US, the contemporary racial environmental state, understood as an assemblage of institutional and ideological capacities, functions through and is shaped by conflicts over the ways that race and environment are defined, maintained, and incorporated into hegemonic social relations, specifically, capitalist social relations. Building on David Theo Goldberg’s (Goldberg 2002) historical analysis of the racial state’s role in shaping and mediating racial categories and meaning through its various powers, I refer to the aforementioned convergence of institutional capacities as the racial environmental state.

The racial environmental state should not be confused with government, which is the object, the “thinginess,” that instantiates the state through policies and actions. Rather, the racial environmental state operates through the management of race and environment as both ideological concepts and material practices. It is at times racist and environmentally destructive, but it also variously employs anti-racism or environmental protections as functional components of state building and ensuring the reproduction of capital. The racial environmental state functions through policy, law, police powers, and other mechanisms of political will and power, and is shaped through countless forms of conflict, deliberation, and force. Just as the contemporary racial state functions to maintain racial capitalism, or the saturation of racial logics through the organization and reproduction of capitalist social relations, including the political, economic, cultural, and ideological structures articulated with race that are in turn “structured in dominance” (Robinson 1983; Hall 1980), so too does the racial environmental state function to simultaneously
and interdependently maintain both racial capitalism and uneven productions of nature.

One way to get at the racial environmental state is through the concept of racial projects developed by Omi and Winant (1994) to explain the process of racial formation. In their formulation, historically (and geographically) situated racial projects “connect what race means in a particular discursive practice and the ways in which both social structures and everyday experiences are racially organized, based upon that meaning” (56). The racial environmental state can be understood in terms of the state’s capacities for shaping understandings of race and environment as interconnected systems of knowledge and representation that provide structure for each other as modes of domination and dialectically thus, resistance. While race and environment are certainly not inseparable, understanding them through their points of connection and mutual dependencies facilitates an inherently syncretic geographical analysis of the capitalist state. Like the racial state that has evolved through conflicts over racial meanings and domination, so too has the environmental state been shaped through changing understandings of the geographies of human habitation, for example, by shifting understandings of territory, property, natural resources, ecology, biomes, climate, and natural disasters. Conceiving of the racial environmental state provides a framework for understanding how racial meanings are produced through the ways that the state operates through environmental functions, and vice versa. For example, the “green-washing” of prisons by employing renewable energy, reclaimed water, and on-site gardens to help legitimize the state’s continued use of cages to warehouse populations rendered surplus within contemporary racial capitalism demonstrates the way that an environmental project—the green-washing of prisons—functions to maintain the hegemony of the prison industrial complex as a racist geographical structure of state power and racial domination.

In this dissertation, I utilize the concept of the racial environmental state in order to understand how the EIA process functions as a mechanism of the state and renders the state as a site of racial and environmental conflict. In turn, my research highlights the capacities and limitations of this particular state formation for social and environmental justice organizing.
CHAPTER 1. INTRODUCTION

Through my case studies, I argue that the EIA process institutionalizes environmental justice principles prior to their official codification under President Bill Clinton’s Executive Order 12898 in 1994, which made environmental justice a priority for all government agencies. This move represented a significant victory for environmental justice activists, but it also cemented a particular set of racial and environmental logics and neoliberal rationality within the state. This signals the ways in which racial capitalism was reorienting itself around projects of what Jodi Melamed (2011) calls “neoliberal multiculturalism” to describe the phase of racial capitalism in which official state anti-racisms became linked to the maintenance of state legitimacy in light of shifting racial regimes, the solidification of neoliberal mechanisms of free-market economism and technocratic rationalities, and the growth of “differentiated” or “neoliberal sovereignty” under global capitalism (Ong 2006; Chalfin 2010; Melamed 2011).

Indeed, the EIA process has become an inextricable component of global capitalism through its adoption both as a government function in almost every country, but more importantly, as a prerequisite for transnational lending institutions such as the World Bank. In this role, it provides a normative, technocratic framework for the incorporation of rational scientific, economistic, and risk-based metrics for global development and policy implementation. EIA provides a method for the implementation of biopolitical, and as I argue, racial knowledges and modes of governance that secures and legitimizes the hegemony of neoliberal forms of governance that aim to unify the underlying contradictions of the political economic, social, cultural, and environmental crises within contemporary racial capitalism (see Melamed 2011). Furthermore, through its biopolitical mechanisms for producing knowledge about the human environment and its racially and economically differentiated populations, the EIA process functions in service of what Ong (2006) terms “differentiated citizenship,” which Jodi Melamed (2011) describes as “a differentiated experience of citizenship that ensures governments protect those who are valuable to capital, whether formally citizens or not, and devalue and render vulnerable those who are not valuable within circuits of capital, whether formally citizens or not” (39-40). Differentiated citizenship encapsulates the structural conditions addressed by radical
CHAPTER 1. INTRODUCTION

approaches to environmental justice, and describes one of the primary functions that the contemporary racial environmental state mediates through its various modes of environmental governance.

Methodology

The purpose of this dissertation is to develop understanding about the form and function of the EIA process. To accomplish this task, I looked at case studies in which the EIA process was interrupted by lawsuits brought by individuals and groups looking to challenge the state’s actions. While challenges to the EIA process can take different forms, the most visible and potentially disruptive means for using the EIA process or the statutory and procedural requirements of the NEPA legislation to challenge agency actions is by filing a civil lawsuit against the agency responsible for the EIA process. It follows, then, that the case studies I examined for the purposes of this dissertation involve judicial intervention. With this in mind, appropriate case studies were identified through a combination of word-of-mouth from individuals who had familiarity with cases they thought might be interesting, and through preliminary research into cases with enduring significance to NEPA case law. I encountered numerous cases that could have been included in my research, and can say with confidence that most of them could have surfaced interesting aspects of the EIA process and its impacts to the racial environmental state and community organizing.

In the end, I settled on the three particular cases included in this dissertation due to the particular ways that each of the cases reveal different aspects of the ways that the environmental justice framework intersects with and gets institutionalized within the EIA process, whether that is explicitly or implicitly. These three case studies were not selected because they are representative of any sort of totality, though I attempted to select cases that provided diversity across a range of categories to highlight the effects of the EIA process across a similarly diverse set of conditions.
One might think of these as geographically contingent contextual variables within my data. The three cases I selected for this dissertation span the US—one is in urban New York City, another is in rural Central California, and the last involves an unpopulated valley wedged between rural and urban parts of the Hawaiian Island of O‘ahu. Two involved federal actions based on the NEPA legislation, while one involved a state-level “mini-NEPA” with similar EIA requirements. One of the cases eventually ended up being heard at the Supreme Court, one is still active in a federal district court, and the one at the state level ended in the California State Appeals Court. In two of the cases, the courts decided in favor of the state agencies that were defending their actions within the EIA process, while the last case remains unresolved, but appears to be headed in a direction that is ultimately favorable to the community organizations challenging the state’s actions. Two of the cases feature social and environmental justice community organizing in opposition to the state’s proposed actions, while in the third, social justice advocates side with the state in opposition to racist and classist community organizers who fought to stop the state from implementing a public housing project. Finally, all three cases take up the concept of racialized environments in very different ways, but in each case, the legal battle over the EIA process is tied up in both struggles over differing racialized visions of place, as well as in conflicts over the state’s engagement with different understandings of race and difference.

Since each of my case studies involves legal proceedings, and because the EIA process itself is primarily procedural and enforced by the judiciary, I decided early in the research process that my data for this project should focus on the legal and procedural aspects of each case. This approach allowed me to pay close attention to the workings of the state and to the ways in which activists and other non-state actors operated in relation to the state (Hooks 1991). Thus, in order to narrate the stories of each case study, I used a combination of court rulings, documents filed by lawyers and witnesses during court trials, and primary source documents published as part of the EIA process. To provide context, fill gaps in the narrative, and better understand the various actors in each case study, I also incorporated a variety of secondary sources including published interviews, newspaper articles, press releases, and other scholarly works that discuss the cases.
CHAPTER 1. INTRODUCTION

The bulk of these data were collected using news and scholarly databases, and documents made available by public agencies, while other data had to be specially accessed through court record databases such as the Public Access to Court Electronic Records (PACER) system, and public records requests under the Freedom of Information Act (FOIA).

This combination of data sources allowed me to analyze the ways that both the state and non-state actors engaged the EIA process, in terms of both administrative procedure and environmental law. Though my particular choice of data sources limited the extent of the inferences I could make about the intentionality behind various actors’ actions, my sources still provided me with plenty of data about how the legal strategy based on the EIA process fit within a broader context of social change. In addition to the archival sources that I used for this project, I could have potentially employed oral history, ethnography, or more in-depth archival research involving historical records kept by parties involved in each of the campaigns. However, I felt that the data were sufficient to the scope of the project and the types of questions I aimed to address regarding the legal and political implications of the EIA process. Data sources between the different case studies were also inconsistent, and for some of the cases, it was difficult to track down additional reliable sources of information, so I decided that limiting the overall scope of data and analysis to the legal and institutional processes was the most prudent course for this dissertation.

As I sifted through the data for each of the case studies, I used legal and historical analyses to make sense of and draw conclusions about the operation of the EIA process. Each case provides unique insights into the functional operation of the EIA process vis-à-vis the judiciary since the precedents established in case law directly affect the ways in which statutes and guidelines are interpreted and applied by state agencies. The full effect, indeed the practical meaning, of any legislation, NEPA notwithstanding, requires legal challenges to define the contours of both state action and responsibility, and thus, analysis of the legal process yields both the shape and texture of the inner-workings and tensions within the state. The EIA process is
CHAPTER 1. INTRODUCTION

dynamic; it’s been gradually transformed through practice and policy, mediated by the law (see Merry 2000). Therefore, a history of the EIA process is inextricable from legal analysis of the cases and practices that forced its transformation. Limiting this dissertation to three case studies means that my analysis not representative of the breadth of case law that has shaped the EIA process in general; nor is this dissertation meant to provide a complete history of the ways that the EIA process has institutionalized aspects of environmental justice practice. Rather, my analysis provides insights into the historical development of the EIA process by glimpsing specific cases in moderate detail to see how the legal and institutional apparatuses of the racial environmental state operate in relation to geographically specific struggles over place.

At the same time, each of my case studies is situated within a particular historical and geographical context that provide the conditions of possibility for the state and various communities to engage in their conflicts. Historical materialist analysis of these conditions allows me to consider the state as a geographically contingent set of relationships and institutions, including the EIA process, as embedded in a dialectical relationship with the environment. That is, my analysis of the environment views it as a social relation between society and “nature” that can only be understood through the ways that people make sense of it; the environment, in its physicality, sociocultural meaning, and political economic functions, exists as such because the state and society have shaped it through their mutual dependence upon it. Therefore, a legal and geographical history of the EIA process requires that I attend to an environmental history of each case study in order to understand the social and cultural changes in the context of a historical materialist perspective (see Harvey 1996).

Organization

This dissertation is organized into three case study chapters that address different aspects of the ways that NEPA and the EIA process get taken up in community struggles that engage the racial
CHAPTER 1. INTRODUCTION

environmental state and demonstrate the ways in which environmental justice principles get variously institutionalized within the EIA process. In Chapter 2, I ask how different ideas and approaches to the concept of environment come to be embedded within the EIA framework. As legislated, NEPA specifies that the EIA process should include analysis of impacts to the human environment, but in practice, “human environment” is a concept whose meaning is worked out through conflicts within the purview of the racial environmental state. This chapter asks what the role of the judiciary is in mediating this process and what implications this bears for the racial environmental state. Chapter 3 addresses questions regarding the use of the EIA process as a strategy for social movement building. What are the implications of engaging the racial environmental state as a site of conflict within a broader social movement for justice? How does this engagement change the stakes of struggle for community organizers, potential collaborators, and state institutions and organizations? What opportunities and constraints come with a legal strategy based around the EIA process? In Chapter 4, I look beyond NEPA to ask how the intersection of other land use policies with the EIA process can consolidate efforts to build a social movement around culturally specific, counter-hegemonic land uses. In turn, how does this engagement with the racial environmental state shift the ways that racial identities get deployed within the movement and synthesized by the state? Furthermore, in considering the ways that the political economic climate has changed dramatically over the nearly half-century since NEPA was enacted, how has the malleability of the EIA process allowed it to adapt to shifting racial and environmental discourses and national priorities? The concluding chapter synthesizes my findings regarding the ways that NEPA and the EIA process have transformed the racial environmental state. It also asks how the environmental justice principles institutionalized through changes within the EIA process relate to the official requirements for environmental justice considerations within Federal agencies under President Bill Clinton’s Executive Order 12898.
2 White Flight and Pocket Ghettos as Environmental Impacts in New York’s Upper West Side

In January 1980, after a protracted legal and bureaucratic battle lasting nearly a decade, the US Supreme Court issued a ruling in *Strycker’s Bay Neighborhood Council v. Karlen* (*Strycker’s Bay*, 444 US 223 (1980)) that allowed the US Department of Housing and Urban Development (HUD) to provide funding for the construction of a public housing project in New York’s Upper West Side (UWS). The plaintiffs in this case were a coalition of property owners and real estate developers that claimed the federal government could not fund the housing development because HUD failed to comply with the procedural requirements of the National Environmental Policy Act (NEPA). They argued that HUD did not adequately consider that the development would create what they claimed was “an impermissible ‘pocket ghetto’ of a nonintegrated nature,” thus deteriorating the local environment by “tipping” the neighborhood demographics toward low-income, and presumably non-white residents, with the implication being an increase of crime, “white flight,” and deteriorated property values.¹ In addition to the racist and classist impunity of the plaintiffs in this case, and the vigor with which local community housing advocates, in league with the local, state, and federal government pushed back in support of public housing, this case is significant for establishing a legal precedent used by courts in adjudicating the conflicting priorities between substantive mandates of federal agencies and procedural requirements of

NEPA, among other things. But what is perhaps most interesting about this case is the bigger issue that it didn’t resolve, but which was emphasized throughout: that the environmental impact assessment requirement under NEPA potentially undermined the substantive mandates of anti-segregation civil rights legislation such as the Fair Housing Act.

The *Strycker’s Bay* case is one within a series of conflicts surrounding public housing in the US following passage of the Fair Housing Act of 1968. At stake in these battles was the development of large-scale public housing designed to alleviate the steady demand growth for housing in urban areas following World War II. The need was greatest amongst the working poor and unemployed populations, especially in communities of color as a result of decades of racist housing and lending practices. But the same racist attitudes that fueled the de jure discriminatory housing practices prior to the Fair Housing Act gave rise to diverse conflicts to prevent, delay, relocate, restructure, and defund, as both a matter of fact and jurisprudence, the racially progressive social welfare housing developments the Act intended to produce. Environmental policy figures prominently within these conflicts, even if not always at the center. Public and affordable housing in the US slowly eroded into private and affordable-for-some housing in the 1990s and 2000s. The legal precedents and political challenges enabling that transition are rooted in, as this case study demonstrates, the racialized struggle over space, as much as the class-based conflict over the state’s role in social welfare provision.

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2In legal terms, the difference between procedural requirements and substantive mandates is that the former is a requirement that specific procedures be followed, usually in accordance with the Administrative Procedures Act. The latter is a more subjective objective such as decreasing segregation or enhancing the environment; in accordance with the APA, it’s left to the discretion of the agency charged with the mandate as to whether or not their actions satisfy the substantive goals of the mandate, so long as their actions are neither arbitrary nor capricious, and do not represent an abuse of discretion (“5 U.S. Code § 706” 1966). The importance of this distinction was made clear in one of the first NEPA cases granted cert by the Supreme Court, *Calvert Cliffs’ Coordinating Committee, Inc. v. Atomic Energy Commission*, 449 F. 2d 1109 (1971), in which the Court’s majority opinion described the substantive goals of NEPA as “flexible,” in contrast with its “not highly flexible” procedural requirements.
CHAPTER 2. WHITE FLIGHT AND POCKET GHETTOS

This court case, and the broader conflict over low-income housing in New York City’s West Side Urban Renewal Area (WSURA) from the 1950s through 1970s, form the heart of this chapter. Through an examination of the legal decisions and policy implications of this case, I showcase important shifts in the form and function of the racial environmental state under the NEPA, in the wake of the Civil Rights Movement, and alongside the slow decline of the Keynesian welfare state throughout the latter half of the 20th century. Environmental policy plays a central role in this story; indeed, I argue that environmental policy helped facilitate the transition from the Keynesian welfare state to a particular form of neoliberal state characterized by what Ruthie Gilmore describes as post-Keynesian militarism (Gilmore 1998; Gilmore 2007). I show how contradictions within housing policy, civil rights legislation, and environmental policy provided fertile grounds for racialized conflicts over the production of space, and how these conflicts reshaped the racial environmental state. The racial environmental state facilitates the capitalist organization and production of space vis-à-vis the management of racially differentiated populations. I focus on the interactions between state agencies and the judiciary in resolving issues borne out of public policy in the wake of social and economic crises beginning in the 1960s. What emerges is a geographical understanding of the ways in which race and environment become reinstitutionalized as mutually constituting frameworks in the post-civil rights era racial state.

Housing Conflict within The Upper West Side Renewal Area

Throughout the mid-20th century, New York City’s Upper West Side entertained massive redevelopment efforts aimed at reinvigorating capital investment and maintaining property values throughout the area. The most notorious effort was Robert Moses’ massive Lincoln Center Renewal Project in the 1950s and 1960s, which razed entire city blocks and displaced hundreds of households in the name of development and progress. Following on the heels of that controversial project, Mayor Robert Wagner established a special Urban Renewal Board in 1959, as an offshoot of the City Planning Commission, to plan the next round of redevelopment in what came to be
CHAPTER 2. WHITE FLIGHT AND POCKET GHETTOS

known as the West Side Urban Renewal Area (WSURA), just a short distance north of the Lincoln Center. Seeking a departure from what Martin Anderson (1964) calls the “Federal Bulldozer” approach to redevelopment, Wagner’s plan for the WSURA called for a partnership with the US Department of Housing and Urban Development (HUD) to leverage federal funds and financing to preserve the existing community through the expansion of decent affordable housing, while still “arresting the spread of blight” (New York City Planning Commission 1958). The plan called for a mix of demolition, rehabilitation, and new construction of housing and community service facilities within a 20-block area bounded by 87th and 97th Streets, Central Park West, and Amsterdam Avenue (see Figures 2.1 and 2.2).

According to the Planning Commission’s (1958) study of the WSURA, one of the primary objectives of the redevelopment plan would be to address the loss of investor confidence in the WSURA, as it “suffered a deterioration in investment quality and…assumed many of the characteristics of a declining area” (26), despite the fact that the same study showed that real estate prices and housing demand indicated otherwise. The Planning Commission viewed high population turnover within the WSURA as a clear indication of the “under confidence of capital” (28). This finding is confounding because on the one hand, high population turnover coupled with high housing demand can promote steady rent increases. On the other hand, their analysis equated turnover with neighborhood instability and a lack of social investment in community building and place making, with the long-term effect being an erosion of housing stock and greater risk to the maintenance of property values. This latter conclusion reveals the true nature of racial capitalism, and thus the project of the racial state underlying the WSURA redevelopment. To quote from the Planning Commission’s study of the WSURA:

The size of the Puerto Rican in-migrant population and the fact that they have contributed to the over-crowding and deterioration of the Area have aroused fear and hostility. This reaction is often in excess of what actual conditions might warrant. Much of the fear of crime and violence expressed by long-time residents of the Area is not related to knowledge of specific incidents. It is often generalized and associated with Puerto Ricans. (33)
CHAPTER 2. WHITE FLIGHT AND POCKET GHETTOS

Figure 2.1. Overview Map of the West Side Urban Renewal Area (Source: Urban Renewal Board 1959)
CHAPTER 2. WHITE FLIGHT AND POCKET GHETTOS

Figure 2.2. Map of the West Side and Seward Park Expansion Urban Renewal Areas

Map Author: Keith Miyake


Additional Sources: Esri, HERE, DeLorme, USGS, Intermap, increment P Corp., NRCAN, Esri Japan, METI, Esri China (Hong Kong), Esri (Thailand), MapmyIndia, © OpenStreetMap contributors, and the GIS User Community

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CHAPTER 2. WHITE FLIGHT AND POCKET GHETTOS

Over the preceding decade, the WSURA experienced significant demographic changes—white flight coupled with a roughly 35% increase in the Black and Puerto Rican populations. Therefore, inasmuch as the Plan aimed to “retain the traditional diversity of the area while attracting a more permanent population” (Urban Renewal Board 1959), the inference is that it targeted the stabilization of white populations and geographical fixation of capital investment through the management and containment of Puerto Rican populations racialized as non-white. This racialized tension between securing the WSURA for capital and maintaining its existing populations reveals itself as the core conflict over the state capacity mobilized through federal and local housing policy and urban renewal programs across the US from the 1930s through the 1970s.

The WSURA Plan would become an important battleground in this war over the capitalist racial state. The Plan leveraged funding from the Housing Acts of 1949 (42 US Code § 1441) and 1954 (Public Law 560, 68 Stat. 590) to publicly subsidize its urban renewal and redevelopment objectives. Because the Housing Act of 1954 emphasized the minimization of displacement resulting from urban renewal efforts, the Plan was required to include low-income housing to accommodate existing Area populations. However, the conservative realignment of state sponsored urban development efforts brought by the Housing Act of 1954, meant that low-income housing and anti-displacement measures were subsidiary concessions to maintain political legitimacy, while the primary objective of the Plan was to attract capital investment in the area through federally subsidized mortgages and infrastructure development. Richard Flanagan (1997) points out that the Housing Act of 1954 marked a more conservative departure from previous efforts.

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3 Specifically, Title I of the Housing Act of 1949 states: “The Congress declares that the general welfare and security of the Nation and the health and living standards of its people require housing production and related community development sufficient to remedy the serious housing shortage, the elimination of substandard and other inadequate housing through the clearance of slums and blighted areas, and the realization as soon as feasible of the goal of a decent home and a suitable living environment for every American family, thus contributing to the development and redevelopment of communities and to the advancement of the growth, wealth, and security of the Nation.” Thus, it is the primary driver of “slum clearance” efforts in the 1950s, and is redoubled under the subsequent Housing Act of 1954.
efforts at providing adequate public housing for poor and middle class urban populations because of its focus on commercially oriented urban renewal rather than public housing. It was essentially an early neoliberalization of housing policy that shifted funds away from state sponsored public housing toward the neoliberal model of subsidized private development, with low-income housing provisions merely riding the coattails of broader efforts to bolster increases in real estate equity and returns.

Like the Lincoln Center Renewal Project that preceded it a dozen blocks to the south, the WSURA Plan was essentially a gentrification project disguised as a welfare state project to revitalize the neighborhood for the benefit of existing populations. In other words, the low-income housing provisions funded by the program aimed to maintain, without increasing, non-white populations in order to promote—and publicly finance—private development and investment while attempting to allay capital’s racist insecurities around communities with large non-white populations. Thus, poor and working class Black and Puerto Rican populations became the subjects of both direct and indirect forms of displacement or containment in favor of publicly subsidized private mixed-use real estate developments with greater profit and property value potentials. The proposed slum clearances would eliminate existing housing and consolidate displaced residents in newly constructed high-density public housing projects. Yet despite the concessions made by the Plan for the sake of capital, the state was still committed to increasing the stock of publicly owned and operated housing in an attempt to maintain the neighborhood’s existing demographic composition against the pressure to liberalize the housing and real estate markets.

The WSURA Preliminary Plan, submitted on May 28, 1959, called for 400 new “low-rent” public housing units in a single housing project, with an additional 1,050 units in rehabilitated structures. During public hearings, the City Planning Commission received criticism for these paltry numbers and the inevitable displacement they presaged, and so the Commission recommended an increase of another 400 low-rent units and an increase from 2,400 up to 3,600
tax-abated or middle-income units. In June 1959, the City Planning Commission approved this Preliminary Plan, however housing advocates continued pressing for additional low-income housing allowances during public hearings held by the Board of Estimates to solicit feedback on the funding plan for the WSURA. As a result of these organizing efforts, the WSURA plan was further amended to include a minimum goal of 1,000 “low-rent” units, along with 4,200 middle-income units, of which 630 were to be made available at rents comparable to those in public housing; additionally, 496 units would be made available in three perimeter sites outside of the WSURA. The City Planning Commission finally approved the revised plan in 1962, but community activists still weren’t satisfied despite the increased commitments within the plan for low-income housing. The day before the Board of Estimates hearing that would finalize the WSURA plan, Mayor Wagner issued a press release announcing his executive directive to more than double the number of low-income units from 1,000 to the final figure of 2,500, with 1,010 of those coming from an increase in the number of units in mixed-income developments, in place of the 630 “public housing-rate” units described above. The press release also indicated that additional units would be made available in other surrounding developments in the immediate vicinity of the WSURA.

From the outset, the WSURA Plan was fraught with controversy and sharply divided the neighborhood along racial and class lines. Advocating for replacement housing on behalf of lower-income residents in the WSURA, as well as people displaced by the Lincoln Center redevelopment, were a handful of community-based organizations including the Stryker’s Bay Neighborhood Council and the Goddard Riverside Community Center, along with a number of state officials such City Council member Ruth Messinger, who earned the title of “poverty czar” from her opponents (Wilson 1987). On the other side of the aisle were a number of powerful business and property owners, white upper-middle class residents, local institutions such as the

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CHAPTER 2. WHITE FLIGHT AND POCKET GHETTOS

Trinity Episcopal School Corporation, and a coalition called Committee of Neighbors To Insure a Normal Urban Environment (CONTINUE). They generally favored market-rate housing under the liberal banners of property value protection while maintaining the “integrated character” of the neighborhood, a reference to the area’s historically mixed income and racial composition, but which was still a majority white. They opposed the perceived threat that an increase in lower income, non-white populations within the neighborhood would, as Andrew Alpert, the Vice President of the West Side Chamber of Commerce put it, lead to “falling property values, rising crime and a return to decay and poverty which had historically plagued the Upper West Side” (qtd. in Wilson 1987). Fears of the neighborhood becoming majority low-income and non-white were likely far overblown given the pre-existing trend of increasing property values and rents throughout the 1960s and 1970s (Smith 1987; Wilson 1987). The pervasive sentiment characterizing this camp is captured in a 1961 New York Times account of a fight that occurred on West 84th Street:

The conflict surrounding the WSURA Plan did not end when it finally received approval by all requisite parties and entered the first phase of implementation in January 1963. Indeed, as construction commenced, so too did the next round of conflict over who would be able to live and resettle in the Upper West Side. By 1968, four public housing projects had been completed and five Mitchell-Lama co-ops and rental buildings had opened to residents, with between 1,200 and
CHAPTER 2. WHITE FLIGHT AND POCKET GHETTOS

1,500 units occupied by low-income tenants. However, increasing construction costs caused Mitchell-Lama rents—those presumably for middle- to moderate-income residents—to skyrocket, and led to the suspension of all new construction. The City’s ability to fulfill its commitment to 2,500 low-income units in the Area was clearly in doubt. A series of revisions to the WSURA Plan, and newly available federal funds from the Fair Housing Act of 1968, allowed for an increase in the number of low-income units available in the mixed-income developments by reducing the number of middle- and moderate-income units and subsidizing their cost with federal funds, thus keeping the project viable while also meeting the ever-increasing demand for additional low-income housing.

Despite the additional low-income units, the Plan was still falling short of its targets so as a stop-gap measure, the Department of Social Services even began placing welfare-assisted families in middle-income units in excess of the allocations in the Plan or its revisions. But these concessions still left a gap of nearly 1,000 units between the City’s agreed upon goal of 2,500 low-rent units and the number of units inhabited by low-income households by January 1969. In a bold move, the City decided to convert two additional sites, Sites 4 and 30 (see Figure 2.3), from proposed middle-income developments to low-income public housing projects. This conversion upset the members of the conservative coalition, so they organized opposition to the public housing conversion, and a local private school and several homeowners, on behalf of the larger

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8 Trinity Episcopal School Corporation v. Romney, 387 F. Supp. 1044 (1974). Without the federal (Section 236) funding allocated under the Fair Housing Act of 1968, which were designated for middle- and moderate-income households—rents on those units would have been prohibitively expensive in order to cover the additional low-income units. Thus, even though the funds were designated for middle- and moderate-income households, they were effectively used to subsidize additional low-income units to help the City meet its goal of 2,500 low-rent units. It also bears mentioning that the Fair Housing Act of 1968, also known as Title VIII of the Civil Rights Act, in part resulted from uprisings in cities across the country that precipitated following news of the assassination of Dr. Martin Luther King, Jr. Although the Fair Housing Act is historically significant as a capstone to Civil Rights era legislation, much of the anti-discrimination and anti-segregation measures that it codified generally were already operating as substantive goals in federal housing policy.
coalition, filed a lawsuit against HUD to prevent HUD from funding the building conversion.

**Racial “Tipping” and “Pocket Ghettos”**

The City’s decision to construct additional low-income units caused the conflict over housing within the WSURA to boil over into the courts. Prior to construction, but after federal funds were committed to the public housing project on Site 30, HUD conducted a Special Environmental Clearance Study to satisfy their own internal policies with regard to NEPA. In acknowledging the controversy surrounding the Site 30 proposal, the HUD study concluded that the proposed project would not have “a significant adverse impact on the environment” despite “considerable organized opposition to the project…motivated by alleged social impacts…[but such] impacts are not environmental impacts within the context of Section 101(b) of NEPA.” With this environmental clearance in place, construction was set to begin on Site 30. But then in 1971, the Trinity Episcopal School Corporation (Trinity), joined by two “brownstone” homeowners, Karlen and Hudgins, and members of the pro-market rate housing coalition CONTINUE (see above), sued HUD to halt construction of the public housing project on Site 30. In defense of the Site 30 proposal and HUD, the housing advocacy group Strycker’s Bay Neighborhood Council joined the

9 Depending on the type of project being proposed, HUD typically requires either a Normal Environmental Clearance, Special Environmental Clearance, or a full EIS depending on the size of the proposed housing development, with a full EIS being required only for the largest projects of over 500 units (US Department of Housing and Urban Development 1972; “HUD Handbook 1390.1” 1973)


11 “Brownstone” homes refer both to the construction materials—a brown sandstone used for exterior walls—and a type of row house found throughout much of New York City’s borough of Brooklyn, but the UWS is one of the few neighborhoods in Manhattan where brownstones are still common. Trinity is a private K-12 (lower, middle, and upper) school located across 91st Street from Site 30. At the time of the lawsuit, it had recently expanded its facilities to include a mixed-use development that also included middle-income housing, as part of the WSURA Plan, and it was in the negotiations with city officials that they claimed contracts were signed ensuring the 2,500 figure would be a maximum number of low-income units throughout the WSURA.
Figure 2.3. Detail Map of the WSURA Showing Site 30 (Source: Urban Renewal Board 1959)
case as an intervening defendant alongside HUD.

The suit contained four issues: the first two were breach-of-contract claims, a pair of brownstone homeowners, Karlen and Hudgins; the third issue was the claim that the housing project would cause a “tipping” condition within the WSURA and lead middle-class residents to flee, and that it the project would create a “pocket ghetto” in the immediate vicinity of Site 30; and the fourth issue was that HUD had not complied with NEPA requirements for environmental impact assessment in its approval to fund construction of the public housing project. In 1974, the District Court issued a lengthy ruling in favor of HUD on all four issues. The two breach of contract claims related to the plan for 2,500 units of low-income housing and the revisions to the plan to use Sites 4 and 30 for the construction of public housing projects were dismissed based on legal and contractual terms, and are not really pertinent to the discussion at hand. The tipping, pocket ghetto, and NEPA claims were also dismissed by the District Court, but their particularities warrant further discussion since they remained important issues in the subsequent appeals leading ultimately to the case being heard by the Supreme Court.

The issues of tipping and the creation of a pocket ghetto evoked throughout the Strycker’s Bay cases draw from a precedent set by the 2nd Circuit Court of Appeals in 1973, in Otero v. New York City Housing Authority. At issue in Otero was the claim that the New York City Housing Authority (NYCHA) ignored internal regulations specifying that in urban renewal housing projects, first priority for tenancy should be granted to the people displaced by the urban renewal activities and development. NYCHA was accused of violating the regulations by granting a majority of leases in a newly constructed public housing project to white residents who had previously resided outside of the urban renewal area. The suit was brought against NYCHA by a class of 322 predominantly Puerto Rican applicants who were denied housing at the new housing project in Manhattan’s Lower East Side that was constructed as part of the Seward Park Extension Urban Renewal Area (SPURA; see Figure 2.2), a similar undertaking to the WSURA. The

12 Otero v. New York City Housing Authority, 484 F. 2d 1122 (1973).
plaintiffs argued that NYCHA’s actions constituted racial discrimination under the Fair Housing Act of 1968, also known as Title VIII of the Civil Rights Act (42 USC §3608(e)(5), 1976), and that their Constitutional rights of due process and equal protection were also violated. NYCHA, supported in their defense of the lawsuit by the group of low-income, predominantly Jewish residents whose applications were approved even though they were not among the former area residents who were displaced by the urban renewal project, defended the resident selection process by claiming that granting first priority to the displaced families would create a so-called “pocket ghetto” and cause tipping in the neighborhood in violation of their affirmative obligation to achieve residential integration under the same Fair Housing Act. Of more than 1,800 families displaced by the SPURA, approximately 60% were non-white; 161 of the 360 available leases in the new housing project went to displaced former area residents at the same three-to-two ratio of non-white to white families; 171 of the remaining leases went to the defendant class, with only 12% going to non-white families; two units went to resident employees, and the remaining 26 units were unallocated (see Table 2.1). The case was ultimately decided on appeal in favor of NYCHA, with the ruling judge determining that the state’s obligation to promote residential integration outweighed its duty of nondiscrimination.

Table 2.1. Racial Composition of Seward Park Extension Urban Renewal Area Displacement and New Leases in *Otero v. New York City Housing Authority*, by Family.\(^{13}\)

<table>
<thead>
<tr>
<th></th>
<th>Former Area Residents Displaced by Urban Renewal Project</th>
<th>Leases Granted to Former Area Residents (undisputed)</th>
<th>Disputed Leases</th>
<th>Total Leases</th>
</tr>
</thead>
<tbody>
<tr>
<td>White</td>
<td>40%</td>
<td>40%</td>
<td>88%</td>
<td>64%</td>
</tr>
<tr>
<td>Non-white</td>
<td>60%</td>
<td>60%</td>
<td>12%</td>
<td>36%</td>
</tr>
</tbody>
</table>

The tipping argument used in the *Otero* case was defined in relatively unambiguous terms

CHAPTER 2. WHITE FLIGHT AND POCKET GHETTOS

with a clear bias toward maintaining white majorities as an indicator that the neighborhood was racially integrated. Tipping is the sociological phenomenon where the increase in a neighborhood’s non-white population reaches a so-called tipping point, analogous to adding weight to a balance beam until it tips, though the tipping point is not necessarily equivalent to a one-to-one ratio of white people to non-white people. After the neighborhood reaches the tipping point, white people, feeling psychologically threatened for whatever reason, would increasingly desire to leave the neighborhood in favor of other places with greater concentrations of white people, resulting, according to the case, in overall greater degrees of racial segregation between different neighborhoods (see McDougall 1981, 185 note 57). It’s worth pointing out that in the legal construction of what constitutes a segregated community or concerns about tipping, the prospect of a supposedly integrated neighborhood becoming inundated with white people, or poor people being forced out of a neighborhood due to increasing rents, i.e., gentrification, never gets raised as a plausible concern regarding neighborhood “integration” or desegregation because of the tipping argument’s valorization and normalization of whiteness (see Harris 1993; Pulido 2000). Additionally, as I discuss below in greater detail, the relationship between poverty and race is confounded throughout the tipping argument, especially when comparing the Otero case with the Strycker’s Bay case because in the latter, the white residents who evoked the tipping argument claimed it was not about the race of people moving in, but rather about their class backgrounds, though the defendants as well as the court cut through the claim to reassert tipping as a raciological phenomenon. But in the case of Otero, class really had nothing to do with tipping, as all of the potential residents for the disputed public housing project qualified for housing assistance within the state’s purview of social welfare assistance.

Beyond the Otero case’s relevance for providing a legal definition of tipping, an important consideration in the case is that racial tipping was debated based on the claim that a dense concentration of non-white residents in a single building could itself constitute a pocket ghetto and would create the conditions leading to an area-wide tipping that would drive white flight, and thus, further neighborhood segregation. This reveals several crucial aspects of the ways in which
CHAPTER 2. WHITE FLIGHT AND POCKET GHETTOS

the racial state operated to effectively dismantle the plaintiffs’ arguments: the co-optation of racial categories, jumping scale, and the disarticulation of race and class. The manner in which NYCHA’s attorneys argued the tipping claim depends on the homogenizing use of the racial category “non-white” as constituting a collective majority over the white racial category.\textsuperscript{14} Given this claim, the meaning of integration was skewed such that a 60% white population in the renewal area was deemed acceptable to the court since it was closer to a 50-50 mix (see Table 2.2) even though the 40% non-white population depended on the lumping together of Black, Latino, and Asian populations within the racially homogenizing and whiteness-normalizing umbrella category of non-white.

Table 2.2. Projected Racial Composition of Seward Park Extension based on the outcome of Otero v. New York City Housing Authority, by Family.\textsuperscript{15}

<table>
<thead>
<tr>
<th></th>
<th>Within Disputed Project</th>
<th>Across Urban Renewal Area\textsuperscript{16}</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>if Otero prevailed</td>
<td>if NYCHA prevailed</td>
</tr>
<tr>
<td></td>
<td></td>
<td>if Otero prevailed</td>
</tr>
<tr>
<td>White</td>
<td>20%</td>
<td>60%</td>
</tr>
<tr>
<td>Non-white</td>
<td>80%</td>
<td>40%</td>
</tr>
</tbody>
</table>

Interestingly, the use of the “non-white” racial category was initiated by the predominantly Puerto Rican plaintiffs as a political move to collectively argue as a unified class that was the target of racial discrimination; the district court judge affirmed the use of this racial category. Thus despite the anti-racist project of solidarity intended by evoking the non-white racial category in opposition to the similarly homogenizing white racial category, the racial

\textsuperscript{14}The distinction between white and non-white is not the least bit ironic given that 1970 was the first year that the “Hispanic” question was added to the Census to disaggregate white (and Black) populations.


\textsuperscript{16}Estimates contested by NYCHA upon appeal. See Otero v. New York City Housing Authority, 484 F. 2d 1122 (1973).
state—here represented by the court and NYCHA—co-opted and reified that category as being antithetical to the goal of integration under the Fair Housing Act, rendering in its wake a defanged racial liberalism that displaced—both materially and discursively—the potential for anti-racist coalitional solidarity.

This state’s appropriation of the non-white racial category that was leveraged in favor of NYCHA worked in concert with a geographical sleight of hand that reappeared in the *Strycker’s Bay* case: “jumping” geographical scales from the neighborhood to the individual housing project. NYCHA successfully reinscribed the scale of conflict, and in this case racial domination, from the broader SPURA neighborhood scale down to the scale of the individual housing project, a strategic process of political geography that Neil Smith (1992) refers to as jumping scales in order to reorganize the politics of, in this case, social reproduction. Despite the numbers supporting the claim that the urban renewal area as a whole would remain extremely white regardless of the court’s decision (see Table 2.2), NYCHA argued, and the Court of Appeals judge concurred, that a predominantly non-white population within the individual housing project was unacceptable for the purposes of integration under the Fair Housing Act. Quoting from the *Otero* ruling:

> Defendants rejoin that large concentrations of non-whites in one or more pockets within the community would act as a “tipping” factor which would precipitate an increase in the non-white population in the surrounding neighborhoods, leading to a steady loss of total white population over a given period of time. It argues that it is under an obligation to prevent the formation of such concentrations or pockets of non-whites rather than limit itself to consideration of the overall current community proportions of whites and non-whites. We agree with the parties and with the district court that the Authority is under an obligation to act affirmatively to achieve integration in housing.\textsuperscript{17}

In addition to the clear indication that NYCHA was attempting to maintain the status quo white majority throughout the neighborhood, the NYCHA argument supported by the court

\textsuperscript{17}Otero v. New York City Housing Authority, 484 F. 2d 1122 (1973).
presupposes that a 60% majority of white residents within the project represents a victory for racial integration at both the building and neighborhood scales even though this would result in a roughly 82% white population across the entire urban renewal area. Furthermore, this numbers game reifies the position that the remaining 40% non-white population within the individual housing project represented an achievement of “racial integration” since the non-white families would cumulatively represent a homogeneous bloc of non-white racial “others”—despite any real or perceived racial and ethnic heterogeneity—in the dichotomous view of integration as a quantifiable measure of white versus non-white populations. Thus, NYCHA’s and the court’s confinement of their arguments regarding racial integration to the scale of the housing projects resulted in the production of coupled geographical scales of domination at both the building and neighborhood scales, whose function is to ensure the social reproduction of white families, and the rendering of non-white people as surplus populations within the logics of the welfare state. Moreover, this production of space represented an inversion of the attempt of individual claimants—the potential non-white residents—to jump scales from the individual as the site of discriminatory actions, up to the project, neighborhood, city, and even national policy scales as the terrain of racially and economically articulated struggle over the housing and social reproduction responsibilities of the racial state.

Expanding upon both of the previous points, there is further irony in the defendants’ use of the phrase “pocket ghetto” because it demonstrates the insidiousness of the racial formation process at work in the Otero case specifically, and in the racialized production of space more generally (see Omi and Winant 1994). The predominantly Jewish defendants, whose applications for the housing project were approved by NYCHA, used the phrase “pocket ghetto” in a derogatory fashion to describe a locally concentrated population of non-white residents. In this way, they engaged in a racial project that reified their status as white people to legitimate their entitlement claim over space, in the form of state sponsored housing, through their disassociation with the Jewish ghettos of Europe. In turn, this affirms the idea that Puerto Ricans—who constituted the majority of the plaintiffs—are not white, and it reasserts the racial-geographical
CHAPTER 2. WHITE FLIGHT AND POCKET GHETTOS

formation of the “ghetto” as a decidedly non-white space marked by poverty and undesirability, and antithetical to capitalist property relations. Furthermore, the particular phrase “pocket ghetto” bears the connotation of a particular geographical scale that is both manageable and surplus to the larger neighborhood. Something pocket-sized is easily contained and dealt with before it spreads the contagion of the ghetto—that is, dense concentrations of non-white bodies—and with it, the degeneracy that mark it as surplus to the relations of American capitalism. Thus, the idea of a pocket ghetto works as a discursive production of space that is inextricably linked to the organization of material space in terms of the social reproduction of “deserving” white populations through the displacement, exclusion, and rendering as surplus of non-white populations.

The last point about the Otero case that bears relevance to the Strycker’s Bay cases is that the court decision disarticulated race and class as mutually constituting forces in the operation of housing discrimination and segregation that the Fair Housing Act ostensibly aimed to combat. On its face, the Act is aimed at remedying the enduring spatial effects of historical practices of racism and discrimination. These effects frequently materialize in conditions of environmental racism, where non-white populations are geographically differentiated from their white counterparts in terms of access to infrastructure, social services, resources, and employment opportunities, and a predisposition to hazards or other environmental burdens (Pulido 2000). In this light, the Fair Housing Act’s mandate to promote integration is on its face designed to operate as a form of affirmative action to remedy these historical inequities by using integration as a proxy measure for equality of access, not a racially liberal end in itself. Interestingly, this position was recognized, only to be upended, in the Court of Appeals decision:

Action must be taken to fulfill, as much as possible, the goal of open, integrated residential housing patterns and to prevent the increase of segregation, in ghettos, of racial groups whose lack of opportunities the Act was designed to combat. […] [District Court] Judge Lasker recognized these mandates. However, he further concluded that because the primary intention of the Act’s sponsors was to benefit minority groups, the affirmative duty to integrate public housing should not be
given effect where it would deprive such groups of available and desirable housing. We disagree. Such a rule of thumb gives too little weight to Congress’ desire to prevent segregated housing patterns and the ills which attend them. To allow housing officials to make decisions having the long range effect of increasing or maintaining racially segregated housing patterns merely because minority groups will gain an immediate benefit would render such persons willing, and perhaps unwitting, partners in the trend toward ghettoization of our urban centers.\textsuperscript{18}

The last sentence in this quote from Court of Appeals ruling makes clear that integration was the end unto itself despite its language of considering the “long range effect” because its consideration of “ghettoization” is confined to the scale of the individual housing project even though the “opportunities the Act was designed to combat” are hardly confined to that particular geographical scale. Furthermore, the court determined that a ruling in favor of the plaintiffs resulting in a dense concentration of non-white residents in a single housing project was unacceptable because it reproduced conditions of segregation, when in fact its ruling in favor of the defendants actually resulted in racial discrimination, displacement, denial of access to housing, and an increasingly gentrified neighborhood that was hostile to an increase in concentrations of non-white residents.

The court’s ruling in the \textit{Otero} case affirmed that the overriding force in the NYCHA selection process should be their duty to take affirmative measures toward achieving a racially integrated housing project and urban renewal area, even if, as reality would have it, this meant blatantly discriminatory practices that contributed to gentrification, further displacement, and disenfranchisement of non-white populations in addition to those families already displaced by the SPURA. Instead of providing housing to non-white former area residents, NYCHA used the Fair Housing Act as a means for racial exclusion. Although the Fair Housing Act is explicit in its mandates to end housing discrimination based on protected classes, as well as in its promotion of residential integration, it does not explicitly specify priorities for addressing these mandates.\textsuperscript{19}

\textsuperscript{18}Otero v. New York City Housing Authority, 484 F. 2d at 1134 (1973).
\textsuperscript{19}Constitutionally protected classes include race, color, religion, national origin, age, sex, pregnancy, citizenship, familial status, (dis-)ability, veteran status, genetic information, and as
CHAPTER 2. WHITE FLIGHT AND POCKET GHETTOS

a decision whose rhetoric strikes a chord with juridical challenges to affirmative action policies in the 1990s and 2000s, the judge in the *Otero* case ruled that the liberal objectives of integration where it promotes a white-normative status quo, overrides the protection of people within suspect classes from discriminatory practices and the ability to benefit from spatially differentiated social welfare provisions. This ruling demonstrates the success of the contemporary racial state in leveraging strict legal interpretation to reduce integration to a pluralistic end, and as such, it reproduces the uneven historical conditions that anti-discrimination policies ostensibly exist to combat. And importantly, *Otero* succeeds both in its accomplishment in expanding, and as a successor to, what amounts to de facto exclusionary zoning practices in light of the Fair Housing Act.

Turning back to the *Strycker’s Bay* cases, whereas the *Otero* ruling relied upon a careful disarticulation of race and class as mutually constituting forms of oppression in order to support the use of affirmative action housing policy on behalf of white populations at the expense of excluding non-white populations, the District Court decision in the *Trinity I* case leading up to *Strycker’s Bay* was much more ambiguous on this point. Because the racial composition of future residents of the proposed public housing project was unpredictable, the plaintiffs decided to rely on the certainty that they would all fall into the category of low-income residents in order to qualify for leases. Thus, they claimed that the suit was not racially motivated, but rather, based purely on the class backgrounds of potential future residents, but they argued that the net effect of low-income residents moving en masse into the neighborhood would have a cumulatively similar impact as the non-white residents in the *Otero* case. They argued that the concept of tipping used in *Otero* should be expanded to include economic factors in addition to the racial categories already accepted under *Otero*. The tipping arguments and evidence forwarded by the plaintiffs, however, was inconsistent in laying out a strictly economic argument and conflated racial and economic factors throughout, basing their arguments in large part on the subjective racial

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of June 2013, to a limited extent, sexuality.
prejudices and fears of white middle-class residents while attempting all the same to deny that their claims were racially prejudiced. This is demonstrated in the legal analysis of the tipping claim in the court decision to *Trinity II*:

> tipping, as a phenomenon, cannot be discussed satisfactorily in terms of the income levels of housing residents. Plaintiffs claim, nonetheless, that an increase in the number of low income residents would be synonymous with an increase in the number of nonwhite tenants and that if the Area tips, middle income non-white residents will also flee. (Tr. 263-264, 301-303, 2526-2530). Plaintiffs’ expert witness Roger Starr testified that tipping in the Area has nothing to do with the extent of the racial prejudice of its residents because they expected that the Area would contain a mixture of races and that they would not have moved in were they prejudiced. Rather, he contended, the Area will tip if the number of low income units exceeds 2,500 because these residents relied upon alleged representations of that figure as the maximum number of such units and because if this understanding is violated, their “subjective reactions” will cause them to flee. (Tr. 300-307).20

This excerpt shows that, on the one hand, the plaintiffs racialize poverty as non-white, while also claiming not to be racially prejudiced because they celebrate the idea of liberal pluralism. On the other hand, they claimed that the only way to avoid white middle-class residents from fleeing the area was by excluding additional low-income residents from the neighborhood, and by extension of their own logic, this also implied the necessary exclusion of non-white residents. Clearly, the plaintiffs were attempting to justify the exclusion of a particular class of residents from their neighborhood based on the combined anxieties around personal safety and property values. Their contradictory understandings, or at least their articulations, of who and what constituted this threat seem to indicate an underlying desire for a space dominated by white middle-class people and values, mixed with a nascent desire for liberal multiculturalism-as-capital, but which is tempered by a legal framework premised on anti-discrimination principles.21 However, because

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21 I am referring to the capitalist productions of multicultural space, where a desire for an “integrated community” can be interpreted as the desire for the ability to consume ethnically
the plaintiffs’ claim relied on the impact of these anxieties, namely white flight, as opposed to the
direct potential of low-income and non-white residents to actually engage in the anti-social
behaviors attributed them by the plaintiffs, it was possible for the court to recommend that these
factors be considered in weighing alternatives under the statutory requirements of NEPA of
Sections 102(c)(iii) and 102(e).22

Looking at the Otero case in relation to the Strycker’s Bay case reveals the ways that the
changes in the racial state due to conflicts over the Fair Housing Act became further articulated
within the armature of the racial environmental state. The same types of arguments about
integration and tipping that emerge in the Otero case get reworked in the Strycker’s Bay case as
being more than just considerations for state sponsored housing development, and instead as
qualified areas of environmental impact that warrant incorporation within the EIA process more
broadly. Where the Otero case deals in the domain of the Fair Housing Act and Constitutional
protections and a specific conflict over the hierarchy of agency priorities, Strycker’s Bay operates
in the realm of NEPA and the EIA process that is specific but not limited to the particular case. As
such, the arguments in Strycker’s Bay that echo those made in the Otero case regarding
neighborhood integration, tipping, and pocket ghettos under the Fair Housing Act, though
rejected by the courts on their face, still end up being institutionalized as environmental
considerations as a result of the Strycker’s Bay cases, meaning that federal agencies could evoke
diverse cultural amenities such as museums and restaurants, but which aren’t necessarily spaces
for the social reproduction of economically, ethnically, or racially diverse populations. See for
example, Arlene Davila’s Barrio Dreams (2004).

Section 102 of NEPA (42 USC § 4332) states: “The Congress authorizes and directs that, to the
fullest extent possible: (1) the policies, regulations, and public laws of the United States shall be
interpreted and administered in accordance with the policies set forth in this Act, and (2) all
agencies of the Federal Government shall … (c) include in every recommendation or report on
proposals for legislation and other major Federal actions significantly affecting the quality of
the human environment, a detailed statement by the responsible official on … (iii) alternatives
to the proposed action, … (e) study, develop, and describe appropriate alternatives to
recommended courses of action in any proposal which involves unresolved conflicts concerning
alternative uses of available resources.”
CHAPTER 2. WHITE FLIGHT AND POCKET GHETTOS

the race liberal discourses of integration in assessing and justifying future projects, as I discuss in the subsequent section.

Integrating Race and Class into NEPA

After the District Court ruled in favor of HUD in the initial lawsuit (*Trinity I*), the case was appealed in the Second Circuit Court of Appeals in *Trinity Episcopal School Corporation v. Romney* (*Trinity II*). The ruling in *Trinity II* upheld the ruling in *Trinity I*, except on the NEPA issue, for which it ordered HUD to revise its Special Environmental Clearance to explicitly consider alternatives to Site 30, and remanded the case to the District Court. In the second round at the District Court, *Trinity Episcopal School Corporation v. Harris* (*Trinity III*), the court approved the revised environmental clearance, and this decision was again appealed by the plaintiffs in the Second Circuit Court of Appeals in *Karlen v. Harris* (*Karlen*). In *Karlen*, the court ruled in favor of the plaintiffs, imposing an injunction on the construction of the housing project on Site 30 on the basis that the HUD selection of Site 30 over other alternatives represented an abuse of discretion because it was not in holding with the ideal of neighborhood integration. Finally, case was appealed to the Supreme Court in *Strycker’s Bay Neighborhood Council v. Karlen* (*Strycker’s Bay*), which was ultimately decided in favor of HUD on what amounted to a combination of administrative procedures and judicial jurisdiction.

The Supreme Court decision declared that in issuing the *Karlen* ruling, the Second Circuit Court of Appeals overstepped its judicial bounds defined by the Administrative Procedures Act (APA) in reordering HUD’s substantive priorities. The Court found that HUD had fulfilled its NEPA responsibilities by considering alternatives to converting Site 30 into a public housing

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project based on their agency discretion, and therefore had no other overriding substantive obligations.\textsuperscript{27} However, by tacitly rejecting the tipping claim before it on procedural grounds without weighing on the substantive arguments about the applicability of demographic changes and tipping fears to NEPA, the Supreme Court held with the Court of Appeals decision in \textit{Trinity II} requiring consideration of these impacts and analyses under NEPA. These rulings have important implications for the EIA process and understanding the relationships between federal agencies and the judiciary, and between the NEPA and other federal statutes. The subsequent sections of this chapter provide an analysis of the various court decisions and discuss their importance to understanding how the EIA process and the NEPA function, particularly as a state mechanism that mediates different national priorities, especially regarding racial and environmental conflict.

Although in \textit{Trinity I} the District Court rejected the racial tipping arguments based on unsubstantiated claims, and while this rejection was affirmed by the Court of Appeals in \textit{Trinity II}, the judge in \textit{Trinity II} essentially took the sociological and psychological anxieties behind the tipping argument, veiled in the language of neighborhood integration, to suggest that consideration of such phenomena should be included within the social-environmental impact assessment required by NEPA. The District Court ruling in \textit{Trinity I} rejected the use of economic classifications as a tipping category “because, unlike the racial characteristics of a neighborhood, which are easily measurable, any definition of low income is imprecise and depends upon an arbitrary income ceiling, the family size, and the cost of living, none of which remains constant.”\textsuperscript{28} That same court also rejected the plaintiff’s arguments that the tipping anxieties, reflected in the “attitudes and fears of community residents…do not lend themselves to…objective analysis and are not required in a NEPA study,” citing other cases in which similar arguments were made regarding the difficulty or impossibility of quantifying psychological environmental impacts.\textsuperscript{29} In \textit{Trinity II}, the Court of Appeals concurred generally with the District

\textsuperscript{27}Strycker’s Bay Neighborhood Council v. Karlen, 444 U.S. 223 (1980).
\textsuperscript{29}Trinity Episcopal School Corporation v. Romney, 387 F. Supp. at 1079 (1974); see Hanley v.
CHAPTER 2. WHITE FLIGHT AND POCKET GHETTOS

Court ruling, and upheld the District Court’s rejection of the tipping claim, but the presiding Judge Moore explicitly linked the substantive goal of integration to the procedural requirements of NEPA in remanding the case to the District Court:

The statement of possible alternatives, the consequences thereof and the facts and reasons for and against is HUD’s task. Such a statement should be made, not as HUD’s concept or the Housing Authority’s views as to how these agencies would choose to resolve the city’s low income group housing situation, but as to how within the framework of the Plan its objective of economic integration can best be achieved with a minimum of adverse environmental impact…The purpose of the Plan is integration—not concentration. That purpose would not be achieved by concentrating low-income housing on 91\textsuperscript{st} Street and compensating for this segregation by an equal concentration of middle-income housing on 97\textsuperscript{th} Street.\textsuperscript{30}

Thus, even though the courts refrained from expanding the tipping precedent from \textit{Otero} to include economic class as a legal basis for protection under the Civil Rights Act, the Court of Appeals asserted that NEPA requirements created an obligation for HUD to consider tipping and integration as environmental impacts within the environmental assessment and site selection processes, effectively expanding the tipping argument of \textit{Otero} through the mechanisms of NEPA.

This outcome provides a key insight to how and why NEPA works so well as a mechanism of governance within, and helps establish the foundations of, the racial environmental state. NEPA is highly flexible, meaning it can be applied to a broad swath of potential environmental impacts; yet it is also easily constrained by agency discretion and judicial narrowing. This flexibility allows NEPA to be selectively applied within agency decision-making, which in turn allows it to be leveraged in service of various state objectives such as the two sides of the same post-Civil Rights Movement coin: racial integration on the one hand, and maintenance of racialized class hierarchies and uneven development on the other. Yet the question remains as to

\textsuperscript{30}Trinity Episcopal School Corporation v. Romney, 523 F. 2d at 94-95
CHAPTER 2. WHITE FLIGHT AND POCKET GHETTOS

the source of this malleability, particularly regarding the racialized governance of space.

The language of NEPA is deliberately vague and encompasses a broad range of potential impacts under the umbrella concept of “human environment.” Entire volumes exist to explain the details and nuances of what falls within the legal scope of NEPA and how the law defines the requirements and obligations of state institutions with respect to considering these impacts within the EIA and decision-making processes (e.g., Anderson 1973; Fogleman 1990). However, in considering the ways in which NEPA shapes the racial environmental state as a nexus for social justice struggles, the most pertinent aspects of EIA are those relating to social impacts on human environments. The range of social impacts covered under NEPA is broad, yet subject to judicial narrowing, or the exemption of specific impacts as determined by courts. Social impacts determined to be covered under NEPA include health and safety related to urban infrastructure such as sewage and solid waste management, roads, traffic, mass transit, and fire and police services, and access to controlled substances; impacts to social services such as education, healthcare, business, and parking; impacts to land uses, zoning, and aesthetics; urban planning impacts to things like neighborhood stability, growth, renewal, and blight; and impacts to historically or culturally significant resources (Fogleman 1990).

Through the use of linguistic analysis of NEPA, courts and legal analysts have inferred Congress’s legislative intent as to just about every aspect of the policy, including the meaning of words such as “significant,” “impact,” and “environment” (Daffron 1975), and as a result, the effective scope of NEPA is limited specifically to impacts resulting from changes in the physical environment. It does not apply to purely psychological or socioeconomic impacts lacking a physical component, even if physical changes might ensue as a secondary result of the proposed action; this means the exclusion of impacts to factors such as employment or speculative impacts related to fears of things like increased crime or nuclear meltdowns (Fogleman 1990). But

31 For example, Metropolitan Edison Company v. People Against Nuclear Energy (460 U.S. 766 (1983)) determined that psychological effects of restarting one of the nuclear power reactors
despite the meticulousness with which courts have dissected the language of NEPA and debated over the legislative intent of Congress in passing NEPA, there remain a number of gray areas where rulings have either been contradictory or ambiguous as to NEPA applicability such as psychological impacts related to changes in the physical environment or the significance of aesthetic impacts (Fogleman 1990; Daffron 1975).

The inherent ambiguity within the scope and legislative intent of NEPA is crucial to understanding its flexibility as a mechanism of governance and site of struggle because it leaves open the possibility for the selective incorporation or dismissal of various environmentally situated claims. For instance, *Maryland-National Capital Park and Planning Commission v. US Postal Service* established that the influx of a particular class of people did not constitute a form of environmental pollution cognizable under NEPA.\(^{32}\) However, in *Strycker’s Bay*, it was exactly that phenomenon—the influx of a dense population of low-income residents, and the psychological threat they posed to existing white residents, as antithetical to the goals of integration—that the Court of Appeals in *Trinity II* implored HUD to consider in their site selection alternatives as required by NEPA. The difference between the two cases is largely a matter of semantics, nuance, and judicial interpretations, where the integration-as-impact argument is allowed in one case, but essentially the same underlying phenomenon—and the white middle-class anxieties surrounding it—are disallowed from NEPA consideration in the other.

CHAPTER 2. WHITE FLIGHT AND POCKET GHETTOS

Legacies of *Strycker’s Bay* and the Continuing Battle over Housing

The Strycker’s Bay case provides an important example of how the EIA process institutionalizes and reworks racial logics vis-à-vis environmental knowledge within an environmental policy framework. As analytical concepts, both racial and environmental knowledge were transformed over the course of the decade long legal battle, and politically, large scale public housing projects were dealt another legal and procedural setback despite the ultimate ruling in favor of HUD. In effect, the plaintiffs succeed in their lawsuit by delaying the public housing project until it was no longer relevant to the City’s immediate problem of providing adequate affordable housing as a social welfare consideration to offset displacement within the WSURA. Site 30 eventually opened as public housing for the elderly in 1994, and was named the Sondra Thomas Apartments in honor of the longtime Executive Director of the Strycker’s Bay Neighborhood Council. By this point, the political landscape of public housing had already shifted away from the construction of large-scale public housing in favor of Section 8 vouchers and public subsidies of private mixed-income developments.

The demise of large-scale public housing developments in the wake of a series of court battles such as *Strycker’s Bay* and *Otero* was bittersweet. While there is no question that such developments contributed to de facto racial segregation, abandonment by the state, and social disinvestment in places like Chicago and St. Louis, they have been largely successful in New York despite the constant need for housing advocates to push for adequate funding for maintenance work (see Bloom 2008). The highly publicized failures of large-scale public housing, the rise in anti-welfare rhetoric lumped on the back of the figure of the “welfare queen”, and the tide change away from a Keynesian social welfare state toward neoliberal market idealism all meant that the loss of public housing developments would result in a deficit of urban housing that was actually affordable for poor and working class people.

This series of cases represent part of a major battle over racial and class segregation and
integration in urban housing that endured throughout most of the mid-20th century. New York City, Chicago, Philadelphia, and Boston were home to some of the most visible struggles over the construction of public and subsidized low-income/low-rent housing where questions of segregation, integration, displacement, and clustering poverty emerged as battleground issues in defining the contours of Civil Rights legislation and the role of the racial welfare state. At issue was the geographical problem of addressing the legacies of de facto housing segregation while also increasing the stock of affordable housing, particularly in dense urban areas with significant non-white populations. From the perspective of the state, constructing high-density housing projects to ease the demand for affordable housing seemed to contradict the substantive goal of racial integration. Since these housing developments often resulted in clusters of low-income, predominantly Black and Brown residents, the middle class white residents in the surrounding areas, as well as developers and property owners, argued that this outcome increased neighborhood segregation and ran counter to the goal of integration.\footnote{Piven and Cloward point out that support for low-income housing projects in New Jersey was achieved when accommodations were made from the outset to site housing for predominantly white tenants in the outlying “country club” neighborhoods and to site housing for non-white tenants in “central ghetto wards” (1966). In New York and other cities where existing urban populations were more racially and economically diverse, Not-in-My-Backyard (NIMBY) politics seemed to predominate, causing the site selection process to be the primary point of contention, source of delays, and in some cases, death blow to the proposed projects.}

In terms of social reproduction, desegregation is a matter of reducing uneven access to adequate housing, social services, labor, and healthful environments; the debates over public housing reproducing conditions of segregation, however, are completely divorced from these concerns and represent a clever way of co-opting civil rights discourses to distract from the intersection of white anxieties about people of color. Within both the \textit{Strycker’s Bay} and \textit{Otero} cases, desegregation discourses get taken up as part of the state’s mechanisms of racial liberalism that reinforce the twinned maintenance of property values and the “protection” of white populations from the encroachment of non-white populations. That is, the racial state subsumes
CHAPTER 2. WHITE FLIGHT AND POCKET GHETTOS

desegregation discourses and reworks them to meet the dictates of capitalist property relations, and in so doing, reshapes the terrains of racialized struggle over placemaking. In the Otero case, NYCHA took affirmative measures to ensure that Manhattan’s Lower East Side remained predominantly white to mitigate the potential for white flight, thereby reducing the possibility for previous area residents to maintain their proximity to their former neighborhood community. In the Strycker’s Bay case, it was the urban renewal area’s existing white residents who were threatened by the potentially changing racial composition of their neighborhood due to the addition of new public housing units. They therefore used similar arguments about white flight to force the state to consider desegregation policy as an affirmative measure within the EIA process to maintain a critical mass of white residents. But in the Strycker’s Bay case, there was the important additional consideration of class as a proxy for both race per se, as well as the basis for protecting their capitalist interests in property values. In both cases, the state was ultimately charged with the duty to consider a racially liberal reworking of neighborhood desegregation that would uphold both public and private property as institutions operating in service of the social reproduction of white residents through the minimization, dispersal, and displacement of poor people of color.34

While residential segregation continues to be a structural problem producing uneven access to and distributions of social services among other things, the argument against public housing because it promoted segregation was completely misguided from a civil rights perspective. The segregation argument obfuscates geographical access to social services—including adequate housing—behind a quantitative facade of demographics. In their assessment of the situation, Frances Fox Piven and Richard Cloward (1966) hit at the heart of the dilemma:

The myth that integrationist measures are bringing better housing to the Negro

34 See Tighe (2012). Also, ironically, a number of studies have shown that affordable housing has little to no negative impact on surrounding property values, revealing that the basis for this anxiety is entirely based on racist and classist assumptions (Nguyen 2005).
poor comforts liberals; it placates (and victimizes) the Negro masses; and it antagonizes and arouses the bulk of white Americans. The “backlash” is part of its legacy. While turmoil rages over integration, housing conditions worsen. They worsen partly because the solution continues to be defined in terms of desegregation, so the energies and attention of reformers are diverted from attempts to ameliorate housing in the ghetto itself. (20)

Throughout the 1970s and 1980s, the declining welfare state faced the serious problem of considerable demand for additional affordable housing units, while at the same time, the evolving racial state needed to negotiate white anxieties through careful legal maneuvering so as not to tip the balance of racial “tolerance,” or putting up with people of color in decidedly white spaces, forged through Civil Rights activism legislation while still attending to the rise of neoliberal market economism and new forms of coded racism and “colorblindness” (see Bonilla-Silva 2001; Mills 2011; Omi and Winant 2015). Given this context, the Strycker’s Bay and Otero cases reveal the EIA process under NEPA as one of the means and capacities through which space is regulated vis-à-vis racial conflict in the post-Civil Rights Act era. The Otero case demonstrates how sociological factors and psychological fears get worked into Fair Housing Legislation, and in the process, reify racial categories and the sociological meaning attached to those categories with respect to white and non-white populations. In turn, this becomes embedded as a mechanism for the racial state to assert control over the ways in which space is racialized, in the case of Otero, through the establishment of a predominantly white neighborhood. The project succeeds because it appeals to quantitative, decontextualized, race-liberal notions of racial integration that are

35 Contradictions abound in looking at the outcomes of state practices around housing and desegregation, for example, in ongoing debates over how to use policy and planning to reduce concentrations of poverty (e.g., McClure 2008), the unaffordability of subsidized housing (e.g., Quigley and Raphael 2004; Begley et al. 2011), racist lending practices (e.g., Williams, Nesiba, and McConnell 2005; Wyly et al. 2007; Beeman, Glasberg, and Casey 2011), uneven access to health care and adequate schooling and related issues of environmental racism (e.g., Bryant 1995; Bullard 2001; Cole and Foster 2001), and racist policing and incarceration practices across the country (e.g., Hall et al. 2013; Camp 2016 Camp and Heatherton (2016)). See also Keating (2010).
CHAPTER 2. WHITE FLIGHT AND POCKET GHETTOS

divorced from justice-oriented notions of antiracism and desegregation. That is, the notions of racially integrated space in the Otero case depend solely on the presence, absence, and quantity of white and non-white populations without regard to the intentionality behind such quantification metrics.

On the other hand, the Strycker’s Bay cases build on the racial state’s innovations of tipping and pocket ghettos, but reworked under the guise and insulating capacities of the NEPA legislation, and through the newly evolving post-Civil Rights racial regime of covert “raceless” racism. The arguments put forward in the case eschew the language of race, opting instead to align with the other side of the same coin that is racial capitalism—the protection of property and surplus value. While both cases operate under the premise and promise of racial diversity, Strycker’s Bay makes the important link between diversity and the structural forces of systemic racism, criminalization, and exclusion that continue to permeate contemporary racial capitalism. Though the plaintiffs in the Strycker’s Bay cases were unsuccessful in their attempts to renovate the tipping and pocket ghetto arguments using economic classification schemes to differentiate desirable and undesirable populations, their arguments were pernicious nevertheless. The plaintiffs substituted the purportedly race neutral language of “class,” “income,” “economic factors,” and “crime” to represent racialized white anxieties over poor people of color occupying and even taking over what they saw as their entitlement to space via property ownership and capital appreciation realized through property values.

Despite striking down the tipping and pocket ghetto arguments on their face, the Court of Appeals made the case for how and why these same considerations should be incorporated into the environmental review process, making the arguments that failed in this particular case applicable to other projects more generally. And though the courts ruled that quantifying economic factors was incongruous with measuring racial factors—problematic in and of itself for the ways it reifies racial categories and normalizes whiteness—the court still provided a means for assessing economic tipping points that on the one hand recognizes the interconnectedness of
race and other sociological factors, but on the other, attempts to qualify neighborhood tipping in the absence of explicitly racial considerations. That is, the courts go along with the use of colorblind proxy metrics for assessing the race-liberal forms of integration that we see operating under the Fair Housing Act in *Otero*, but institutionalize them within the EIA process as a potential way for federal agencies to weigh racially and geographically differentiated environmental impacts—a precursor to the official environmental justice requirements of President Clinton’s Executive Order 12898.

Despite HUD’s ultimate victory in the *Strycker’s Bay* case, what remains is the significant legal and institutional legacy of the Supreme Court and Appeals Court decisions. From a legal standpoint, *Strycker’s Bay* is often cited as the case that defanged the NEPA legislation as a potential means for enforcing environmentally friendly decision making within federal agencies, and by way of precedent, public agencies more generally (see Lindstrom 2000). The Supreme Court decision in *Strycker’s Bay* essentially eliminates the possibility for courts to weigh on the substantive merits of agency decision making, effectively rendering the EIA process as an exercise in procedural environmental knowledge production. So long as an agency is thorough—and not arbitrary and capricious—in its duty to investigate, document, disseminate, and respond to environmental impacts of a proposed project, courts after *Strycker’s Bay* cannot override agency discretion in weighing environmental concerns versus its other priorities. The institutional legacy of *Strycker’s Bay* can be thought of as the tacit requirement for agencies to consider the social, racial, and classed impacts of their actions on the environment under the NEPA. Though this is still a gray area due to the limitation of the EIA process to impacts that

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36 *Trinity Episcopal School Corporation v. Romney*, 387 F. Supp. 1044 (1974). The court outlines three criteria to determine whether a neighborhood has reached the tipping point: “(1) the gross numbers of minority group families or families in a measurable economic or social group which are likely to affect adversely Area conditions; (2) the quality of community services and facilities; and (3) the attitudes of majority group residents who might be persuaded by their subjective reactions to the first and second criteria to leave the Area” (*Trinity*, 387 F. Supp. at 1066 (1974)).
stem directly as a result of changes to the physical environment, in the case of housing, impacts to a neighborhood’s character need to be considered as they pertain to an agency’s overlapping obligations under the Fair Housing Act and other civil rights legislation. This outcome is less a direct result of this particular case, but rather, the accretion of numerous legal, administrative, and individual decisions of which Strycker’s Bay played a key role.

The combination of these legal and institutional legacies of Strycker’s Bay mean that agencies have a responsibility and prerogative to make informed decisions about how their racialized actions impact urban environments. Though in many ways this was not new or unique under the NEPA legislation since the state has long been able to exercise its sovereign power in such a fashion, the NEPA legislation and the EIA process altered the institutional framework through which the decision making process and public intervention occur. This framework, and the Strycker’s Bay decision are also important because they established a means and process for evaluating what amounts to an institutionalized form of environmental justice within agency decision making. Though environmental justice considerations were officially added as a separate requirement for all federal agencies under Executive Order 12898 signed by President Bill Clinton in 1992, the much of the framework and many of the administrative procedures for implementing this Order were already in place within the EIA process, and decisions were already officially factoring in similar considerations—or at least were required to investigate and report on environmental justice-type factors—within NEPA-based environmental studies.

The decline of the welfare state throughout the latter half of the 20th century marked the ascent of several other particular aspects of the state, most notably for the purposes of this chapter, new contours in the environmental state. This is not to say that the environment has not always been one of the fundamental axes of the state’s operation, since land and property regimes, resource management, territoriality, and conquest of peoples vis-à-vis the land have always been central to the functioning of contemporary racial capitalist states. Rather, the environmental state is marked by a shift in political discourse related to the popular recognition of “environmentalist”
issues, inaugurated in the US with the passage of NEPA and the first Earth Day in 1970, as well as an attendant shift in the ways in which the environment gained purchase as one of the fundamental means for the state to manage social difference without explicitly dealing with “racial” issues. That is, the racial environmental state takes on new political and geographic contours when state functions were restructured under Civil Rights legislation of the 1950s and 1960s, as well as under the NEPA legislation that took effect in 1970. One of the areas in which this was most pronounced was in the regulation and management of property. Indeed, if one considers property regulation as one of the primary functions of a state, the environmental state of the late 20th century is host to new principles organizing the use of land and environment under capitalist property regimes. The explicit use of racial categories as an organizing principle of both property and public space under Jim Crow and other forms of discriminatory policy were replaced by covert forms of racist management such as redlining and predatory lending. Meanwhile, NEPA brought new requirements for interrogating the sociodemographic characteristics of neighborhoods and the impacts of state actions on the physical environment, which invariably lead to racially and geographically differentiated impacts to underlying communities and land uses.

Though the Otero case didn’t deal directly with the EIA process or NEPA legislation, it helps pinpoint the racialized conflicts over placemaking and the environment that the EIA process helps to resolve. The unstated outcome of the Strycker’s Bay case was the understanding that sociological changes that directly impact geographically differentiated communities as a result of physical changes to the environment under federally funded projects such as in urban redevelopment programs, were cognizable environmental impacts under the NEPA legislation. As such, the EIA process provides an institutionalized site for the working out of racialized conflicts over the visions of place that take shape under federal programs. While the scope of these conflicts can easily exceed the limitations of the EIA process, the process of weighing these impacts in a systematic fashion insulates the racial environmental state from a great deal of conflict, in large part because as the Strycker’s Bay and other legal cases held, the EIA process is little more than a procedural requirement that leaves agencies largely immune from judicial
CHAPTER 2. WHITE FLIGHT AND POCKET GHETTOS

intervention so long as administrative procedures are followed and all areas of environmental impact are sufficiently considered. The inextricability of poverty, non-white racial status, and crime, in both the *Stryker’s Bay* and *Otero* cases demonstrate how the category of “environmental impact” provides a novel sociopolitical structure within which to couch preexisting sociological prejudices, which perpetuate and reconstitute longstanding forms of racial and class domination embedded within the capitalist racial state. In the next chapter, I look at a case in which this structure is used as the foundation for challenging the state’s racist practices around incarceration, and a movement built around radical approaches for combining and reworking racial and environmental logics in order to foster unlikely alliances in service of shared environmental interests.
3 Police, Prisons, and Pollution: EIA as an Environmental Justice Organizing Strategy

Once the heart of farm labor organizing and the birthplace of the United Farm Workers labor union, the City of Delano, in California’s verdant San Joaquin Valley, is host to three prisons, whose combined population accounts for around 16-20% of the city’s roughly 53,000 residents (US Census Bureau 2010; Department of Corrections and Rehabilitation, State of California 2011; Department of Corrections and Rehabilitation, State of California 2016). The City’s transition from being a hub of union labor to one of prisons emblematizes broader shifts in the state’s and country’s political economy with the erosion of the Keynesian welfare state into a permanent crisis workfare-welfare state (Gilmore 2007). Where racial capital’s demand for farm labor previously necessitated a steady stream of immigrant workers to suppress both wages and capacities for labor organizing, the unemployment rate for the past two decades has remained several times higher than the statewide average, and populations toiling in the fields have been replaced by populations idled in prisons.\(^1\) Horribly, and yet unsurprising given the high rates of unemployment, these populations, rendered surplus within the local economy, live in the county which, in 2005, had the highest per capita rate of people killed by law enforcement.

\(^1\) At the close of the first quarter of 2016, the citywide unemployment rate was just below 14%, roughly 2.5 times higher than the statewide average of 5.4% (State of California Employment Development Department 2016; State of California Employment Development Department 2016). Incredibly, this high rate of unemployment is a marked improvement compared to the 1990s, when the unemployment rate in Delano was consistently over 30% and nearly hit 40% in 1993, while the statewide average never exceeded 10% (US Department of Labor, Bureau of Labor Statistics 2016a; US Department of Labor, Bureau of Labor Statistics 2016b).
officers anywhere in the US (Swaine et al. 2015). How might we begin to account for the changes that have occurred in Delano and across the South San Joaquin Valley? In this chapter, I examine the relationships between the state, capital, labor, and environmental policy that facilitated and resisted social and environmental changes in Delano over the past 150 years, culminating with the construction of a second massive state prison in the City of Delano in 2005. I also foreground one particular site of resistance to this narrative, a campaign to stop this third prison from being built, situated within the conditions for its possibility, the racial environmental state.

In this chapter, I examine the ways in which the racial environmental state and the social relations of production, that is, the particular geographical arrangements of labor and capital, have shaped the development of Delano over the past two centuries, resulting in its current state as a prime example of what Ruth Wilson Gilmore (2008) describes as “organized abandonment.” By organized abandonment, Gilmore is referring to the concept developed by David Harvey (2006) to describe the product of “intricate arrangements” of “market, institutional, and state” capacities “for the production, modification, and transformation of spatial configurations of the built environment” in order to meet the “variegated requirements of both capital and labour in general” (397). Tracing the long history of Delano reveals points of crisis where the state, labor, and capital erupt in conflicts that shape the racial and environmental landscape of the town. Furthermore, this history provides an important context for understanding the social, cultural, legal, and political economic conditions from which anti-prison community organizers established a campaign to stop the California department of Corrections (CDC) from building its second state prison within the City of Delano.²

Scholars have previously used the Delano II campaign as a case study in creative social justice organizing strategies that links prison abolition with environmental justice. Rose Braz and Craig Gilmore (2006) situate the Delano II case study within the ongoing fight to halt the massive

²The California Department of Corrections was renamed the California Department of Corrections and Rehabilitation (CDCR) in 2004.
expansion of prisons and incarceration in California since the early 1980s, to document and reveal the radical potential of coalitional strategies like those developed throughout the Delano II campaign. They show how the campaign came to embody the struggle against the biggest threats identified by youth environmental justice activists: the “three Ps” of police, prisons, and pollution. Extending this analysis, Ruth Wilson Gilmore (2007; 2008) uses the campaign to highlight the possibilities that emerge for developing new structures for understanding, and social relations for engaging social change through the process of coalition building like that around the Delano prison. She describes the way that activists started with a flexible understanding of environmental justice as highlighted by Braz and Gilmore, to organize people across disparate social identities, political struggles, and urban/rural geographical divides by identifying the ways in which their struggles are linked by dominant and dominating flows of capital, people, and resources under racial capitalism. For Gilmore, carefully examining sites of organized abandonment that are “intensely occupied by the antistate state,” such as Delano, reveals the types of conceptual and political linkages that can emerge through and between “marginal people and marginal lands in both urban and rural contexts and raises the urgent question of how to scale up political activity from the level of hyper-local, atomized organizations to the level of regional coalitions working for a common purpose, partly because their growing understanding of their sameness trumps their previously developed beliefs in their irreconcilable differences” (Gilmore 2008, 38).

In analyzing the Delano II campaign, I extend Gilmore’s analysis to show how the EIA process and juridical framework in which that process operates provide a specific set of conditions and possibilities for social movement building and confrontational engagement with the state that aims to produce social change. I am interested in how the structures of the racial

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3Ruth Wilson Gilmore brought to my attention that the three Ps were misquoted by Braz and Gilmore (2006), and that the specific triad used by the youth activists was “police, prisons, and pesticides,” lending a higher degree of specificity to the forms of environmental threats faced by rural farm communities.
environmental state, and particularly the EIA process, facilitates these important forms of coalitional politics while simultaneously establishing limitations on the legitimate forms and modes of challenging the state through these means. The broad scope of the EIA process, and its embedded public feedback mechanisms seem to provide an intrinsic opportunity for coalition building and the development of unexpected political structures such as those foregrounded in previous scholarship about the Delano campaign. Yet the very structures that enable engagement with the state, specifically the EIA process, are circumscribed by the administrative and juridical bounds of public policy. The ways of knowing, shaping, and stretching the concept of racialized and multiply inhabited environments are still bound to legal definitions and precedents. Likewise, the rules of engagement depend upon Cartesian definitions of place and belonging, further delimiting the scope of impacted environments and populations, even as political mobilizations attempt to reinscribe the material and affective geographies of struggle. By reexamining the campaign to stop the Delano II prison, I demonstrate both the capacities and limitations of engaging the racial environmental state to bring about social and environmental change.

The campaign to stop the construction of the second prison in Delano was one fight in an ongoing struggle to curtail growth of the prison industrial complex and mass incarceration of people across the US (Braz and Gilmore 2006). Campaign organizers had three primary goals for the campaign. First was to stop the proposed prison in Delano from being constructed. Second, was that stopping the prison from being built might, at least temporarily, end California’s massive 20-year prison construction spree that had begun in the 1980s. Finally, and perhaps most importantly, the campaign was an opportunity for galvanizing broad opposition to the continued expansion of the prison system from constituencies throughout the state. Even though stopping the prison from being built was an uphill battle, working toward that goal enabled the campaign organizers to establish relationships with other organizations and state institutions around the central idea that prisons are bad for the environment, that the environment is more than just the air, land, water, and animals that exist outside of human society, and that these environmental impacts of prisons resonate throughout the region and are not confined to the immediate vicinity.
In addition to the strategic significance of stopping the construction of the Delano prison, the campaign itself, and the tactics used within the campaign, demonstrate the viability of environmental justice principles as a heuristic for organizing diverse struggles within and against the racial environmental state. Environmental justice activism emphasizes the structural interrelatedness of social, economic, and cultural factors in producing and reproducing environmental conditions that render geographically differentiated populations vulnerable to premature death (Bullard 1994; Pulido 2000; Gilmore 2007). As others have shown, and I discuss later in this chapter, the conceptual flexibility of the environmental justice framework helps to map the impacts of prisons onto the diverse places where prisoners and their families come from, the communities and environments where prisons are erected, and the regions whose economies and resources are burdened by the material effects of prisons (Braz and Gilmore 2006; Gilmore 2008). The campaign hooked into this flexibility to engage a diverse and unlikely coalition of people and organizations opposed to the prison in the public feedback portion of the EIA process and subsequent legal battle. Thus, even though the short-term goal of stopping the Delano prison was significant, the campaign’s overarching objective was to strengthen the broader movement against the state’s use of prisons as a “catch-all solution to social and political problems” (Gilmore 2008, 142).

Transformations in California’s Central Valley

White Settlement throughout the Valley

When the Delano II campaign began building steam in 2001, the proposed prison was slated to become the second prison, and third detention facility including the City-owned community corrections facility adjacent from the proposed Delano II site, in a small agricultural town still reeling from the construction of its first prison less than a decade earlier. The first prison was
supposed to be a boon to the local economy, but never lived up to those promises; while the statewide unemployment rate was nearly halved between 1993 and 2000, from approximately 9.5% to just under 5%, unemployment in Delano remained high and only decreased about a third, from approximately 35% to 23% over the same period (US Department of Labor, Bureau of Labor Statistics 2016a; US Department of Labor, Bureau of Labor Statistics 2016b). But more than just their lack of contribution to the local economy, the Delano prisons stand in for the social, cultural, and political economic shifts that maintain relationships of domination between capital and racialized labor throughout the Valley. The prisons’ imposing presence on the outskirts of Delano serves as a physical reminder of the ways in which the state punitively disciplines people on the margins of capitalist society. They are yet another outcome of a long history of racial projects aimed at dehumanizing and delegitimizing people racialized as illegal, foreign, unassimilable, and exploitable within California (cf. Ngai 2004; Molina 2014). This section explores the history of the City of Delano to provide a geographical and historical context for the campaign to stop the Delano II prison construction, and to shed light on the ways that the political economic shifts throughout the City’s history helped shape the political possibilities for organizing the campaign in the way that it was.

For thousands of years, the Paleuyami and other groups of people associated with the Yokuts and Shoshonean linguistic groups prospered throughout California’s southern San Joaquin Valley—the vast stretch of fertile lands nestled between the Tulare Lake basin, the Tule River, Sierra Nevada Mountains, Tehachapi Mountains, and Pacific Coastal Mountains, including the area now incorporated as the City of Delano (Kroeber 1907a; Kroeber 1907b; Kroeber 1925; Spier 1978). In addition to the Paleuyami, some 50 Yokuts tribelets, with a combined population

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4Yokuts (also Yokote, Yokots, or Yokoch) and Shoshonean are general terms that refer to linguistic families, not specific tribes. Yokuts is a word meaning “people” in most of the Yokuts dialects, while Shoshonean identifies peoples whose dialects derived from the Shoshoni language. Most of the Yokuts peoples were divided into tribes with distinct names and dialects. The area where the City of Delano now sits was primarily inhabited by Paleuyami peoples when the Spanish and Americans settled in the valley. Their neighbors were other Foothill and Valley
CHAPTER 3.  POLICE, PRISONS, AND POLLUTION

of at least 19,000, inhabited the greater Tulare Lake region, making it one of the most heavily and densely populated regions in the state prior to the arrival of Spanish settlers (Kroeber 1925; Preston 1981). The first documented expeditions into the San Joaquin Valley by white people were led by Spanish missionaries Pedro Fages and Francisco Garcés in 1772 and 1776, respectively (Brewer 2001; Garone 2011). Over the next 75 years, small numbers of Spanish and Mexican cattle and pig ranchers, and white American fur trappers settled throughout the Valley. Relations between the white settlers and Yokuts may have initially been amicable; the Spanish and Mexican ranchers looked to the Yokuts for their labor and as the objects of religious salvation and “civilization” (Cook 1971; Preston 1981). However, the racial attitudes of the Spanish toward the Yokuts as “fickle, unreliable thieves” (Preston 1981, 53), led to exploitation of Yokuts through manipulation, coercion, and enslavement (Preston 1981). Unsurprisingly, the incursion of these early white settlers precipitated a sharp decline in Yokuts populations as a result of raids on Yokuts rancherías, the spread of diseases such as malaria and syphilis, forced removal, and displacement due to the depletion of resources by settlers’ agricultural activities. By the middle of the 19th century, the Yokuts population was reduced to a quarter of its size prior to contact with white settlers (Preston 1981; Garone 2011).

Following the discovery of gold at Sutter’s Mill in 1848, prospectors began scouring the San Joaquin Valley for other mining opportunities. The discovery of gold in the Greenhorn River around 1851 led to the Kern River gold rush and massive settlement boom in the Valley throughout the 1850s (Menefee and Dodge 1913; Preston 1981; Vredenburgh 1991). Many of the white American settlers drawn to the Valley by the gold rush established agricultural settlements on the fertile soils of the greater Tulare basin in fulfillment of American Manifest Destiny. Settlers’ agricultural activities initially consisted primarily of cattle ranching, but later transitioned to intensive wheat production. The wheat boom drove further settlement of the

Yokuts tribes including the Yauelmani, as well as the Shoshonean Giamina. (See Kroeber 1907a; Kroeber 1907a; Kroeber 1925)

84
CHAPTER 3. POLICE, PRISONS, AND POLLUTION

Valley, and introduced capitalist relationships between people and the land. Though the indigenous populations throughout the region largely depended upon cultivated subsistence agriculture for their survival, the white settlers introduced intensive farming techniques and concentrated livestock grazing to produce marketable commodities and accumulate surplus value (Preston 1981).

The capitalist restructuring of the San Joaquin Valley began with the social and environmental transformations of the Valley that flowed from the colonial mentality of American Manifest Destiny. The increase in white settlement of the Valley and conversion of the land to agricultural uses further entrenched the remaining Yokuts populations and former “Mission Indians” who fled to the Valley in refuge from the coastal missions (Gorenfeld 1999). The introduction of non-native flora and fauna, coupled with the expansion of intensive farming, and especially open-range livestock grazing, dramatically altered the Valley environment and significantly reduced the availability of usable resources for the remaining indigenous populations. According to Preston (1981), the threats of starvation and alienation from the land pushed the Yokuts to develop new subsistence strategies throughout the 19th century, such as raiding white settlements for livestock and incorporating the newly introduced grains into their diet. Like the Spanish and Mexican settlers that preceded them, the white American settlers developed racial logics that marked the Yokuts as “savage” and “treacherous,” but unlike the Spanish, they did not view the Yokuts as a potential source of labor (Preston 1981, 81). Rather, the white Americans viewed the Yokuts as a population that needed to be eliminated or removed as a necessary, and indeed inevitable (following from the idea of Manifest Destiny), condition for further capitalist development of the Valley. The Yokuts, pushed to the limits of survival, resisted through increased raids and warfare, with a number of skirmishes with US militias leading up to the “Indian War” of 1856 (Menefee and Dodge 1913; Cook 1971; Preston 1981; Gorenfeld 1999). Although a number of treaties were negotiated on behalf of the US government in the 1850s, the US Senate refused to ratify any of them, denying payment to the Yokuts for any ceded lands, availing lands set aside for reservations for white settlers, and reinforcing the status of indigenous peoples as outside of
Constitutional protections and essentially without rights. After the failure of the Senate to ratify the treaties, the Army established separate reservations, and by 1860, the majority of Yokuts had been relocated to these poorly managed reservations with scarce food resources, sealing the fate of the valley under white capitalist settlement (Heizer and Elsasser 1980; Gorenfeld 1999).

With the flood of white settlers arriving in the Valley during the Kern Valley gold rush, and the simultaneous elimination of the last significant Yokuts populations, the capitalist transformation of the Valley shifted focus from domination of people to domination of nature through the technologies of capitalism. Until the 1850s, the US government’s primary involvement in the colonization of the San Joaquin Valley was through military conquest and Indian Affairs. However, once the State of California was admitted to the Union in 1850, the process of state making switched from military conquest to geographical domination through systems of knowledge, law, and infrastructure—the technologies of capitalism that helped to reorganize the “wilderness” of the Valley into a social space for the production of wealth (Smith 1984).

The first of these endeavors in state making involved the use of geological surveys to take stock of the lands and therefore consolidate control over the territories under both the State and Federal governments. Between 1851 and 1855, the US Department of the Interior conducted the first Public Land Survey in the San Joaquin Valley to classify, grade, and subdivide parcels of land to facilitate their transfer from the “public domain” of federal control into the hands of private speculators and developers. William Preston (1981) notes that this conversion of land into a real estate commodity drove speculation among settlers in terms of the land’s potential for agricultural yields as well as in world commodity markets. As a commodity, however, the lands

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5The systems of reservations established by the US Army for the resettlement of indigenous populations in California went through much turmoil throughout the 1850s due to widespread corruption and abuse by government officials. Food on the reservations was scarce, funds intended to support reservation life were embezzled by local government agents, and the military did little to protect the reservation populations from white marauders (Heizer and Elsasser 1980).
CHAPTER 3. POLICE, PRISONS, AND POLLUTION

were geographically differentiated in their value as farmland, and therefore required further interventions to ensure their productive value.

Another limitation to land use the surveys helped overcome was that of transporting commodities to markets. Surveyors, some commissioned by the federal government and others by private rail companies, identified routes for rail lines that would eventually connect the San Joaquin Valley to San Francisco and Los Angeles, as well as to Sacramento where they met with the transcontinental railroad (Menefee and Dodge 1913; Preston 1981; Rails West 2014). The establishment of rail lines throughout the Valley allowed for cheaper transportation of commercial agricultural goods, while also allowing for quicker transport of troops to ensure continued military dominance of the white settlers against the remaining indigenous populations still scattered throughout the Valley and foothills. With construction of the transcontinental railroad completed in May 1869, the Central Pacific Railroad Company initiated construction later that year of a rail line down the San Joaquin Valley to eventually connect Sacramento and San Francisco to Los Angeles. Around the same time, Central Pacific started a cemetery along the planned route, just south of the border between Tulare and Kern Counties, where many of the rail workers would be buried (“History of North Kern Cemetery District” 2014). Due to financial troubles, the Southern Pacific Railroad Company, which had been purchased by the “Big Four” controlling shareholders of Central Pacific in 1868, halted construction of the railroad tracks and set up a railhead in the vicinity of the cemetery, establishing the town of Delano in 1873, named in honor of Columbus Delano, Secretary of the Interior under President Grant (Dunne 1967; Rails West 2014; “History of North Kern Cemetery District” 2014). This rail connection spurred a new wave of growth as investors, homesteaders, and laborers flocked to Delano to take advantage of the commercial agriculture possibilities opened by the improved connectivity and sense of “security” the railroad line provided for white settlers.

While the surveys and railways enabled the commodification of land throughout the Valley, one of the most enduring and contentious issues addressed unevenly by the state has been
the use and availability of water for irrigation, and protection from flooding. Again, the state intervened by conducting further land surveys, setting the stage for the later establishment of infrastructure to control flooding and provide irrigation throughout the Valley (Alexander, Mendell, and Davidson 1874; Preston 1981). Although much of the early irrigation infrastructure was privately funded, the state provided both the geographical knowledge that facilitated water diversions for irrigation, as well as the legal system for establishing water rights (cf. Hanak et al. 2011). Starting in 1854 near Visalia, large-scale irrigation projects began diverting water from the tributaries to Tulare Lake in order to increase arable lands, to protect against drought and dry seasons, and by the 1860s, to increase commercial crop yields, especially on smaller farms lacking the economic buffers afforded by scale. Through the middle of the 19th century, Tulare Lake, situated along the western edge of the San Joaquin Valley, was the largest areal body of fresh water in the western part of the continent. In the latter part of the nineteenth-century, diversions of the tributary rivers to Tulare Lake for agricultural irrigation led to the disappearance of all of the lake’s surface water except in times of floods (Alexander, Mendell, and Davidson 1874; Preston 1981; Vredenburgh 1991).

The last two major factors that contributed to the capitalist transformation of the Valley were establishing means for protecting farmland from grazing livestock and the development and incorporation of mechanized technologies as a means of production. Prior to the No Fence Law of 1874 and invention of barbed wire fencing that same year, ranchers largely relied on open range grazing for their stocks of cattle and sheep, both of which were in heavy demand for food and wool, respectively. Prior to that year, the prohibitive cost of enclosing farms with fencing effectively discouraged large-scale farming due to the risk of livestock damaging crops; but the new law and inexpensive barbed wire tipped the scales toward farming. The introduction of barbed wire allowed farmers enclose their farmland with a much smaller outlay of time and capital than that needed for traditional fencing. Furthermore, the No Fence Law made it possible for farmers to sue ranchers for damages incurred by livestock or to confiscate stray livestock that wandered onto their farmland. The availability of cheap rail transportation for delivering goods to
 CHAPTER 3. POLICE, PRISONS, AND POLLUTION

eager markets, both domestic and foreign, combined with the means for high-surplus production opened up by farm enclosure, resulted in a wheat boom throughout the Valley from the 1860s through the 1880s (Menefee and Dodge 1913; Preston 1981; Community Planning Laboratory 2009). With wheat booming, farmers throughout California’s Central Valley were quick to adopt, and in many cases, contributed to the innovation of, mechanization technologies such as larger gang plows and combined harvesters. The dependence on mechanization, combined with the uneven availability of water throughout the Valley meant that farming generally required large outlays of capital, meaning that larger-scale farms run by capitalists tended to win out over the smaller family farms prevalent in other parts of the US (Olmstead and Rhode 2003).

Water Rights and Management

Water rights have played an important role in shaping settlement and development throughout California since the Gold Rush of 1848. Miners relying on water for hydraulic mining techniques in hills far from surface water sources typically turned to appropriative rights, or the “first-in-time, first-in-right” principle to resolve disputes over water rights (Hanak et al. 2011). This conflicted, however, with the common-law practice of riparian rights that gives landowners the right to use water from sources within their landholdings. When agriculture began to become a commercially viable enterprise, the need to resolve disputes between appropriative and riparian rights grew into numerous lawsuits, and eventually, state intervention through legislation (Hanak et al. 2011).

In 1887, the California legislature passed the Wright Act, allowing the formation of local irrigation districts. These districts, essentially collectives of landowners, planned and financed acquisition of water rights and water infrastructure improvement projects to divert or otherwise distribute water for irrigation (Hanak et al. 2011). Even though the State Supreme Court had previously ruled that riparian rights still maintained priority over appropriative rights, the Wright Act, its subsequent revision passed in 1897, and the Reclamation Act of 1902 cemented the place of appropriative rights by ensuring access to water for all landowners and by establishing the
CHAPTER 3. POLICE, PRISONS, AND POLLUTION

doctrine of “most beneficial use” to mediate disputes between riparian and appropriative uses (Preston 1981; Hanak et al. 2011).6 Within a few years of the Wright Act, irrigation districts were established throughout the Valley, including the Poso Irrigation District directly east of Delano, and the Kern and Tulare Irrigation District, which encompassed Delano (US Geological Survey 1898). Unlike many of the newly established irrigation districts, however, the Kern and Tulare Irrigation District never realized any of its infrastructural construction plans and it was dissolved by 1898 (US Geological Survey 1898). Despite the dissolution of the irrigation district in Delano, the overall impact of these districts throughout the Valley is unmistakable as numerous dams, levees, canals, ditches, and diversions were constructed, transforming the distribution of water across the Valley and made water available to lands previously lacking riparian rights. Significantly, the irrigation districts also transformed the real estate market by tethering land sales to the purchase of water rights from the district (Preston 1981).

By the start of the 20th century, the large number of irrigation districts resulted in competition between neighboring districts over water usage and resulted in a fractured water management landscape (Hanak et al. 2011). To ease tensions, as well as to coordinate statewide efforts toward flood control management, the California legislature eventually passed the Water Commission Act of 1913, establishing a central agency to regulate and permit water rights for unimproved lands. Then, in the 1920s, the federal government began funding large scale water projects to redistribute water throughout the state, including the Central Valley Project, which would eventually regulate and transport water from Northern California and the Sierra Nevada Mountains to the San Joaquin Valley. In response to the Central Valley Project, the Southern San Joaquin Municipal Utility District (SSJMUD) formed in 1935 to allow landowners in northern Kern County to purchase water rights from the Central Valley Project (Southern San Joaquin Municipal Utility District 2012). The SSJMUD jurisdiction includes lands previously serviced by the Poso Irrigation District and Kern and Tulare Irrigation District, including the cities of Delano

and McFarland, though it does not provide service within either city (Southern San Joaquin Municipal Utility District 2012). In addition to regulating and distributing irrigation water obtained through surface water supplies and the Central Valley Project, the SSJMUD also regulates groundwater use to avoid significant overdrafts and promote groundwater recharge.

Although the irrigation districts, as well as individual landowners, developed pumped and artesian groundwater wells to supplement surface water supplies throughout the latter half of the 19th century, the use of groundwater remained limited throughout most of the Valley due to high capital requirements and technological limitations, and wouldn’t become widely used until the turn of the 20th century when decreasing surface water supplies drove landowners and irrigation districts to begin developing more wells (Preston 1981; Olmstead and Rhode 2003; Hanak et al. 2011). Over the first three decades of the 20th century, groundwater usage rapidly expanded, especially throughout Tulare County. Overdrafting, or drawing more water from the ground than that which is recharged by infiltration from surface supplies, became more frequent, leading to a dramatic decline in groundwater levels by the 1930s, which in turn led to deeper wells and increased competition over groundwater supplies (Preston 1981; Hanak et al. 2011). The ensuing competition and between neighboring districts and individual landowners contributed to the demand for state and federal intervention through large scale water infrastructure projects like the Central Valley Project (Hanak et al. 2011). With its rights to water from the Central Valley Project and other surface water supplies, the SSJMUD does not regularly rely on groundwater supplies, and discourages groundwater pumping within District boundaries, although many property owners served by the district also operate their own pumps to supplement their SSJMUD allocations (Southern San Joaquin Municipal Utility District 2015).

The cumulative impact of the establishment, growth, and consolidation of irrigation districts in the Central Valley has been the development of infrastructure to support water distribution to most of the Valley’s arable lands and a more stable system of rights (and rates) management under a combination of local districts and the statewide Water Commission, and
later, the State Water Resources Control Board. Water districts allowed landowners to expand their operations by easing the burden of infrastructural capital required to develop lands lacking riparian rights, and in the process, ensured the continued growth and profitability of agriculture throughout the 20th century. Interestingly, the combination of urban development and construction of prisons throughout the Central Valley, have reduced the acreage of irrigated farmlands, and at least in the case of the SSJMUD, have led to new land acquisitions, apparently to maintain both federal water allocations as well as financial solvency (Southern San Joaquin Municipal Utility District 2015). Maintaining consistent agricultural acreage within the SSJMUD service area would prove to be an important factor in the campaign to stop the Delano II prison construction, as I detail later in this chapter.

_Agricultural Growth and Labor Militancy_

Though transformations of the Valley through water policy and land use are essential pieces to the puzzle of how California’s Prison Alley came into being, equally important are the people, particularly those employed to work in the fields and whose labor militancy led the state and capital to develop in the particular ways that they did (Mitchell 1996). The wheat boom throughout the Central Valley in the mid-19th century gradually gave way by the 1880s to the expansion of fruit orchards and row crops such as sugar beets and cotton due to the widespread cultivation of wheat elsewhere in the country and the high profitability of fruit production. Whereas wheat was easily planted and harvested on small farms, the transition to these capital- and labor-intensive crops resulted in the renewed growth of large commercial farms in favor of the smaller family farms and an increased demand for a low-wage workforce (Daniel 1982; Mitchell 1996; Olmstead and Rhode 2003).\(^7\) The diversification of agriculture, however, meant

\(^7\)One of the reasons the higher profit margin crops were feasible for the planters was that the early consolidation of farmlands afforded the large landholders to diversify and experiment with their planting and gradually transition to the fruit trees that needed time and capital to mature and become profitable. Had the “family farm” model dominated instead, it’s unlikely that many
that the various crops and fruit trees had different picking seasons, and so farm laborers could follow the harvests across the western states, reducing their seasonal unemployment, and cementing the migratory farmworker as a fixture in California agribusiness. The mobility of the labor force, lack of fixed geographical social structures resulting in social isolation, invisibility to landowners, and constant threat of seasonal unemployment transformed the social relations between farms and farming with the migratory farmworkers into that of industrial “factory” and a proletariat class of labor (Daniel 1982; Mitchell 1996). In addition to maintaining the lowest possible wages that would still compete with those in urban factories, landowners provided migratory workers with deplorable living and working conditions and treated and portrayed them as little more than the means of production (Mitchell 1996).

As the commercial agricultural industry grew in Delano and throughout the San Joaquin Valley, so too did the tensions and contradictions of growth premised on racial capitalism. Racial differentiation and fragmentation exploited by growers, as well as US immigration policy, factored heavily in farm employment throughout the entire period of agricultural growth in California. The growth of commercial agriculture over the last half of the 19th century meant increasing demands for low-wage labor. The Yokuts and other native peoples, slave or free, were all but eliminated from the farmlands by the time the railroads came through. Chattel slavery was prohibited by the state constitution and free Black people initially denied entry to the state, so Black farmworkers were scarce. White European immigrants rarely took to the fields, as farm work was deemed unsuitable to whites. So the landowners looked enthusiastically to Chinese laborers coming off their work on the railroads. These workers, racialized by employers as “docile, industrious, trustworthy, and reliable…[and whom], because they were not white, did not, planters would be able to afford the capital outlays to convert their fields from multiple-harvest wheat to slower maturing, labor intensive crops (See Mitchell 1996; Olmstead and Rhode 2003). Ironically, this growth in large scale commercial farming was at odds with measures taken by the state and smaller landowners to promote family farms, including their support for the Chinese Exclusion Act of 1882 because of its intentions to dry up the supply of low-wage laborers that helped maintain the profitability of the larger commercial farming operations (Daniel 1982).
indeed could not, have aspirations or expectations comparable to those that white workers might harbor or consider a matter of right on the basis of whiteness alone” (Daniel 1982, 27). The supply of Chinese laborers dwindled, however, after the growers lost out to the prevailing tide of mostly urban white working-class anti-Chinese sentiment resulting in the Chinese Exclusion Act of 1882, barring further immigration of Chinese laborers and forcing the growers to search elsewhere to meet the increasing demand for labor in the intensive farming boom that coincided with the Exclusion Act.⁸

After the Exclusion Act, growers searched for other sources of labor to fill their needs. Growers initially turned to Japan to serve as a surrogate for China in supplying low-wage workers, and, as Daniel (1982) recounts, this seemed like an ideal solution as many of the Japanese immigrants arrived having previous experience in agricultural work and were willing to accept substandard wages negotiated for them by labor contractors. As the growers soon discovered, however, this was a calculated bargaining strategy, as the Japanese labor contractors were highly organized and strategic, and the wage suppression was a tactic used to gain exclusive control of the fields so that the workers could threaten to strike right before the time-sensitive harvests in order to negotiate better contracts.⁹ Furthermore, growers viewed Japanese workers as a threat to the stability of the commercial agricultural industry they were building because many of the workers had ambitions to become landowning agriculturalists—clearly threatening the

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⁸Simultaneous to, and in many ways in support of the growers’ racialization of Chinese laborers as ideally suited to farm labor, came widespread vitriol about urban, predominantly male, populations of Chinese laborers from state officials, popular media, “respectable Chinese merchants,” and the white working class (Shah 2001). Whereas growers took to Chinese laborers because of their apparent willingness to work the fields at whatever wages offered them as “the practical equivalents of slaves” (Daniel 1982, 27), the white urban populations, as well as the agrarian proponents of family farming, viewed Chinese farmworkers as a threat both to wage depression and heteronormative, middle-class, domestic respectability (Daniel 1982; Mitchell 1996; Shah 2001).

⁹Don Mitchell (1996) and Cletus Daniel (1982) both point out that not only did the Japanese labor contractors work in solidarity with the laborers, but that this was markedly different from the Chinese labor contractors who more frequently exploited the labor gangs for their own profit and likely to maintain contracts with employers.
CHAPTER 3. POLICE, PRISONS, AND POLLUTION

nascent racial capitalist order.\textsuperscript{10} Growers instead turned to Indian, Mexican, and Filipino workers, but facing similarly racist attitudes as the Japanese and Chinese laborers who preceded them, Indian workers—racialized under the catch-all category of “Hindus”—were only allowed to immigrate until the US passed the Immigration Act of 1917 (Mitchell 1996; Ngai 2004). Despite Filipino revolutionaries’ declaration of independence from Spain in 1898, the US claimed it as a colony following the Spanish-American War and subsequently imposed colonial rule in the wake of the bloody Philippine-American War. The colonial relationship between the Philippines and the US meant that Filipino workers could emigrate to the US without restrictions despite the 1917 Immigration Act, up until the Philippines gained independence in 1934, at which point they were subject to extremely limited immigrations quotas (Ngai 2004). For Mexican immigrants and transnational migratory workers, coming to California was relatively easy prior to World War I due to lax immigration enforcement, but as Mae Ngai (2004) points out, “[d]uring the 1920s, immigration policy rearticulated the US-Mexico border as a cultural and racial boundary, as a creator of illegal immigration” (67), thus hindering but hardly stopping, a steady stream of Mexican agricultural workers to meet the needs of growers.

The effects of agricultural growth and the rise of nonwhite migrant labor in the first third of the 20th century deeply shaped the California landscape, and transformed US racial, immigration, and labor politics, or the forms and forces of US racial capitalism (Mitchell 1996; Ngai 2004). In 1908, anti-Japanese sentiment peaked from both the top and bottom when the US entered into the “Gentlemen’s Agreement” with Japan that de facto restricted Japanese immigration to the US due to Japan’s growing imperial power as well as the perceived threat to white working-class populations posed by Japanese laborers, their families—San Francisco segregated schools in 1906—and their entrepreneurial and agriculturalist aspirations. Unsurprisingly, the State of California passed the Alien Land Law in 1913 to prohibit “aliens ineligible for citizenship” from owning or holding long-term leases of land. The presumption that Japanese and other Asian immigrants were ineligible for citizenship had already been upheld in federal courts, though it wasn’t until a decade later that the Supreme Court would famously codify the “common sense” white supremacist logics of race and citizenship in \textit{Ozawa v. US} (261 US 178 (1922)) and \textit{US v. Thind} (261 US 204 (1923)) by declaring Asians nonwhite (and non-Black), and therefore excluded from naturalization (See Lowe 1996; Mitchell 1996; Ngai 2004).
Part of the central contradiction of this agricultural growth was the rise of racialized labor militancy. Growers innovated and reshaped the ways that racial differentiation and racial codes were used as a means for recruiting workers and implementing divide-and-conquer strategies to discipline and proletarianize labor. Despite this, workers were able to organize themselves, and organized labor unions such as the Industrial Workers of the World (IWW or Wobblies) and the Cannery and Agricultural Workers Industrial Union (CAWIU), were able to successfully mobilize agricultural workers to fight for things such as fairer wages, improved living conditions, and eight-hour workdays (Mitchell 1996). Don Mitchell (1996) asserts that these labor struggles, most of which were led by or involved nonwhite workers, had the profound effect of mobilizing resistance—a movement in both senses of the word—that “took hold of the established spatial practices of industrialized agriculture and other resource-based industries in North America and utilized them for its own purposes” (66). He continues:

Here lay the very subversiveness of mobility. By connecting place-based struggles, migratory workers were able to transcend the spaces and places of their oppression; they were able—at least potentially—to rattle the patterns that underlay capitalist productivity. In this sense, mobility was both necessary and subversive to the aims and desires of capital and the state. (66)

However, just as farmworkers were able to organize themselves in collective resistance, the capitalist class of growers and canners had been corporatizing through a long process of consolidation, as well as horizontal and vertical integration, or, respectively, the coordination between growers, and controlling every step of production from the farm to the packing houses to shipping companies, and even produce exchanges (Mitchell 2012). And when the Dust Bowl droughts and dust storms struck the Great Plains in the early 1930s, thousands of predominantly white “Okies” and “Arkies” migrated to California and the San Joaquin Valley, creating new labor

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11 Mitchell (1996) cites the Wheatland riot of 1913 for kick starting an epochal period of labor militancy on the west coast of the US that included numerous strikes and labor organizing activities, including the Wheatland hop riot in 1913, and especially in the 1930s leading up to the Bracero program in 1942.
surpluses, racial tensions, and diminished possibilities for labor organizing. The combined impact of the flood of Dust Bowl laborers and the consolidation of capitalist power gave growers an advantage despite by the mid 1930s, and they used every tactic at their disposal to suppress—often violently—the farmworkers and raise barriers to organizing. They even worked alongside local, state, and even federal agencies to coerce or forcefully deport to Mexico, hundreds of thousands of Mexican, and even some Filipino workers, regardless of their citizenship status (Mitchell 1996; Ngai 2004; Molina 2014).

When the US ramped up its military industrial machinery during World War II, most of the white farmworkers were drawn away from the fields and into the battlefields or manufacturing sectors. As a result of the labor shortages, and at the prompting of growers, Franklin Delano Roosevelt initiated the Emergency Farm Labor Program, or “bracero” guest worker program in 1942 to ensure the continued surplus of labor power and avert the potential for organized labor to gain power. The poorly regulated program and lack of enforcement mechanisms served to further discipline labor, and led to inhumane living conditions, withheld pay, and mistreatment among farm workers; a large influx of non-contract Mexican farm workers; and virtual collapse of organized agricultural labor unions on the west coast (Mitchell 2012). Yet the bracero program eventually gave rise to renewed forms of labor activism, with organized strikes and boycotts eventually leading to the program’s abandonment in 1964 (Mitchell 2012). Among the organizations that formed under the bracero program were the National Agricultural Workers Union (NAWU), the Agricultural Workers Organizing Committee (AWOC), as well as the National Farm Workers Association (NFWA) in 1962, under the leadership of César Chávez and Dolores Huerta.

A year after the bracero program folded, and on the heels of a successful NFWA grape pickers strike at Martin Ranch, the Delano AWOC, comprised primarily of Filipino grape pickers, and led by Philip Vera Cruz, Larry Itliong, Benjamin Gines and Andy Imutan, organized a strike against table grape growers in 1965. They immediately reached out to the NFWA for support,
knowing that the campaign’s success depended on the unified front of Filipino, Mexican, and Chicanx laborers, as well as other organizations such as the International Longshore and Warehouse Union. A week after AWOC walked off the fields, NFWA voted in Delano to join the strike, and a year into the campaign, AWOC and NFWA merged, forming the United Farm Workers of America (UFW). The campaign endured for five years, but the UFW emerged victorious, securing contracts with both of the growers in the campaign’s crosshairs, and marking the first major victory for union organizing amongst farm workers after the bracero program, and setting the tone for the use of a combined strategy of a nonviolent field strike, labor boycott, consumer boycott, marches, and hunger strikes.

The victory in the table grape strike at Delano marks the birth of the UFW and a significant turning point in farm labor unionization, both of which, in turn, are important dimensions of the solidification of Chicanx and Latinx political power throughout the state. The enduring legacy of Chicanx activism and agricultural labor militancy in California factors significantly in the broader politicization and mobilization of Chicanx and Latinx communities beyond the agricultural industry (Pulido and Peña 1998), and undoubtedly contributed to the campaign to stop the Delano II prison gaining traction amongst Delano residents and others involved in environmental justice organizing throughout the Central Valley.

However, the period of renewed labor militancy in the 1960s, combined with the growers’ loss of what Don Mitchell calls the “labor market insurance braceros,” put growers on the defensive and contributed to the ensuing “labor market adjustment” (2012, 409) that saw the rapid adoption of mechanization for many crops and subsequent stagnation or declines in the migrant agricultural workforce. This reduced demand for agricultural labor dovetailed with significant structural changes in agricultural production over the last three decades of the 20th century, and as Ruth Wilson Gilmore (2007) explains, created a crisis of surplus land, labor, and capital that set the stage for California’s prison building boom, particularly in the Central Valley.

Less than a quarter century after the table grape strike victory, plans were underway to
build the first state prison in Delano, the North Kern State Prison. Like other small towns in California’s Central Valley and elsewhere in the state, the Delano City Council saw the prison boom as an opportunity to bolster the declining local economy so they lobbied the CDC to get a prison. In addition to the purported boost to the retail and service economy, the state had been establishing mitigation funds for municipalities to bolster local infrastructure that would be impacted by the increased population and resource demands created by new prisons so inviting a prison meant a “free” boost to civic development, though the state subsidies only covered a portion of the costs for the infrastructural and social development needed to accommodate prison-fueled population growth (Pyle and Gilmore 2008; “CA Codes (Pen:7000-7050)” 2016). The reality faced by most of the towns that won prison bids is that the economic development came in the form of chain stores that displaced local businesses, and despite the promise of jobs, a very small number actually went to local residents. So rather than an economic boom, the prisons by and large represented a drag on local economies (Pyle and Gilmore 2008).

The Delano Prisons

Shortly after the first prison in Delano, North Kern State Prison (NKSP), began accepting inmates in 1993, the CDC began planning for a second state prison within the City of Delano, which it designated the California State Prison-Kern County at Delano II (Delano II). Since the early 1980s, the State of California had been engaged in a prolonged expansion of its prison system, and beds were being filled with new inmates just as fast as they were being constructed. Ruth Wilson Gilmore (2007) describes this expansion as California’s “use of prisons catchall solutions to social problems” (5), and Delano II was slated to become the latest addition to California’s prison construction boom.

Within the State of California, the majority of prisons are located in rural areas, particularly in the “prison alley” that stretches along the Central Valley’s Interstate 5 freeway and
CHAPTER 3. POLICE, PRISONS, AND POLLUTION

California Highway 99 (see Figure 3.1), with 18 facilities between Tehachapi and Folsom, 13 of which were built during the prison construction boom (see Appendix A); the vast majority of prisoners, however, come from urban areas, and especially the greater Los Angeles Metropolitan Area (Gilmore 2007; California Department of Corrections and Rehabilitation, Data Analysis Unit 2011). Ruth Wilson Gilmore (2007; 2008) meticulously argues that the geographical connections between the urban and rural that link prisoners and prisons emerged as part of the spatial fix provided by publicly funded prison construction to the crises of surplus land, labor, and capital (accumulation) that accompanied political economic restructuring throughout the latter part of the 20th century. The City of Delano, having already successfully petitioned the CDC for a first prison, probably seemed like an ideal location for the next prison expansion, particularly since it met the prerequisites of having abundant surplus agricultural lands ripe for acquisition by the state and existing municipal and social infrastructure needed to run a new prison.

In 1994, the CDC commenced their planning efforts for the Delano II prison by publishing an environmental impact report (EIR), the state-level equivalent of the EIS, as required by the California Environmental Quality Act (CEQA), the State of California’s “mini-NEPA” statute. Whereas federally funded projects in the US are subject to NEPA and its EIA process, the State of California requires state funded projects to adhere to CEQA. Like NEPA, CEQA mandates an EIA process, which includes the Environmental Impact Report (EIR) and a published Notice of Determination (NOD), or the state equivalents to the EIS and ROD under NEPA. While there are significant differences between NEPA and CEQA, for the purpose at hand they dissolve beneath their structural imperatives to get state administrators thinking about environmental factors in their decision making, and to open that process up to public scrutiny.

The Delano II EIR produced by the CDC in 1994 called for a 400-acre, 4,180 inmate facility with a Level IV maximum security designation. Through the process of feedback and revision, however, the planned facility was scaled back. By the time the CDC certified the EIR and issued its NOD in 1995, the proposed prison called for a site on 320-acres, housing 2,200
Figure 3.1. California State Prisons and Correctional Facilities, 2016
CHAPTER 3. POLICE, PRISONS, AND POLLUTION

inmates—a significantly smaller facility, but massive nonetheless (California Department of Corrections 2000a). The property the CDC selected for the prison is located approximately four miles west of California Highway 99, approximately 2.5 miles west of Delano’s urbanized area, about half a mile south of the existing North Kern State Prison, and adjacent to the 500-bed, City owned Delano Community Correctional Facility (see Figure 3.2). When the CDC proposed the new prison, the site was being actively used as farmland, and was surrounded on three sides by productive farmland.

The CDC successfully completed its statutory requirements to begin construction of Delano II in 1995, however the plans had to be placed on hold when the state legislature failed to provide funding for the prison. Throughout the first half of the 1990s, California was struck harder by economic recession and recovered much more slowly than the rest of the US (California Legislative Analyst’s Office 1995b). Furthermore, reductions in military spending following the end of the Cold War in the early 1990s had a particularly strong effect on the California economy due to widespread military base closures and reduced contracts to the aerospace industry, one of Southern California’s largest industries (Dertouzos and Dardia 1993). As a result, the state shifted its budget priorities, making significant reductions to spending across the board, particularly in areas of health and welfare, with modest increases in corrections and education spending. However, the roughly 8% increases in corrections spending in both the 1994-1995 and 1995-1996 state budgets merely covered the costs associated with housing increasing prison populations, due in no small part to the projected growth resulting from the “Three Strikes” law enacted in 1994 (California Legislative Analyst’s Office 1995a). As a result, the 1995-1996 budget did not allocate any new funds for the construction of prisons including Delano II, although it continued to fund the construction of the prison being built in Corcoran. Despite projections of continued growth in prison populations and overcrowding in existing prisons, the 1995-1996 budget did not allocate any funds for the construction of new prisons, including Delano II, so the project was put
Figure 3.2. The City of Delano, CA and Its Three Correctional Facilities
on hold pending budgetary approval.\textsuperscript{12}

Even though the California legislature didn’t allocate any funds for additional prison construction from 1995-1999, the policing and sentencing practices that kept prison beds filled, continued doing their worst. Despite the long-term trend of decreasing crime rates between the mid-1980s and 2000, the continued growth in California’s prison populations throughout the 1990s—fueled in part by enactment of the notorious “Three Strikes and You’re Out” law in 1994—led to unsustainable overcrowding (California Legislative Analyst’s Office 2005; Gilmore 2007). In 1999, the newly elected Democratic Governor Gray Davis indicated his willingness to fund further expansion of the state’s prison system by proposing a budget that allocated $335 million for construction of the Delano II prison and the planning of a second additional prison in San Diego (California Legislative Analyst’s Office 1999). In May 1999, a month before the final budget would be approved by the legislature, Governor Davis pushed through urgency legislation\textsuperscript{13} allocating over $311 million toward Delano II implementation, including $4 million for the cost of mitigating the prison’s impacts on the municipal government (Braz and Gilmore 2006).\textsuperscript{14} Funding for the prison came in the form of lease-purchase financing and lease-revenue bonds, which, as Ruth Wilson Gilmore (2007) compellingly argues, are one of the pieces to the partial “fix” to crises of accumulation that enabled the California prison boom over the last two decades of the twentieth century. She further explains that this process also establishes prisons as an infrastructural securities investment mechanism with higher returns for private firms than

\begin{footnotesize}
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\item[\textsuperscript{12}] Although the state legislature didn’t allocate any funds for new prisons, they continued funding the construction of the Corcoran prison, whose construction was already underway. See also, (Gilmore 2007).
\item[\textsuperscript{13}] In the State of California, “urgency legislation” is a term used to describe legislation that takes immediate effect once passed by the legislature and signed by the governor, and requires a two-thirds vote for approval. In the case of budget items, urgency legislation can make funds available for immediate appropriation, rather than when the full budget is signed by the governor (California Department of Finance 2012).
\item[\textsuperscript{14}] \textit{Friends of the Kangaroo Rat v. California Department of Corrections} 4 Cal. Rptr. 3d 558 (2003).
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standard municipal bonds with little added investment risk, and a whole lot less potential for political fallout from the increased tax burden of voter-approved municipal bonds.

With a budgetary green light, the CDC resumed planning for Delano II in 1999. Due to the continued growth in prison populations over the intervening years, the CDC increased the planned prison capacity by 235% from the initially approved capacity of 2,000 inmates, up to 5,160 inmates, and from a 320-acre site up to a 480-acre site.\(^\text{15}\) This design change triggered the need to amend the previously approved 1995 EIR with additional analyses considering the environmental impacts of the newly proposed design revisions. In February 2000, the CDC published the Draft Supplemental EIR (SEIR) for a 45-day period for public review and comment and held a subsequent public hearing to receive oral comments, in accordance with CEQA guidelines (2014, sec. 15105). On May 22, 2000, the CDC published a Final SEIR containing a record of the comments received and the CDC responses to those comments, followed by the publication of the Notice of Determination (NOD) approving the Final SEIR on June 7, 2000, which is the California equivalent to the NEPA Record of Decision granting final approval of the environmental review process. Typically, this is the point at which the lead agency may proceed with project implementation. However, in the case of Delano II, this was the point at which organized opposition to the prison led to a five-year delay in prison implementation with a lawsuit built around the requirements of California’s EIA process.

Taking the CDC to Court

When Governor Davis pushed to pass the urgency legislation to fund the Delano II prison construction, prison abolition organizers from across the state rallied opposition to the funding bill at the state capitol. Despite their efforts, the bill was passed by the legislature. However, the

\(^{15}\) The original EIR evaluated impacts for up to 4,180 inmates on a 400-acre site, however the certified decision only called for 2,200 inmates on 320 acres. (California Department of Corrections 2000a, 1)
energies directed at opposing the bill were not for naught. The organizers continued pressure to keep the prison from being funded and used the momentum from the initial push at the state capitol to expand the fight into two other strategies for social movement building: a legal strategy targeting the prison through the EIA process under CEQA and expanding their campaign to reach new constituencies to support the legislative and legal battles.

*Public Feedback on the SEIR*

The strategy to use the EIA process to stop the proposed prison from being constructed began to take shape during the initial public comment period held by the CDC for the SEIR. Several groups opposed to the prison submitted written comments expressing their concerns about the prison’s environmental impacts that weren’t addressed in the Draft SEIR. These organizations included Critical Resistance (CR), the Center for Biological Diversity (CBD), the National Lawyers Guild (NLG) Prison Law Project, Friends of the Kangaroo Rat (FKR), and Critical Mass (CM) (California Department of Corrections 2000b). The majority of the comments submitted on behalf of these organizations followed the lead of CBD in its lengthy critique of the SEIR for its inadequacy in addressing the impacts to the endangered Tipton kangaroo rat, San Joaquin kit fox, burrowing owl, and their habitats, the need for an Incidental Take Permit under the Endangered Species Act, and the inadequacy of the proposed mitigation measure of setting aside an equivalently sized plot of land as a habitat reserve. Other comments related to the construction of an on-site wastewater treatment facility, the mitigation of traffic impacts, the lack of consideration given within the SEIR to a “no project” or “no build” alternative to the proposed prison, the impacts of electrified fences on migratory birds, impacts to school overcrowding, impacts to groundwater supplies, and the cumulative impact of prison-related local development and growth on biological resources. The breadth of comments regarding impacts to endangered species and their habitats was well within the domain of expertise for CBD, which has a record of building similarly comprehensive cases to block, curtail, or mitigate profit-driven development projects.
CHAPTER 3. POLICE, PRISONS, AND POLLUTION

throughout the US southwest. The organization was founded in 1989 to protect sensitive plant and animal species, along with their habitats, from destructive commercial practices and exploitative uses of natural resources. Their work focuses on the systematic use of “biological data, legal expertise, and the citizen petition provisions of the Endangered Species Act” to gain legally binding protections for species and their habitats across much of the US, as well as the Pacific and Atlantic oceans (The Center for Biological Diversity 2016).

The expert knowledge of endangered species and their habitats provided by CBD, allowed the other groups in the campaign to get involved in the SEIR public feedback process despite their primary political interests and areas of technical expertise being in other areas. Critical Resistance (CR) is a nonprofit organization that formed in 1997 to build a movement to eliminate the prison industrial complex (PIC), beginning with a three-day conference in 1998 that “brought together over 3,500 activists, academics, former and current prisoners, labor leaders, religious organizations, feminists, gay, lesbian and transgender activists, youth, families, and policy makers from literally every state and other countries” (Critical Resistance 2016). For CR, stopping the prison would mean slowing the growth of the PIC, while the campaign to stop the prison would provide an opportunity to build their broader movement. The National Lawyers Guild Prison Law Project is a project and committee within the National Lawyers Guild (NLG) that, in addition to providing a platform for jailhouse lawyers to connect with one another, provides informational resources regarding Constitutional and civil rights violation claims for persons in prison or jail (National Lawyers Guild 2016). As an organization, the NLG works to defend Constitutional rights and to basic human rights, and as such, advocates against “the systemic abuse of solitary as a routine form of punishment, and the greater system of discriminatory over-incarceration,” (“Written Statement of the National Lawyers Guild Before the United States Senate Judiciary Subcommittee on the Constitution, Civil Rights, and Human Rights” 2014) which would both be expanded under the proposed Level IV Security “Supermax” prison in Delano. Even though both CR and the NLG Prison Law Project wanted to stop the Delano II prison because of the consequences of the new prison for incarcerated and incarcerable populations, their official
involvement in the SEIR public feedback process relied on the tactic of forcing the CDC to strictly adhere to its legal and statutory obligations under CEQA, focusing on topics well supported by existing case law: ecological impacts overlapping with the Endangered Species Act, evaluation of cumulative impacts, and full consideration of the no project alternative. Building on the comments submitted by CBD, CR, and the NLG Prison Law Project, Babak Naficy, an environmental lawyer who would later represent the anti-prison coalition in court, submitted a detailed set of comments on behalf of both FKR and CM that additionally called on CDC to detail the various required permits for water discharge, as well as to provide documentation for some of its data sources. FKR was a group of area residents who organized to protect the kangaroo rat and its habitats. CM is a non-hierarchical (dubbed “Xerocracy”) association of individuals who participate in direct action cycling events to reclaim public space (Critical Mass 1994).

In addition to the comments filed on behalf of the organizations aiming to stop the proposed prison, comments were filed by city and state administrators and several local residents. While many of these comments raised similar issues to those made by the anti-prison organizers, one comment made by Bill Hylton, a retired city employee and local business owner who spoke during the oral hearing expanded on the “significant and unavoidable” impact of taking 480 acres of Farmland of Statewide Importance out of cultivation. While others made mention of the fact that this impact was unmitigated within the SEIR, Hylton expanded the scope of feedback by adding the possibility of utilizing other uncultivated lands as a possible mitigation measure (California Department of Corrections 2000b). Though the CDC’s response to comments dismissed Hylton’s suggestion and concern, his comment would become relevant during the court proceedings because it helped established an administrative record of public concern for, and a proposed solution to, the unmitigated impact of removing farmlands from cultivation. In a similar fashion to their response to Hylton’s comments, the CDC responded in a cursory manner to most of the other comments with little acknowledgement of the inadequacies of the SEIR in addressing all of the requirements of the CEQA legislation. The exceptions to this were the addition of several minor mitigation measures within the SEIR to reduce impacts to endangered species.
during both construction and operation of the proposed prison and an agreement to initiate consultation with the US Fish and Wildlife Service to obtain an Incidental Take Permit for the Tipton kangaroo rat under the Endangered Species Act (California Department of Corrections 2000b).

The CDC published its response to the SEIR comments in May 2000, followed less than a month later by the publication of an NOD approving the SEIR and the proposed prison in June 2000. Almost immediately thereafter, the anti-prison organizers filed a lawsuit against the CDC with the Kern County Superior Court of California. The lawsuit called on the court to prevent the CDC from implementing the proposed prison until the CDC addressed the inadequacies of the SEIR and the failure of the CDC to meet its statutory obligations under the CEQA legislation.16 The plaintiffs in the lawsuit included three of the organizations that had filed comments with the CDC during the public response period for the SEIR: CR, the NLG Prison Law Project, and FKR. Being that the lawsuit was part of a broader movement to stop the prison and the growth of the PIC in general, campaign organizers used the lawsuit as an opportunity to rally greater support against the prison. They contacted local residents, state and local politicians, and people within institutions such as the SSJMUD to convince them that the proposed prison was bad for Delano and populations throughout the state, and to get them to understand the negative environmental impacts the prison would have related to the particular political or social stakes of different stakeholders.

“Joining Forces: Environmental Justice and the Fight Against Prison Expansion”

Several months after filing their lawsuit against the CDC, the campaign organizers held a conference in Fresno, about 90 miles north of Delano, to bring together prison abolitionists and

16Friends of the Kangaroo Rat v. California Department of Corrections, 4 Cal. Rptr. 3d 558 (2003).
environmental justice activists from across the region. This conference, titled “Joining Forces: Environmental Justice and the Fight Against Prison Expansion,” aimed to build political formations that took advantage of the conceptual linkages between existing anti-racist social justice struggles and environmental justice networks throughout California.\(^{17}\) In addition to CR, sponsoring organizations included the California Prison Moratorium Project, the Southwest Network for Environmental and Economic Justice, the Center on Race, Poverty and Environment, Fresno State University MEChA, and the West County Toxics Coalition. These organizations each work on sometimes-overlapping, but often geographically and thematically distinct community based struggles for social justice and/or environmental justice in various parts of California. For example, the Center on Race, Poverty and Environment, a community-centered legal advocacy organization based out of Delano, uses legal strategies based around the Civil Rights Act to fight for environmental justice (Center on Race, Poverty & the Environment 2011). The California Prison Moratorium Project, on the other hand, explicitly focuses its efforts on stopping all prison construction in California, both public and private. They frame the issue in terms of the environmental injustice that prisons “are normally built in economically depressed communities that eagerly anticipate economic prosperity,” and view them in the same light as other toxic industries that negatively “affect the quality of local schools, roads, water, air, land, and natural habitats” (California Prison Moratorium Project 2015).

One of the organizers who helped set the agenda for the conference and who served as the conference’s opening speaker was Juana Gutiérrez, the co-founder and president of Madres del Este de Los Angeles, or Mothers of East LA (MELA). Gutiérrez used her opening address to describe how she and her fellow organizers worked tirelessly for nine years to stop a prison from being constructed in their neighborhood, and how along the way, they caught wind of plans to build a hazardous-waste incinerator in the neighboring town of Vernon, which became the second

\(^{17}\)This conference is discussed and analyzed in far greater detail by Rose Braz and Craig Gilmore (2006) as well as Ruth Wilson Gilmore (2007; 2008), all of whom were in attendance during the actual conference. This summary is based on their documentation of the conference.
focus of their organizing efforts. Through their anti-prison organizing, members of MELA discovered that the state officials planning the prison assumed that all the prisoners in California came from East LA and therefore decided that the state’s next prison might as well be located there as well. Digging deeper into the logics behind this reasoning, the organizers saw that the state officials pointed to the abundance of “risk factors” such as not graduating from high school, as correlating with a greater likelihood for people to become incarcerated. Gutiérrez pointed out that students who missed a lot of school tended to be less likely to graduate, and a lot of students missed school due to health complications from asthma. Extending this line of reasoning even further, members of MELA realized that people in their community were more likely to suffer from asthma, and then discovered that asthma can develop from prolonged exposure to airborne toxics, such as those produced through hazardous-waste incineration and in other polluting industries that abound in East LA.

By identifying the connections between environmental hazards and the logics behind expanding the prison system, MELA developed a complex analysis of the ways that environmental racism functions simultaneously across a range of domains to shorten the lives of populations rendered vulnerable by the structures of racial capitalism—the state officials justifying a new prison to keep people locked in cages; the toxic industries drawn to poor neighborhoods with large non-white populations; an educational system that at best is ill equipped to prepare students for success, and at worst prepares them for failure or incarceration; the police and policies that target poor communities of color to keep the prisons filled. It was because of the organic way that MELA developed an environmental justice position from their anti-prison activism, and because of the shared experiences with environmental racism between East LA and the Central Valley that Gutiérrez’s opening remarks at the Joining Forces conference were so appropriate to the type of expansive, cross-issue thinking and urban-rural coalition building envisioned by the conference organizers and coalition working to stop the Delano II prison.

Rose Braz and Craig Gilmore (2006) describe the conference as the “first statewide
CHAPTER 3. POLICE, PRISONS, AND POLLUTION

gathering designed to explore the place of prisons in the environmental justice movement and the ways that anti-prison activists can learn from environmental justice examples” (98). They highlight one of the critical moments during the conference, when youth environmental justice activists helped others recognize that one of the key linkages between communities of color throughout the Central Valley and those in urban areas where many of the prisoners were from, was the common environmental threats of the “three Ps”: police, prisons, and pollution.¹⁸

Borrowing from Ruth Wilson Gilmore’s (2008) definition of racism, each of these represent state sanctioned, structural forms of environmental hazard or violence that produce group differentiated vulnerabilities to premature death. Though not popularly represented as environmental factors in and of themselves, police and prisons both dramatically shape environmental landscapes by controlling populations through group- and geographically differentiated forms of surveillance, displacement, violence, and disenfranchisement. Furthermore, the physical infrastructure of prisons in particular, shapes local economic development, resource utilization, and ecological landscapes—rarely in ways that benefit those populations on either side of the barbed wire that are rendered as surplus to capitalism by the carceral state.

The insights from the conference didn’t stop with the three Ps. Rather, building on the three Ps led participants to recognize that the concept of environment was indeed conceptually flexible, both as a rallying point for justice organizing, as well as an organizing logic for environmental policy. It was through these insights developed at the Joining Forces conference that disparate populations from disparate places began to recognize their shared struggles, which in that moment manifested itself through the campaign to stop the Delano II prison. Coming out of the conference, organizers scaled up their campaign using the full range of insights developed through the conference by recruiting additional populations from a range of backgrounds whose shared concerns for environmental justice, in all its various forms, was sufficient to bring them

¹⁸See previous footnote explaining that the three Ps highlighted by youth organizers were actually police, prisons, and pesticides.
together to fight against the Delano II prison despite any preconceived notions or prejudices about the irreconcilability of their varied interests or priorities (Gilmore 2008). This meant that the lawsuit against the CDC, which was made possible by California’s NEPA-modeled environmental review process and the US Administrative Procedures Act, gave organizers an opportunity to scale up, both horizontally and vertically, their legal case by bringing in a range of supporters, from both urban and rural parts of the state, who recognized in the struggle their own senses of environment that were threatened by the proposed prison. The conceptual flexibility of the concept of environment within environmental policy meant that all of these supporters could find traction for their seemingly—and in some cases realistically—incongruous visions of place for the Central Valley, and for the state as a whole.

The Lawsuit

The lawsuit filed on behalf of the three plaintiff organizations, CR, the NLG Prison Law Project, and FKR, made several arguments against the CDC that all centered around the failure of the SEIR to fully consider the environmental impact of the prison. These arguments included the failure to fully and adequately describe the proposed prison development project; failure to consider a reasonable range of alternatives to the proposed prison including the “no project” alternative; failure to adequately consider the cumulative impacts of past projects in addition to the proposed prison; and failure to propose adequate measures to mitigate the significant foreseeable impacts on wastewater treatment, local schools, and the habitat of the Tipton kangaroo rat and the San Joaquin kit fox. The Tipton kangaroo rat is a subspecies of the San Joaquin kangaroo rat whose habitat is limited to a relatively small stretch of land in Kern County. The San Joaquin kit fox is a small nocturnal fox whose diet includes kangaroo rats and whose habitat is limited to portions of the San Joaquin Valley; it is one of the most endangered animals in California (Defenders of Wildlife 2012). Neither species was identified on the specific plot of land proposed for the Delano II prison during the short five-day trapping survey conducted by the
CHAPTER 3. POLICE, PRISONS, AND POLLUTION

CDC during preparation of the SEIR. However, numerous comments submitted to the CDC in response to the SEIR pointed out that they had both been found on adjacent lands in previous surveys, including on the site of the North Kern State Prison located across the street from the proposed Delano II prison site (California Department of Corrections 2000b).

Shortly after the lawsuit was filed, the CDC challenged the legal eligibility of CR and the NLG Prison Law Project to be parties to the suit. The CDC claimed that the underlying intent for both organizations was not predicated on “environmental harms” that might result from shortcomings in the SEIR, but rather, on a non-environmental political agenda aimed solely at stopping prison expansion. The court agreed with the CDC position and issued a preliminary ruling disqualifying both organizations from continuing as parties to the lawsuit on the grounds that both organizations lacked legal standing to bring suit under CEQA.

The concept of standing is an extremely important part of environmental law because it is the factor that establishes whether or not a person or organization can legitimately use the courts to challenge environmental policy decisions (Fogleman 1990). Standing in the Delano II lawsuit rested on the plaintiffs’ claim that there were three areas of environmental impacts not considered under the SEIR that would cause harm to the plaintiffs. The Court ruled that neither CR nor the NLG Prison Law Project sufficiently substantiated that any of these three areas of impacts would directly inflict injuries upon members of either organization since they did not bring forth evidence that their members lived, worked, or played within the local environments that would be affected if the prison were to be constructed. Even though the EIA process is intended to consider a range of environmental impacts including social and economic impacts resulting from changes to the physical environment, the court chose not to accept the argument that the prison’s physical presence would directly impact the lives, livelihoods, and communities of incarcerated individuals.

19 Friends of the Kangaroo Rat v. California Department of Corrections, 4 Cal. Rptr. 3d 558 (2003).
20 Friends of the Kangaroo Rat v. California Department of Corrections, 4 Cal. Rptr. 3d 558 (2003).
CHAPTER 3. POLICE, PRISONS, AND POLLUTION

people since those impacts were not part of the plaintiffs’ legal claims against the CDC under CEQA. This setback did not stop the prison abolitionist and environmental justice coalition from continuing to support FKR, but there is some irony in that the environmental policy established to protect the human environment, ultimately only functioned to serve those people whose interests were explicitly in protecting kangaroo rats, and not those people fighting on behalf of the people whose lives and environments would be most directly impacted by the proposed prison. But it’s not in the least bit ironic or coincidental that the campaign organizers deliberately worked to bring together these disparate organizations for the common cause of stopping the proposed prison and all of its negative environmental impacts.

The Court Rulings

After the trial court issued its preliminary decision that removed CR and the NLG Prison Law Project as plaintiffs, the trial proceeded, and in July 2001, a year after the lawsuit was originally filed, the Kern County Superior Court issued its final decision in the case. The court issued a ruling that favored the anti-prison coalition, finding that the CDC had failed to adhere to CEQA guidelines by not fully considering the combined environmental impacts of the proposed prison in light of the existing North Kern State Prison and community corrections facility on the adjacent lots. In light of this ruling, the court issued an injunction preventing the CDC from proceeding with its plans to implement the Delano II prison until they fulfilled their obligations under CEQA.21 Though the court ruling generally favored the anti-prison coalition, the court only

21 Friends of the Kangaroo Rat v. California Department of Corrections, 4 Cal. Rptr. 3d 558 (2003) and Friends of the Kangaroo Rat v. California Department of Corrections, Ordered Not Officially Published, Previously Published at 111 Cal. App. 4th 1400 (2003). The ruling was originally published by the California Appellate 4th District Report, however it was later depublished and portions were stricken from the original Report; the depublished court ruling appears in the California Reporter, 3rd District. The difference between the two is that the court’s discussion of the water and traffic issues do not appear in the depublished ruling. A copy of the full original ruling containing the court’s discussion of the water and traffic issues was obtained directly from the environmental lawyer who represented FKR in the case, Babak
granted one of the plaintiffs’ arguments, rejecting the other arguments about the need for additional mitigation measures including those for the endangered species and the need for further consideration of the no project and no build alternatives. The court determined that the CDC had already fulfilled its CEQA obligations regarding these two additional points. Though the anti-prison coalition argued, both in their original comments on the SEIR and during the trial, that the mitigation measures outlined by the CDC were insufficient, the court held that the mitigation measures contained within the SEIR were in fact adequate. Regarding the no project alternative, CDC argued and the court concurred that it had already fulfilled its obligation to consider the no project alternative by virtue of its baseline investigation of the proposed site as well as in its original 1995 EIR for the prison. By granting the cumulative impact argument and rejecting the rest of the arguments, the court reduced the scope of future legal arguments that the anti-prison coalition could use to hold the CDC accountable for complying with CEQA. In any case, the court ordered the CDC to postpone construction until it addressed these deficiencies in its analysis by returning to the EIA process to conduct further studies of the cumulative impacts of past and probable future projects, and circulate that study for an additional round of public comments.

The CDC complied with the court order and produced a Draft Revised Cumulative Impact Analysis (RCIA). This document provided a brief history of the region and detailed analysis of the projects developed in the 15-year period leading up to Delano II, as well as several projects planned for the region over the next few years (California Department of Corrections 2001). As the RCIA was still published as part of the EIR process, the CDC circulated it for public review and comments in August 2001. During the review period, the campaign organizers, along with other members of their anti-prison coalition, scrutinized the RCIA and submitted comments repudiating the CDC’s findings. The CDC responded to the comments in a Final RCIA, issued a NOD, and submitted both to the Superior Court, along with a petition asking the court to lift the injunction stopping them from commencing construction of the Delano II prison.

Naficy.
CHAPTER 3. POLICE, PRISONS, AND POLLUTION

Following a second trial to hear arguments from both parties as to the sufficiency of the RCIA, the court ruled in April 2002 in favor of CDC, approving the RCIA and lifting the injunction against the implementation of the proposed prison. The anti-prison coalition, however, was not ready to give up their fight so in July 2002, they filed an appeal with the California Fifth Appellate District Court, causing the injunction to remain in place until the case was decided by the appellate court. The appeal made by the anti-prison coalition contained three issues: the “water issue,” “traffic issue,” and “farmland issue.”

The water issue concerned the CDC’s findings in the RCIA regarding the impacts of the proposed prison on local water supplies and on the municipal water district. Regarding the traffic issue, the coalition argued that CDC had not addressed cumulative impacts to traffic patterns in any of the environmental analyses. On the farmland issue, the coalition argued that the CDC’s conclusion that the significant and unavoidable impacts to farmland were unmitigable failed to consider mitigation measures such as establishing an agricultural easement in the vicinity of the proposed prison. The appeal process lasted until August 2003, more than three years after the initial lawsuit was filed. Ultimately, however, the appeals court ruled against FKR and the anti-prison coalition on all three points, clearing the path for the CDC to commence construction of the Delano II prison. Importantly, as I discuss later in the chapter, following the decision handed down by the Court of Appeals, FKR, many of the other member organizations in the anti-prison coalition, and a number of uninvolved parties successfully petitioned the court to depublish its decision to prevent the rulings from establishing new legal precedents.

22 Notably absent in the appeal was the argument that the RCIA did not adequately address the cumulative impacts of the proposed prison on sensitive species, e.g., the Tipton kangaroo rat and San Joaquin kit fox. The sensitive species issue was raised during the trial court hearing on the RCIA alongside the other three issues argued on appeal, but the sensitive species issue was dropped from the appeal.

23 Friends of the Kangaroo Rat v. California Department of Corrections, 4 Cal. Rptr. 3d 558 (2003) and Friends of the Kangaroo Rat v. California Department of Corrections, Ordered Not Officially Published, Previously Published at 111 Cal. App. 4th 1400 (2003). The ruling was originally published by the California Appellate 4th District Report, however it was later depublished and portions were stricken from the original Report; the depublished court ruling
CHAPTER 3. POLICE, PRISONS, AND POLLUTION

The court decision contains several points warranting discussion related to the use of a legal strategy based around the EIA process as part of a social and environmental justice campaign. Part of understanding how this campaign functioned through and against the racial environmental state is interrogating the operation of the legal and procedural aspects of the state in relation to both the anti-prison coalition’s ambitions and the CDC’s functional objectives. In the sections that follow, I dissect the court decision in order to highlight the potential openings and limitations that come with a legal strategy that engages the state in a racial and environmental conflict through the EIA process.

The Water Issue

The water issue concerned the CDC proposal within the RCIA to switch the source of water supplying the proposed prison. The existing farmland on the proposed site used surface water supplied by the South San Joaquin Municipal Utility District (SSJMUD), supplemented by a small amount of groundwater when needed. The CDC proposed supplanting the surface water supplied by SSJMUD with groundwater pumped from on-site wells, and redistributing treated wastewater from the proposed prison for the irrigation of neighboring farmlands. The CDC concluded that groundwater pumping would be cumulatively beneficial to the groundwater supply, and despite posing significant impacts to the ground and surface water supplies, no further mitigation steps were necessary (California Department of Corrections 2000a; California Department of Corrections 2001). FKR argued that these conclusions were not supported by sufficient evidence, that the additional groundwater pumping would negatively impact the aquifer, appears in the California Reporter, 3rd District. The difference between the two is that the court’s discussion of the water and traffic issues do not appear in the depublished ruling. A copy of the full original ruling containing the court’s discussion of the water and traffic issues was obtained directly from the environmental lawyer who represented FKR in the case, Babak Naficy.
and that this change would have negative economic impacts on SSJMUD.\textsuperscript{24} Even though SSJMUD was not a party to the lawsuit, the campaign organizers had successfully reached out to individuals within SSJMUD and convinced them of their aligned interests in stopping the prison. The result of this coordination was that SSJMUD representatives worked with the anti-prison coalition to further scrutinize the CDC environmental analyses, which is how FKR came to represent SSJMUD’s interest in court with the water issue.

Rather than directly address the points that FKR raised regarding the water issue, the court ruled that CDC was shielded from the water issue because the anti-prison coalition “failed to exhausted its administrative remedies with regard to the issue it [raised] concerning the use of water at the site.”\textsuperscript{25} In order for an issue to be raised as the basis for legal action in a CEQA case, the party bringing the lawsuit needs to provide evidence that the issue was previously brought to the attention of the lead agency conducting the environmental review process during one of the official public feedback periods through appropriate channels such as at a public hearing or by submitting written comments to the agency’s public liaison. FKR argued that two separate letters regarding the water issue were submitted to the CDC as public feedback to the RCIA, and therefore, legitimate attempts were made by the anti-prison coalition to exhaust their administrative options. The court, however, ruled that neither of the letters sufficiently met the legal criteria for exhaustion of administrative options.

The court additionally rejected a third letter, sent on behalf of the SSJMUD, that discussed the water issue as argued by FKR, and which was submitted as evidence to the trial court prior to the hearing on the RCIA. According to Ruth Wilson Gilmore, this letter was originally submitted during the RCIA public comment period, however it was not recorded in the administrative record because the date that displayed on the letter appeared to be after the end of the public

\textsuperscript{24}Friends of the Kangaroo Rat v. California Department of Corrections, Ordered Not Officially Published, Previously Published at 111 Cal. App. 4th 1400 (2003)

\textsuperscript{25}Friends of the Kangaroo Rat v. California Department of Corrections, Ordered Not Officially Published, Previously Published at 111 Cal. App. 4th 1400, p. 7 (2003)
CHAPTER 3. POLICE, PRISONS, AND POLLUTION

comment period. However, the letter was sent as a Microsoft Word document and the date recorded within the letter automatically updated itself each time the letter was opened, meaning that when it was opened by the CDC after the end of the public comment period, it displayed the current date and not the date the letter was actually submitted. The letter was therefore erroneously excluded from the administrative record, subsequently ignored by the trial court, and ruled as irrelevant and inadmissible by the appellate court.26

The court’s rejection of the first two letters was based on a combination of administrative technicalities and subjective interpretation of how environmental impacts fit within the bounds of environmental policy. The first letter was sent by an administrator at SSJMUD, while the second was sent by Craig Gilmore, one of the anti-prison campaign organizers. The court ruled that the first letter was invalid because it was addressed to someone other than the designated EIR contact person, it didn’t explicitly state that it was in reference to the EIR or RCIA, and because it was dated April 10, 2001, which was prior to the official public review period that began on August 25, 2001.27 Even though it was clear by the content of the letter that it was addressed directly to the CDC and commented on the impacts of the proposed prison, the “administrative record” submitted by the CDC in the form of the published public comments on the RCIA did not include the letter, and the court ruled that the letter therefore did not qualify as evidence that FKR had exhausted its administrative options to seek relief directly from the CDC.28 Does this mean that there was no evidence that the letter could have qualified as part of the administrative record thus potentially preserving the water issue in the lawsuit? Hardly, yet the court used its discretion to reject it as valid evidence for not adhering strictly to the acceptable administrative procedures.

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26R. Gilmore, personal correspondence with the author (2016); Friends of the Kangaroo Rat v. California Department of Corrections, Ordered Not Officially Published, Previously Published at 111 Cal. App. 4th 1400, p. 21-22 (2003).

27 Friends of the Kangaroo Rat v. California Department of Corrections, Ordered Not Officially Published, Previously Published at 111 Cal. App. 4th 1400, p. 13 (2003)

The court’s ruling highlights the need for administrative exactitude when dealing with legal proceedings, even in instances of intra-agency communications.

The court further ruled that even had the first letter been included in the administrative record, neither it nor the second letter addressing the water issue sufficiently linked the potential impacts of the prison to physical changes in the environment, and were therefore premised around impacts outside the scope of CEQA. The first letter petitioned the CDC and the State Legislature to remedy the fact that SSJMUD was excluded throughout the prison planning process despite the fact that the proposed prison would directly impact SSJMUD operations. The letter specifically pointed out that the proposed use of groundwater and the redistribution of treated wastewater to neighboring farms would potentially “[endanger] both farming in the area of the prison as well as the District’s ability to retain its current water allocation and financial stability.”

The second letter further clarifies this point:

By ignoring the fiscal impacts of their water plans on SSJMUD and its landowners, the CDC has in fact not provided convincing evidence that the project would have beneficial cumulative impacts. Conversation with SSJMUD suggest that the CDC’s plan could result in higher water costs for other SSJMUD water users. If higher water costs might be anticipated, the RCIA must determine whether higher water costs might cause more agricultural losses, bankruptcies, further consolidation of small farms into larger operations, whether the lack of affordable water might keep other developments from locating in Delano.

As in NEPA, socioeconomic considerations in and of themselves are not directly covered by CEQA impact analysis requirements. However, socioeconomic effects directly caused by, or which result in changes to the physical environment do fall within the scope of both CEQA and NEPA if it can be shown that there is a direct chain of causality linking changes in the physical

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29 SSJMUD qtd. in *Friends of the Kangaroo Rat v. California Department of Corrections*, Ordered Not Officially Published, Previously Published at 111 Cal. App. 4th 1400, p. 14 (2003)

30 C. Gilmore qtd. in *Friends of the Kangaroo Rat v. California Department of Corrections*, Ordered Not Officially Published, Previously Published at 111 Cal. App. 4th 1400, p. 16 (2003)
environment to socioeconomic impacts (Daffron 1975; Fogleman 1990). In the case of the second letter that raised the water issue, the Court determined that the basis for dissent lay only in economic impacts to SSJMUD due to changes in water usage, and not due to changes in either the physical surface water or groundwater conditions. Because neither letter explicitly linked the social and economic impacts of the prison to the physical environmental impacts related to groundwater pumping—which the EIR makes clear there would be—the court used its discretion to rule that the impacts to SSJMUD were outside the scope of environmental impacts covered under CEQA, and therefore did not qualify as having raised the water issue within the administrative record. Even though the letter referred to the physical environmental impacts on groundwater levels, the court decided that the language within the letter did not adequately establish a chain of direct causality between groundwater impacts and the economic impacts to SSJMUD that formed the basis for the claim regarding the adequacy of the RCIA. It didn’t matter

31 CEQA guidelines §15131(a) reads: “Economic or social effects of a project shall not be treated as significant effects on the environment. An EIR may trace a chain of cause and effect from a proposed decision on a project through anticipated economic or social changes resulting from the project to physical changes caused in turn by the economic or social changes. The intermediate economic or social changes need not be analyzed in any detail greater than necessary to trace the chain of cause and effect. The focus of the analysis shall be on the physical changes.” However, §15131(b) clarifies this point by adding: “Economic or social effects of a project may be used to determine the significance of physical changes caused by the project. For example, if the construction of a new freeway or rail line divides an existing community, the construction would be the physical change, but the social effect on the community would be the basis for determining that the effect would be significant...Where an EIR uses economic or social effects to determine that a physical change is significant, the EIR shall explain the reason for determining that the effect is significant.” Finally, part (c) lays out the responsibility of the lead agency regarding any economic or social impacts of a project: “Economic, social, and particularly housing factors shall be considered by public agencies together with technological and environmental factors in deciding whether changes in a project are feasible to reduce or avoid the significant effects on the environment identified in the EIR. If information on these factors is not contained in the EIR, the information must be added to the record in some other manner to allow the agency to consider the factors in reaching a decision on the project” (Association of Environmental Professionals 2014). See also Citizens Assn. for Sensible Dev V. County of Inyo (132 Cal. App. 3d 151 (1985)), Citizens for Quality Growth v. City of Mt. Shasta (189 Cal. App. 3d 433 (1988)), cf. Metropolitan Edison Co. v. People Against Nuclear Energy (460 US 766 (1983)), Baltimore Gas & Electric Co. v. NRDC (462 US 87 (1983)).
that FKR made valid arguments regarding physical environmental impacts during the trial since the court disqualified the issue entirely based on the specific way the argument was raised in the initial comment letter to the CDC during the public feedback period. This nuance of causality, dependent upon physical changes to the environment, and the technical framing required to craft an argument that adequately addresses it, is one of the important ways in which judicial narrowing decreases the scope and applicability of NEPA and similar EIA statutes to social environmental impacts. Even if the causal relationship between physical and social environmental impacts is established, it is up to the lead agency and courts to use their discretion in determining whether or not the issue has been properly framed and the chains of causality properly established.

The Traffic Issue

The second issue in the Court of Appeals decision was the traffic issue. The core of this issue was the claim that the CDC did not adequately consider the cumulative impact on traffic of the prison in conjunction with past and probable future projects within the vicinity of the proposed prison. FKR based its argument on several points, but the two most contentious were that the California Department of Transportation had submitted comments to the effect of calling on the CDC to perform a 20-year traffic study, and that the CDC cumulative analysis did not consider Delano’s General Plan and the Kern County Council of Government regional transportation model. The court rejected this issue on two fronts. First, the court followed a similar set of technicalities as it did with the water issue to reject the administrative record that would allow FKR to raise the traffic issue on appeal. Second, the court ruled against both the traffic study and consideration of the local and regional planning documents based on the premise that the CDC did conduct some cumulative traffic modeling considering other past and future projects, and therefore, had fulfilled their obligations under CEQA since neither of the other considerations was a statutory requirement under CEQA. The legal basis for this ruling doesn’t contribute to the current discussion, however the point worth reiterating is that the comments submitted during the EIR
public feedback period that raised the traffic issue came from the City of Delano and the California Department of Transportation, both of whom were opposed to the new prison, reinforcing the idea that the EIA process facilitated the political organizing strategy of developing unexpected partnerships based on their shared interests in protecting their individual interests as they relate to environmental impacts.

The Farmland Issue and Depublication of the Court Opinion

The third and final issue raised in the Court of Appeals decision, the farmland issue, was important not just within the scope of this case, but within environmental law and policy more generally. In the revised cumulative impact analysis, the CDC concluded that constructing the prison would result in a total of 2,300 acres of agricultural land being converted to nonagricultural uses, and that no mitigation measures were available to reduce this environmental impact. Therefore, it concluded that the conversion of farmland was a significant and unavoidable environmental impact. FKR argued that this conclusion was insufficient to the requirements of CEQA because it failed to consider, among other things, the possibility of mitigating the environmental impact through the establishment of agricultural easements on farmland in the vicinity of the proposed prison. FKR made the case that establishing an agricultural easement might function as a mitigation measure for developing over agricultural lands by preserving in perpetuity, a similarly sized portion of land outside of the project area for exclusive use as agricultural land. Creating such an easement, FKR argued, would shield farmland around Delano from future projects, thus minimizing the cumulative effects of urban development from further eroding agricultural land uses in Delano. Such an arrangement would presumably meet the State of California’s objectives to prevent the overall loss of farmland throughout the state. The Court, however, rejected this argument, stating that once the farmland was taken out of agricultural use,

32 Friends of the Kangaroo Rat v. California Department of Corrections 4 Cal. Rptr. 3d at 564 (2003).
there was no way to get it back, and no mitigation would remedy this; the only way to mitigate the loss of farmland would be to not build the prison in the first place.\textsuperscript{33}

In rejecting FKR’s argument regarding the possibility of using agricultural easements as a mitigation measure, the court stated that such measures would not, in its interpretation, meet the criteria for mitigation as outlined in the CEQA guidelines. The court stated that a legal arrangement such as an easement would fail to compensate for a loss of farmland by “replacing or providing substitute resources or environments.”\textsuperscript{34} The court’s ruling was based on the argument that establishing an agricultural easement outside the proposed project site would not actually reduce the loss of farmland caused by the proposed prison or other probable future developments since once the farmland was converted to a prison, that farmland was gone, there would be a net loss of farmland, and no easements would change that fact. The court did not consider that the State encourages—and provides funding for—the use of easements on private farmland as one measure to protect agricultural lands (California Department of Finance 2012).

Had the court ruled in the anti-prison coalition’s favor on this issue, the CDC would likely have simply produced another revision to its EIR that provided for an agricultural easement on a nearby property as mitigation for the prison’s reduction of farmland, not unlike the many other concessions frequently negotiated between developers and local agencies. Indeed, the State’s budget for the Delano II prison included roughly six-million dollars set aside for infrastructure like schools as part of the CDC’s local concessions acknowledging the necessary mitigations to the prison’s impacts. In terms of the analysis at hand, the question is not whether or not agricultural easements can mitigate the loss of farmland, nor whether such considerations would stop the proposed Delano II prison from coming into being. Rather, it is how raising the farmland issue in court changed the political stakes for the anti-prison coalition. The farmland issue

\textsuperscript{33}Friends of the Kangaroo Rat v. California Department of Corrections 4 Cal. Rptr. 3d at 565-566 (2003).

\textsuperscript{34}Friends of the Kangaroo Rat v. California Department of Corrections 4 Cal. Rptr. 3d at 567 (2003).
allowed the coalition to reach out to farmers, farmworkers, and the agricultural industry broadly to bring them into the fight against prisons. Though on any other day the members of FKR would likely argue that agricultural land uses pose as much if not greater risk to small mammals like the endangered Tipton kangaroo rat than might a prison, the farmland issue in particular, and the campaign against the prison more generally, brought the two sides together in a unified fight against the prison.

The ramifications of the court’s ruling on the farmland issue extend beyond this case study, with continuing relevance in ongoing debates as to whether or not the loss of agricultural lands to development can be reasonably mitigated, and what responsibility government agencies have to evaluate and mitigate the effects of development projects on agricultural and other protected lands (e.g., Safran 2004; Bass 2014). Farmland is considered an important economic and environmental resource within California, and the state has taken measures to reduce the impacts of urban development from encroaching on agricultural production. Indeed, the state runs a Farmland Conservancy Program that provides funding to “encourage the long-term, private stewardship of agricultural lands through the voluntary use of agricultural conservation easements” (“California Farmland Conservancy Program Act” 2011). Therefore, when the court rejected the argument made by FKR about the need for the CDC to at least consider mitigation efforts through the establishment of agricultural easements, people throughout the state who were otherwise unconcerned with the prison began to take notice. After the Court of Appeals issued its decision rejecting the FKR appeal, the organizations within the anti-prison coalition, as well as numerous other agencies and organizations from across the state successfully petitioned the Court to depublish the final ruling, meaning that the case cannot be cited as legal precedent by either courts or parties in future cases.35

Requests to depublish the court ruling came from a broad range of organizations and individuals that are worth mentioning because they speak to the wide-reaching ramifications of

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35 *Friends of the Kangaroo Rat v. California Department of Corrections* 4 Cal. Rptr. 3d 558.

126
this decision. The initial request, made by the California Farm Bureau Federation and the Sierra Club, was joined in support by the Sacramento Area Flood Control Agency, a Public Policy Specialist from the University of California Cooperative Extension, the American Farmland Trust, the Amador Land Trust, the Fresno County Farm Bureau, the City of Davis Farmland Preservation Program, Protect Our Water, the San Joaquin Raptor Rescue Center, the San Joaquin Valley Conservancy, the Central Valley Safe Environment Network, the Community Alliance with Family Farmers, the County of Sonoma and Sonoma County Agricultural Preservation and Open Space District, the California Resources Agency, and an independent environmental attorney. ["3116]

Depublication of the *Friends* ruling has had an important and lasting impact on case law regarding mitigating the loss of agricultural lands within and beyond California, because even though it cannot be cited as legal precedent, the case still informs both administrative and legal decision making (Safran 2004; Meserve 2011; Bass 2014). Courts have differed in their findings regarding the validity of easements or fees in-lieu as mitigation measures required to be considered under CEQA. In 2004, the California Court of Appeals for the third district issued a conflicting ruling in *South County Citizens for Responsible Growth v. City of Elk Grove* (2004 Cal. App. Unpub. 1 (2004)) that agricultural easements or conservation fees could mitigate the loss of agricultural lands to future development pressures, and therefore, the lead agency had an obligation under CEQA to address the issue in its impact assessments. Like *Friends*, the *South County Citizens* decision was not published, so it similarly could not be cited as legal precedent. However, a decade after the *Friends* case was decided, the California Court of Appeals for the First District issued a decision in the case of *Masonite Corp. v. County of Mendocino* (218 Cal. App. 4th 230 (2013)) in which the Court ruled, like in the South County Citizens decision, that a lead agency has a CEQA obligation to consider the use of easements or fees as appropriate mitigation measures for the conversion of agricultural lands.36 Unlike the previous two cases, this

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case was published, so at least in the First District, a precedent was finally established requiring consideration of agricultural mitigation within the CEQA process (Bass 2014).

**Building a Movement to Abolish the PIC**

Even though the Appellate Court lifted the injunction that was preventing the CDC from implementing the Delano II prison construction, the anti-prison coalition continued with the other two prongs of their strategy to put an end to California’s prison construction boom—the legislative strategy and the movement capacity building strategy. Throughout the entire litigation process, the campaign organizers never let up on their legislative campaign to convince the lawmakers in Sacramento to defund the prison construction (Braz and Gilmore 2006). As the legal case drew to a close, the organizers redoubled their efforts in petitioning the State Legislature with the added support from the numerous individuals, organizations, government officials, and public agencies who were drawn into the EIA campaign and court battle. Despite their best efforts, the State Legislature went through with the lease-purchase financing to fund the prison construction. The Delano II facility began receiving prisoners in 2005 under its new name, the Kern Valley State Prison.

The opening of Kern Valley State Prison did not mark the end of the organizers’ struggle. Ruth Wilson Gilmore (2008) argues that the multi-pronged Delano II campaign solidified political structures that stretched across the rural-urban divides to bring together disparate communities in the environmental justice struggle to stop the growth of, and ultimately abolish, the prison industrial complex. The Delano campaign demonstrates the conceptual flexibility of the environmental justice framework for engaging the racial environmental state through the environmental impact assessment (EIA) process mandated by state and federal environmental policies. At the Joining Forces conference held shortly after the campaign began picking up speed, the campaign organizers urged participants to think about the possibilities for community
organizing and building political power by stretching the concept of environmental justice to include other factors beyond just toxics to consider, for example, the impacts of prisons on both rural and urban communities. Bringing this framework back to the Delano II campaign allowed the anti-prison coalition to use the broad range of environmental impacts identified by the CDC to reach new constituencies. The organizers showed how all of the prisons impacts, to schools, water, traffic, urban development, agriculture, and protected species, made the proposed prison incompatible with visions for Delano as anything but a place for locking people in cages.

This strategy allowed organizers to convey to a broad constituency their common sense message that prison construction was neither a prudent nor effective way of building safer communities or spurring local economic development, and thus extended the reach of the campaign to stop the prison beyond longtime prison abolitionists and traditional environmentalists opposed to new construction. Together, these area residents, local and state officials, environmental justice advocates, and prison abolitionists formed a loose coalition cohered in their opposition to the prison and the conversion of farmland into carceral space that tapped into longstanding regional institutions and capacities that that have shaped development throughout the region, such as the water district, the agricultural industry, the cultural and political economic legacies of farmworker organizing, and the networks of social and environmental justice activists who had already been organizing within the Central Valley to rid their communities of toxic pollutants and pesticides. \(^{37}\) For the campaign organizers, understanding the historical and geographical specificity of Delano as more than just another prison town allowed them to tap into these capacities to identify potential supporters, even if it initially seemed that they had little common cause.

\(^{37}\)Examples of earlier environmental justice struggles in the San Joaquin Valley that provided inspiration are the campaign led by El Pueblo Para el Aire y Agua Limpio to stop a toxic waste incinerator from being built in Kettleman City in 1991 and the longstanding campaign led by the West County Toxics Coalition—one of the participants in the Joining Forces conference—to hold Chevron and other companies accountable for making Richmond a hotbed of environmental racism (Kay 1994).
Despite the success of the campaign in rallying opposition to, and significantly delaying construction of the Delano II prison, the prison still eventually opened, and as of 2016, keeps nearly 4,000 people locked in cages (Department of Corrections and Rehabilitation, State of California 2016). One of the remaining questions that this case study leaves unanswered is whether the campaign was ultimately successful as part of the broader prison abolition movement, or if the limitations of the legal strategy premised on the EIA process only served to prolong what some might argue was a losing battle against the state on the state’s terms. On the one hand, the state only rarely loses NEPA-type court cases outright without external intervention such as an executive override or legislative action, so it was relatively unlikely that the legal strategy alone would permanently stop the prison from being built (Lazarus 2012). Within the EIA process, project abandonment or the no action alternative rarely emerges as the decided outcome, even in the face of lawsuits that might try to compel such a decision as in the Delano II case. Rather, the public participation process—and even litigation—is more likely to result in modifications to the parameters of the proposed action or concessions made within the implementation plan, such as additional environmental mitigation measures or payment of concession fees-in-lieu to compensate for environmental impacts. In the case of Delano II, however, such concessions would still have meant that a new prison would be built and more people could be locked in cages. The only legal outcome that would have represented a victory for the organizers was for the CDC to completely abandon its plans for any new prisons, in Delano or elsewhere. Moreover, in this particular case, because an EIR had already been approved in 1995, the no action alternative within the SEIR was actually for the CDC to proceed with its earlier plans rather than the revised plan that triggered the need for reopening the EIA process and the SEIR, which the CDC pointed out in its response to comments (California Department of Corrections 2000b).

On the other hand, the organizers had a broader vision of success in mind for the campaign as a whole beyond the legal strategy. While stopping the prison through the EIA process would have been a phenomenal victory, engaging the EIA process provided a concrete way for the anti-prison coalition organizers to reach out to and politicize new constituencies who
could identify their own visions for justice and placemaking in the struggle. The EIA process itself provides structures through which people can mobilize, gain an understanding of the logics used to justify and legitimize state actions, and formally and legally engage in conflicts over the state that are grounded in the material conditions of their environments. By building a campaign that hooked into these structures of the racial environmental state, the campaign organizers were able to bring together a patchwork coalition of people and organizations through the recognition of their shared understandings that the proposed prison was an environmental harm in all of the different ways that people relate to their environments throughout their daily lives. Furthermore, thinking about the proposed prison through the lens of environmental impacts provides a way for people throughout the state to grasp the very real ways in which the prison affects communities and social environments that span the rural-urban divide because of its impacts to the places where prisoners come from and the policing practices used to keep the prisons filled. It therefore seems likely that the campaign organizers—those prison abolitionists and environmental justice activists who helped publicize, organize, and materialize opposition to the prison construction—engaged the EIA process because they recognized its potential capacities for building and sustaining a broader social movement against the use of cages as a racist and violent method for resolving structural problems plaguing rural economies like that of Delano and urban communities like those throughout Los Angeles County where so many of the state’s prisoners originate (Gilmore 2007).

For people who were mobilized around the campaign’s call for an expansive struggle for social and environmental justice, the fight to stop Delano II provided an entry point to, or path for continuity in, developing an environmental justice-oriented political identity, and engagement in anti-racist community organizing.\footnote{38}{For other examples of this politicization process, see Bullard (1994), Pulido and Peña (1998), Gilmore (2004; 2007).} The campaign built on and helped to consolidate the existing loose networks of environmental justice, environmentalists, labor unions, and immigration rights
organizations operating between the Central Valley and other parts of California. One of the
sponsoring organizations of the Joining Forces conference, the Center on Race, Poverty, and the
Environment, established a coalition called the Central California Environmental Justice Network
(CCEJN) the year before the Joining Forces conference, and that conference was one of the first
CCEJN initiatives. The combination of the Joining Forces conference and the extensive
organizing efforts around the campaign to stop the Delano II prison helped to consolidate CCEJN
into an enduring and important formation within the Central Valley for developing organizational
capacities to combat all of the overlapping and intersecting forms of environmental injustices
affecting their communities.

For those public administrators, members of local government, and others who were not
entirely swayed by the abolitionists’ broader vision for a social movement to end the PIC, the
campaign shifted people’s attitudes toward the state’s prison construction program, particularly
given the widespread negative economic impacts of prisons on small rural town. It’s difficult to
assess the impact of the campaign on the CDC or others within the statewide government
bureaucracy who advocated for the new prison. But challenging the state institutions behind
prison construction through a locally situated struggle allowed the prison abolitionists to engage
the state across geographical and political scales, and to use the conflicting political agendas of
state institutions operating at these different scales against each other, for example by pitting the
local city officials against the state officials once the locals recognized the detrimental
ramifications of the additional prison. Even though the legal case built around the EIA process
didn’t accommodate the abolitionists’ arguments regarding the environmentally racist differential
impacts of the prison on local populations and communities of color across the state, as part of a
broader social movement, the campaign succeeded in shifting discourses within and against the
state about the racist institution of mass incarceration and the policing practices that sustain it, as
well as the ineffectiveness of the “colorblind” policy of transforming rural landscapes into
carceral spaces as a means of combating crime and stimulating rural economies, rather than
investing in institutions and infrastructure to support, for example, education or ecologically
Gilmore (2008) and others have pointed out that when groups of people come together to fight for justice in a common cause like they did in the Delano II campaign, they sometimes face the dilemma of formalizing their organization through the legal and institutional structures of the state in order to gain recognition and legitimacy, which in turn serves as both an opportunity to expand their capacities for political engagement, but also potentially inhibits other possibilities for struggle.  

Engaging the racial environmental state as an entry point for social change, whether through the EIA process or otherwise, carries similar structural opportunities and constraints. This case study demonstrates both the opportunities provided for generating new structures for organizing people across space and place, but also the constraints of both the EIA and judicial processes that establish limitations on the ways that people can engage the state through those means.  

Engaging the EIA process as part of a legal geographical strategy for building a social and environmental justice movement clearly has its advantages and disadvantages. The public participation process institutionalized within the EIA process provides key intervention points for forcing the state to consider not just a range of environmental impacts, but to consider them from the perspective of a range of stakeholders with diverse environmental interests and visions of place in mind. The strict procedural requirements of the EIA process mean that the lead agency is forced to fully consider and evaluate the range of public concerns, and to address the ways in which the proposed project does or does not address and mitigate those areas of concern. Failure on the part of agencies to adhere to their own rules, regulations, and guidelines opens the door to litigation, which in turn has the potential to establish new legal precedents and thus shift the

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39 This is directly related to the non-profit industrial complex, which Dylan Rodriguez defines as “a set of symbiotic relationships that link political and financial technologies of state and owning class control with surveillance over public political ideology, including and especially emergent progressive and leftist social movements” (qtd. in Smith 2007). See Incite! Women of Color Against Violence (2007).
CHAPTER 3. POLICE, PRISONS, AND POLLUTION

terrains of struggle. If much of the racial environmental state’s framework is shaped through policies such as NEPA and CEQA, then it is given meaning through practices such as the EIA process, and force through the operation of laws and courts. Though abstract in its conception, the racial environmental state bears real consequences in the ways that these structures govern and produce the built environment and the populations, both human and otherwise, that inhabit them. Consequently, struggles that can engage the legal process as a means of redirecting practices and influencing policy have the potential to transform the state in the abstract and the material and environmental conditions affecting peoples’ daily lives.

But the administrative procedures of the EIA process are a double-edged sword because they require public participants to adhere to similarly strict procedures in order for their comments to be included within the administrative record and therefore legally valid points of contention in subsequent rounds of the EIA process or litigation proceedings. The ease with which the Appellate Court dismissed the water issue based on the technicalities of the administrative record points to just one of the many ways that the state is insulated through bureaucracy. Additionally, the highly technical and precise fields of environmental and social sciences employed in the EIA process set a high barrier to entry for technical analysis of environmental statements, making the process intimidating to non-experts and people whose geographical and environmental knowledges aren’t represented in the technical language of environmental statements. But as the case study in the following chapter shows, sometimes marginalized forms of knowledge and cultural understanding can be made legible within the EIA process with the right legal framing and organizing strategies. Neither the CDC nor the court did anything to honor the request to translate the environmental reports, but even had the translation been made available, it still wouldn’t make it any easier for the general public to gain access to the highly technical language used throughout the SEIR and RCIA. This limitation of accessibility within the EIA process is also discussed in greater detail in the next chapter where I highlight one of the strategies used by activists—pushing the government agency to establish a technical assistance fund to allow community groups to hire technical experts who could
CHAPTER 3. POLICE, PRISONS, AND POLLUTION

scrutinize the environmental reports and translate the report’s findings into plain language to allow a greater degree of access and participation by members of the affected communities.

Though the EIA process allows members of the general public to participate and intervene within the administrative procedures governing state actions, and even though through this process people can raise issues about environmental impacts unforeseen by the lead agency, the process itself is rife with complex bureaucratic and legal proceduralism. As this case shows, identifying a potential issue within an EIS/EIR isn’t in itself sufficient to carry a lawsuit since there are specific procedures dictating when and how the issue can be raised. Furthermore, even if the procedures are followed according to official guidelines, the reports themselves can be extremely dense and lengthy, and therefore potentially inaccessible to all audiences. One of the points raised by supporters of the anti-prison coalition during the public comment period of the RCIA was a request for the reports to be made available in Spanish and for a subsequent public comment period to be held so that people could have time to read the Spanish translation and provide their feedback.40 This demand lays bare the racialized stakes of this conflict over the environment and over the possible visions for Delano’s future waged through the state. Such demands stake a claim over the state processes that control the production of space for the large number of people within Delano and across California for whom English is not the primary language used to communicate and for whom the capitalist racial environmental state works to alienate, marginalize, and render as surplus.

40 This comment was submitted by Kevin Bundy and was quoted from in the unpublished appellate court ruling. See Friends of the Kangaroo Rat v. California Department of Corrections, Ordered Not Officially Published, Previously Published at 111 Cal. App. 4th 1400, at 33 (2003).
4 Sacred Environments: Resisting Militarization through Cultural and Ecological Preservation

In the previous chapters, I examined the ways in which the EIA process operates alongside Civil Rights and urban planning policy, and how it can provide an entry point for mobilizing diverse constituencies in service of a common cause as part of a broader social movement building strategy. This chapter looks at a case study in which the EIA process provided a platform for articulating cultural and historical claims over contested and militarized space. As in the previous chapter where I showed how the EIA process establishes new institutional structures and mechanisms for the governance of contested racialized space vis-à-vis the Fair Housing Act, this chapter again looks at how the EIA process and NEPA interact with another federal land use and placemaking policy, the National Historic Preservation Act of 1966 (NHPA). I ask what the political ramifications might be of thinking about the EIA process as supplementary to the NHPA, and how linking the two might offer new possibilities for social movement building. I also examine the ways that culturally specific understandings of and relationships to the environment get taken up within the EIA process, and ultimately exceed the legal reach of the NEPA, serving as both an organizing and legal basis for instituting social and environmental change within Mākua.

The case study focus of this chapter is an ongoing series of legal and political battles between the US Army and a coalition of community organizations over the use of Mākua Valley, located on the Hawaiian Island of O‘ahu, for military training exercises involving live weapons and explosives. The contested land has been used by the US military for these “live-fire” training
exercises since before World War II, back when Hawai‘i was still a US territory and not yet a state. Area residents, including many Kānaka Maoli (Native Hawaiians), and other community groups have been organizing opposition to the military presence in Mākua Valley for decades, including an ongoing lawsuit against the Army on the basis of a NEPA violation. With a few exceptions, the military has suspended live-fire training on the contested lands for the duration of the conflict, and has even opened the site to a limited extent for public visits to archaeological sites and sites with cultural significance for Kānaka Maoli. This begs the question of what is special about this case that has caused it to endure for so long, largely in favor of the community groups against the military, particularly given the post-9/11 state of perpetual US militarization. Through a NEPA-focused recounting of major events in the history of the Mākua struggle, I address some of the legal, cultural, political, and geographical issues that have shaped this case and make it useful for thinking about how the EIA process can operate as a springboard for building and sustaining a social movement around counter-hegemonic cultural values and Kānaka Maoli racial identity.

Mākua Valley, located on the leeward coast of the Island of O‘ahu within the Hawaiian Archipelago (see Figure 4.1), has been the focus of a protracted battle between the US Military and Native Hawaiians, or Kānaka Maoli, and their allies since at least the 1920s. The Valley is rich with biodiversity, including some 50 endangered or protected species of plants and animals (US Army Environmental Command and US Army Corps of Engineers 2008). Prior to Western contact, and dating back hundreds of years, it was home to many Kānaka Maoli, whose homes, shrines, sites of prayer, and other culturally significant sites remain intact in spite of half a century of military training and bombing within the Valley (Kelly and Quintal 1977).

The US military initiated its formal occupation of Mākua Valley in 1929 when it acquired three parcels of land for howitzer emplacements (artillery guns), followed shortly thereafter by “military games” and amphibious landings on the Wai‘anae coast and Mākua Beach in the 1930s. Immediately after the Japanese Navy attacked Pearl Harbor in 1941, the US government declared martial law throughout the Territory of Hawai‘i and seized the entire northwestern tip of O‘ahu.
Figure 4.1. Military installations on the Hawaiian Island of O'ahu

Map Author: Keith Miyake

CHAPTER 4. SACRED ENVIRONMENTS

including Mākuʻa and Kaʻena for military security and training purposes.¹ Over the next half century, Kānaka Maoli continued using and living at Mākuʻa Beach despite the military occupation, setting up small communities without permanent structures that endured numerous evictions; many of these “houseless” people turned to Mākuʻa as a place of refuge, healing, and peace, or puʻuhonua (Kajihiro 2009; Kelly and Aleck 1997).

In the 1970s, Kānaka Maoli and their allies, including some of the people evicted from Mākuʻa during World War II, began pushing for the restoration of the Valley and its eventual return to Kānaka Maoli. These activists were directly inspired by the Kānaka Maoli activists who fought for and occupied the island of Kahoʻolawe, which was similarly under US military control, and which spurred the “Hawaiian renaissance” social movement (Kajihiro 2009; Lasky 2010). The struggle around Kahoʻolawe, led by the group Protect Kahoʻolawe ʻOhana (PKO), not only inspired the Mākuʻa activists, but as this chapter will show, it provided a template for a legal campaign based in the NEPA process, as well as a conceptual proto-environmental justice framework for engaging their struggle as one for the Kānaka Maoli right to protect the land and renew its use as a place for cultural and spiritual healing, rather than one for war and destruction. Just as the Mākuʻa campaign would engage the Army through the EIA process, the PKO campaign secured several legal victories based around the EIA process and the National Historical Preservation Act (NHPA) that eventually led to the return of the island to the State of Hawaiʻi and federal funds for the cleanup of environmental toxins and unexploded ordinance across the island (see Kajihiro 2009).

Though the US military had employed the Mākuʻa Valley for training purposes since the early 1940s, they never established formal training grounds until 1985. Per the requirements of the NEPA, the Army prepared an environmental assessment (EA) to construct a company combined-arms assault course on the Mākuʻa Military Reserve (MMR). The newly constructed training facility opened in 1988, and training exercises occurred regularly over the next decade

¹Summarized from Kelly and Quintal (1977).
CHAPTER 4. SACRED ENVIRONMENTS

(US Army Environmental Command and US Army Corps of Engineers 2008, §ES.1). As part of their activities on the MMR, the Army operated an Open Burn/Open Detonation (OB/OD) facility within the Valley where they disposed of munitions and unexploded ordinance, as well, apparently, as various other forms of hazardous waste such as used medical supplies (Aila and Dodge 2012; Dodge 2014a).² In 1992, the US EPA published a notice asking for community input on an Army permit application for the OB/OD area.

In response to the EPA request for input, community members of the Wai‘anae coast began organizing themselves to figure out what they could do about the OB/OD proposal, and formed a nonprofit organization called Mālama Mākua (Ruelas 2013; Dodge 2014b). The newly formed organization initially asked the EPA to extend the public comment period since they only began organizing community members toward the end of the originally scheduled period. They then pressed the EPA to require the Army to prepare a full EIS to assess the impact of OB/OD and training activities on the local environment. The Army initiated, but never completed, an environmental study in 1994, which Dodge (2014b) attributes to Army’s discovery of “dirty stuff: chemical toxins, heavy metals” within the MMR. Following the Army’s abandonment of their initial environmental study, Mālama Mākua continued to organize community members in honor and service of Mākua Valley, with its next big push coming several years later in 1998.

**Live-Fire and Brush Fires**

Between 1988 and 1998, the Army conducted numerous live-fire training exercises at MMR. Throughout this time, brush fires triggered by artillery fire landing outside of designated areas, as well as controlled burns that escalated out of control, became a relatively common occurrence at MMR, with at least 270 documented fires occurring through mid-1998 (Ruelas 2013; Dodge 2014b). Though the fires rarely posed any imminent safety risk to civilian populations because of

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the limited access to MMR, many area residents felt disconcerted by the fires and other training activities at MMR (Earthjustice 2000). So when a series of training-related brush fires burned throughout the Mākua Valley in 1998, culminating with a massive four-day fire that burned around 800 acres, area residents, with the support of the community-based organization Mālama Mākua, took action to stop the fires from continuing to desecrate the Valley and its numerous sacred sites.

Immediately following the large 1998 fire, Mālama Mākua sent a letter to the Army indicating its intent to sue, prompting the Army to halt further training exercises and initiate consultations with the US Fish and Wildlife Service (FWS) to determine the effect of training on endangered species, in accordance with the Endangered Species Act (ESA). As part of their consultation with the FWS, the Army prepared a “Wildfire Management Plan” and the “Mākua Endangered Species Mitigation Plan”. At the same time, the FWS prepared their own study, the “Biological Opinion for Routine Military Training at MMR”. These three documents provide an assessment of the specific impacts of live-fire training and wildfires started by training activities on endangered species, and outline measures and procedures for potentially minimizing risks and impacts, though some of the recommendations were “experimental in nature” without a guarantee of success. Though intended as a show of good faith of the Army’s commitment to following through with their obligations under the ESA, and to provide substantive evidence that their training activities would not cause unmitigated risks to endangered species within the MMR, these documents would ultimately serve as evidence to the contrary in the hands of Mālama Mākua over the ensuing years.

A month after the fire, in October 1998, Mālama Mākua, represented by the environmental law organization Earthjustice Legal Defense Fund, filed a lawsuit demanding the Army evaluate the environmental impacts of the live-fire training exercises under the requirements of the NEPA. Seeing the damage wreaked on the Valley by the brush fire, Mālama

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Mākua wanted to ensure that the Army was held accountable for their activities in the Valley to avoid future incidents and to formally document the impacts that their training exercises were having on the cultural and ecological resources within the Valley. The legal strategy resulted in a settlement agreement between Mālama Mākua and the Army in September 1999, in which the Army agreed not to conduct any training activities at MMR until at least 30 days after completing a NEPA document that evaluated the impacts of all of the training activities they planned for the MMR (Earthjustice 1999).5

Nearly a year after entering into the settlement agreement, the Army circulated a Draft Supplemental Environmental Assessment (SEA) for public comment in September 2000. At the request of community members, the Army held two public hearings regarding the Draft SEA, and received over 130 formal comments. One of the important things to note about the Draft SEA is that it recognized the presence of numerous endangered species whose habitat overlapped the MMR, including 32 plants, two birds, one mammal, and one snail, plus an additional 16 threatened species or species of concern. It further recognized wildfires from training activities as the primary threat to the Mākua ecosystem, and that damage to the native foliage from wildfires would likely allow invasive plants to take over and increase risks to threatened and endangered species.6 In conjunction with the Wildland Fire Management Plan, it was clear to Mālama Mākua and its allies that the Army’s training activities at MMR would result in additional fires, and that these fires posed significant threats to the endangered and protected species inhabiting the Mākua Valley: “[f]ires are inevitable and will start on Army training lands due to the availability of vegetative fuels and the mere nature of the Army’s mission — to conduct livefire training exercises using various types of ammunition, pyrotechnics, and weapon systems.”7

Despite the over 130 public comments submitted to the Army in response to the SEA

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urging further examination of the impacts and alternatives to live-fire training at MMR, in December 2000, the Army followed the Draft SEA by issuing a Finding of No Significant Impact (FONSI) that stated, “because no significant impacts would result from implementing the proposed action an [EIS] is not required and will not be prepared.”\(^8\) In conjunction with the issuance of the FONSI, the Army held a public meeting to announce the results of their investigation, during which they received many more comments from community members raising questions about their findings of no significant environmental impacts due to training activities. As a result of the continued public pressure, they scheduled another community town hall meeting, to be held just over a month after the publication of the FONSI, at which time they would receive additional public comments to be considered before making a decision about resuming training at MMR.\(^9\) Importantly, the date the Army proposed for the town hall meeting fell outside of the 30-day waiting period required before the Army could resume training after publishing its SEA and FONSI under the settlement agreement entered with Mālama Mākua the prior year. Therefore, Mālama Mākua immediately filed a new lawsuit against the Army, charging that the SEA and FONSI were inadequate to fully address the extent of probable environmental impacts and didn’t fully consider other possible alternatives to training in Mākua specifically. They argued that the Army needed to prepare a full EIS in order to address the outstanding concerns of its members as well as the rest of the community members who responded during the public hearings and open comment periods (Earthjustice 2000).\(^10\)

Mālama Mākua and their allies rallied over 500 people at the Army’s community town hall meeting, with 677 written comments and 64 oral testimonies about the Army’s actions. The Army subsequently withdrew the SEA and FONSI, then petitioned the district court to dismiss the pending lawsuit. The Army claimed that because they had withdrawn the NEPA documents, the lawsuit lacked “ripeness,” or the requirement that a case be non-hypothetical and fit for judicial

review—in the same way that ripe fruits are ready to be eaten, ripe cases are ready for legal consumption. The Army further argued that even if the requirements for ripeness were satisfied, they had already withdrawn the NEPA documents, rendering the lawsuit “moot”, or without legal consequences, because the basis for Mālama Mākua’s case was documents that were no longer active.\textsuperscript{11} Mootness is an important concept in NEPA litigation that is closely related to both standing and ripeness. If a case is moot at a particular moment in time, it essentially means that standing is forfeit because if the outcome of a judgment has no relevant consequences for either party, then there is no relief from harm or injury-in-fact, and thus, the requirements for standing are no longer met (Fogleman 1990). Whereas standing is determined at the time the lawsuit is filed, mootness is dynamic and depends on the party’s actions throughout the lifetime of a case (Fogleman 1990). In this case, the court ruled against the Army, asserting that the case was ripe at the time Mālama Mākua filed the lawsuit, and that the case was not moot because the Army had not met its burden of proof for showing that they wouldn’t simply resume their actions once the case was dismissed.\textsuperscript{12} Being that standing, ripeness, and non-mootness are keys to carrying forward a NEPA lawsuit, and the ease with which seemingly minor technicalities can prevent a plaintiff from meeting the requirements for each, this ruling was an important victory for Mālama Mākua (Fogleman 1990). Interestingly, this particular ruling has been cited as precedent on numerous occasions for its clarification of the need to test for ripeness at the time that litigation is entered, and to allow the court to control its docket.

Having been denied its request to dismiss the pending litigation, the Army published a revised SEA and FONSI in May 2001. The major points of revision concerned the scale and scope of the proposed training exercises the Army would conduct at the MMR, with the general

CHAPTER 4. SACRED ENVIRONMENTS

trend being toward reduction of risk of wildfires, but also with the exclusion of future OB/OD activities, relating back to the issue that initially triggered the formation of Mālama Mākua in 1992.13 Like the previous NEPA documents, the May 2001 SEA and FONSI concluded that the environmental impact of their proposed training exercises was not significant, and therefore, that no additional NEPA investigations such as an EIS were necessary. Unswayed, Mālama Mākua and Earthjustice responded to the Army by issuing another request to the district court to require the Army to conduct a full EIS since the changes made to the SEA and FONSI did not address their underlying concerns that the proposed live-fire trainings still posed a threat to the cultural and ecological resources in the Valley. The district court issued a preliminary ruling in July 2001, prior to a full hearing of arguments from both parties, which renewed the ban on live-fire training until the court had a chance to hear arguments from the parties and weigh on the full merits of the case and issue a final ruling regarding the need for the Army to conduct a full EIS; the judge scheduled this hearing for October 29, 2001.14

The preliminary ruling issued by the district court is significant from both legal and political standpoints. On the one hand, the judge in her ruling provides reasonable explanation for the preliminary injunction, or the decision to ban live-fire training until the full trial scheduled for a few months later. The judge points out on several occasions that doubts raised by Mālama Mākua’s and Earthjustice’s arguments as to the insufficiency of the Army’s SEA and error in issuing a FONSI point to “sufficiently serious questions going to the merits to make the case a fair ground for litigation.”15 Furthermore, the decision points out that the preliminary injunction would only remain in place until the full hearing a few months later, and that live-fire training had “not occurred at MMR for almost three years; another few months [would] not cause irreparable

CHAPTER 4. SACRED ENVIRONMENTS

harm,” particularly given the Army’s actions to that point:

The Army voluntarily suspended livefire training exercises at MMR in 1998 and [had] not trained there for almost three years. In December 2000, the Army issued a ‘final’ EA and FONSI, but subsequently withdrew it to address community concerns. This voluntary withdrawal caused a five-month delay in this case. The Army cannot now come into this court and say that national security will be jeopardized by a delay of a few months to determine this case on the merits.16

On both points, the judge relied on the legal standards for “preliminary injunctive relief” in weighing and deciding in favor of Mālama Mākua.17 Though the standards for preliminary injunctive relief, and NEPA-related injunctions in general vary slightly by jurisdiction, they are relatively clearly defined, and the evidence viewed by the courts provided strong justification that the criteria for an injunction were clearly met (Fogleman 1990). In this regard, the judge was clear in her application of law to the issuance of an injunction despite its preliminary nature and without having heard the full evidence of a trial on the merits of Mālama Mākua’s claims, and thus providing Mālama Mākua a somewhat minor, yet important and decisive victory nonetheless (cf. Gartland 2012). On the other hand, in partially weighing the merits of issuing a preliminary injunction based on the evidence of the public interest in avoiding the potential environmental harms caused by live-fire training against the public interest of national security, the judge entered the murky waters of addressing political questions through the application of law.18

In a law review article arguing the case for a national security exemption to NEPA, and with direct reference to the decision in Mālama Mākua v. Rumsfeld, Major Charles J. Gartland (2012) argues: “To enjoin a national defense operation or activity because of a NEPA violation

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18 In legal studies, this is what is known as the “political question doctrine,” or the question of whether or not a court is the appropriate jurisdiction for ruling on an issue that is decidedly political, or if instead those decisions should be reserved per Constitutional and statutory law, for the legislative or executive branches of government. See Tushnet (2002); Mourtada-Sabbah and Cain (2007); Gartland (2012).
CHAPTER 4. SACRED ENVIRONMENTS

not only elevates a procedural statute above national defense priorities, but also opens a path to elevating the judicial branch over the executive and legislative” (30). Although Gartland’s argument in many ways hinges on the potentially problematic notion of military exceptionalism, and to a lesser degree, the executive prerogative power in issues of national security, the question of NEPA’s relationship to other national priorities and statutes, and whether the judiciary is within its discretionary bounds to weigh those priorities is indeed interesting. The court plays a contested role in balancing its power between the political and judicious in assessing the merits of arguments that lie between opposing national priorities and statutes. This is a similar but distinct issue from the one at play in the previously discussed case of Strycker’s Bay Neighborhood Council v. Karlen (“Strycker’s Bay Neighborhood Council V. Karlen” 1980), where the court weighed NEPA against various aspects of Civil Rights and Fair Housing legislation (see Chapter 2).¹⁹ In Strycker’s Bay, the legal conflict arising in the lower courts was that the court overrode and assigned priority in agency decision making that held different priorities in tension, whereas in Mālama Mākua v. Rumsfeld, the court evaluated priorities between different public interests as they factored into their consideration of the merits going toward issuing a preliminary injunction, not as they factored into the actual agency decision making process under NEPA. The judge’s ruling in favor of Mālama Mākua was grounded in the argument that the public interest in protecting Kānaka Maoli cultural and historical artifacts and endangered species outweighed the particular national security interests represented by live-fire training exercises conducted specifically at the MMR. On this point, the judge evaluated the Army’s arguments for overriding consideration and determined that they had not met the steep burden of demonstrating that the preliminary injunction against live-fire training would cause them significant or irreparable harm.

During the court hearing in which the judge granted Mālama Mākua a preliminary injunction, the judge scheduled a follow-up hearing to evaluate the full merits of the lawsuit for October 29, 2001. The events of September 11, 2001 created a state of military emergency that Mālama Mākua found difficult to ignore. Prior to the final district court hearing, Mālama Mākua and the Army reached a “Settlement Agreement and Settlement Agreement” (henceforth “Settlement Agreement”), which was approved by the Hawai‘i District Court, allowing the Army to conduct limited live-fire training exercises while it prepared a full EIS (Earthjustice 2001). Mālama Mākua’s concession was a strategic way of ensuring that the Army still committed to an EIS in the face of a court hearing in which the Army’s evocation of a state of emergency due to national security concerns could be construed by the court as an overriding factor weighing in the Army’s favor (Kajihiro 2009; see Fogleman 1990). Rather than risk a court ruling overriding the NEPA considerations altogether due to the onslaught of national security exceptions passed in the wake of September 11, Mālama Mākua agreed to allow the Army to conduct live-fire training exercises while preserving their ability to return to a legal challenge to the Army’s NEPA requirements at a later date and later stage in the NEPA process.

Owing to the iterative, multi-step NEPA process, public intervention and litigation is not necessarily constrained to a single point within the EIA process, though it should be pointed out that the standards for legal ripeness require an agency action to be finalized before judicial review (Fogleman 1990). In this case, the initial lawsuit filed by Mālama Mākua in 1998 challenged the Army’s attempt to skirt the NEPA requirements altogether—a situation that was ripe prior to initiating the EIA process because of the Army’s statutory obligations under the NEPA. As previously discussed, the second lawsuit challenging the Army’s “final” FONSI was ripe at the time the lawsuit was filed due to the initial FONSI being a final decision not to produce an EIS.
despite the Army withdrawing it before the trial.²⁰ By entering into the Settlement Agreement, the Army agreed to produce a full EIS, which could then be challenged again once it was finalized and ripe for judicial review. Entering into the Settlement Agreement also meant that there was a legally binding agreement between the Army and Mālama Mākua that could be used to hold the Army accountable under contract law prior to ripeness under NEPA, in addition to the provisions under the NEPA and APA. Had the Settlement Agreement not been agreed upon and the case went to trial and if the Army prevailed on the merits or on the overriding consideration for national security prevailing at the time, the Army’s FONSI would be allowed to stand as the final decision in the NEPA process, and excepting the judicial appeals process, would effectively close the door to future challenges to live-fire training under the NEPA.

The Settlement Agreement between the Army and Mālama Mākua contained several provisions to which the Army was required to adhere: 1) prepare an EIS addressing, in the least, impacts to cultural and biological resources at MMR, as well as air, soil, and water contamination due to live-fire training; 2) establish a $50,000 technical assistance fund for hiring independent experts to evaluate and interpret the EIS studies for community members; 3) clear unexploded ordinance (UXO) from MMR to protect the public and improve access to important cultural sites; 4) as much as feasible, transport munitions throughout the Waiʻanae Coast communities via helicopter, and when infeasible, over land during non-peak traffic times and times when children would be traveling to and from school; 5) allow public access to cultural sites on MMR at least twice per month, and overnight camping on MMR at least twice per year; 6) conduct a maximum of 37 company maneuver combined arms live-fire exercises over the subsequent three years (16 in the first year, 9 in the second year, and 12 in the third year); 7) halt live-fire training at MMR after the third year if the EIS was still not completed. Over the course of the initial three-year duration of the Settlement Agreement, the Army would conduct 26 training exercises, foregoing 11 of their agreed upon opportunities for additional training events (Earthjustice 2005).

Though in many ways the Settlement Agreement represented a significant ideological concession to the Army on the part of Mālama Mākua, the terms agreed upon ensured that the dispute over Mākua Valley would not end and that the efforts aimed at ultimately returning the Valley to Kānaka Maoli would endure. Obviously, the terms requiring the Army to complete a full EIS documenting the impacts of their proposed activities meant that the NEPA process would continue despite the temporary allowance for live-fire training activities. Additionally, the technical assistance fund provision meant that the dense technoscientific language and analyses of the EIS could be independently verified and held to expert scrutiny on behalf of the community. But central to the broader objectives of Mālama Mākua’s struggle were the points within the Settlement Agreement that guaranteed access to the Valley and provided greater assurances of the safety of visitors to the Valley, local residents, and the cultural artifacts, sacred sites, and endangered species within the Valley, all in spite of the Army’s resumption of live-fire training and high wildfire-risk activities. In particular, allowing public access to and overnight stays within Mākua Valley meant that Mālama Mākua, their “sister organization” Hui Mālama ʻO Mākua, and the rest of their allies could begin engaging in activities aimed at restoring and returning the Valley to non-military, culturally and spiritually appropriate uses for Kānaka Maoli including, but not exclusive to, the families and descendants of those displaced by the military occupation of the land, and those whose ancestors lived on or are buried within the Valley (Aila and Dodge 2012; Dodge 2014a).

The majority of Mālama Mākua members identify as Kānaka Maoli, and according to board member and spokesperson Fred Dodge (2014a), the organization’s primary objective is to bring an end to the US military destruction and desecration of Mākua Valley and to have it returned to the families of those Kānaka Maoli dispossessed and displaced by the military’s use of the Valley since World War II. In addition to their legal strategy against the Army, Mālama Mākua has focused much of its energies in restorative practices and efforts to reconnect Kānaka Maoli with the Valley. For example, they organize regular visits to sacred sites and overnight stays within Mākua Valley, and they contribute to film, print, and web productions to spread
information about their work and struggles (Cole 2002; Aila and Dodge 2012; Ruelas 2013; Dodge 2014a). The importance of this organizing work in supporting the legal efforts aimed at the EIA process are analyzed in greater detail in the final section of this chapter.

Though their organizing efforts find Mālama Mākua at odds with the Army, Dodge consistently insists that the organization is “not anti-military,” but rather, “pro-peace and pro-Mākua” (qtd. in Ruelas 2013).21 However, perhaps because of the litigious relationship between Mālama Mākua and the Army, a number of community members chose not to join Mālama Mākua, and instead formed a “sister organization” called Hui Mālama ‘O Mākua (Dodge 2014a). Hui Mālama ‘O Mākua has been involved in community organizing activities, particularly things related to documenting and reviving Kānaka Maoli cultural practices at Mākua, but also things such as protests, publicity campaigns, and providing feedback on environmental reports generated by the Army (Ruelas 2013). In addition to Mālama Mākua and Hui Mālama ‘O Mākua, the movement to reclaim Mākua from the military and return it to Kānaka Maoli is supported by the organizations Koa Mana and the American Friends Service Committee Hawai‘i Area Program, now reincarnated as Hawai‘i Peace and Justice – Na Pua Ho‘āla i ka Pono (Ruelas 2013; Hawai‘i Peace and Justice 2016). Koa Mana is an organization that represents the Wai‘anae residents who were evicted from Mākua Valley in and after 1929 when the US government seized control of Mākua and Ka‘ena (Kakesako 1998). Its members hold that their ancestral lineage bestows upon them the duty to act as stewards of the land, and as cultural practitioners, to make decisions and provide guidance on behalf of the land once it is returned to the people by the military (Ruelas 2013). Hawai‘i Peace and Justice is the most explicitly anti-military organization within the coalition, with the demilitarization of Hawai‘i and “addressing both the local impacts and global consequences of the military presence in Hawai‘i” being two of the organization’s primary objectives (Hawai‘i Peace and Justice 2016). Along with other unaffiliated residents of Wai‘anae and allies throughout Hawai‘i, this coalition was able to build a movement around their

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21 See also Dodge (2014b).
shared visions for what Mākua Valley could become through Kānaka Maoli stewardship in the absence of military occupation, or at least a long-term ban of live-fire military training exercises and constant environmental destruction.

In July 2003, two years into the Settlement Agreement, another large brush fire consumed at least 2,500 acres of MMR after a “prescribed burn” started by the Army crossed firebreaks and went out of control (25th ID (L) Public Affairs Office 2003; Earthjustice 2003; Gordon 2003). The fire, which was initiated to clear brush to aid in clearing UXO, caused the detonation of UXO, destroyed endangered species habitat, and likely killed a number of endangered or protected species. But it ironically also revealed previously undiscovered historically significant archaeological sites as well as the discovery of additional endangered species (Schaefers 2003; Kayal 2003). In response to the fire, Mālama Mākua pressed the Army to resume its consultations with the FWS, then followed up with another lawsuit in March 2004, which resulted in a temporary restraining order (TRO) barring the use of the MMR from further training exercises (Earthjustice 2004).

Interestingly, the 2004 court decision granting a TRO against the Army recognizes the priority given to the Endangered Species Act in weighing the merits for allowing training exercises to occur given the risks they posed to endangered species habitat, however the decision also states that an argument evoking “national emergencies” would trump the priority given to the ESA.

Yet the Army chose not to rely on the national security trump card and the court sided with Mālama Mākua in granting the TRO. There is no clear reason why the Army did not evoke national security, but it may have had something to do with the desire to maintain an amicable

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relationship with the local community and preserve the trust it seems it was trying to build as an environmental steward in the Mākua Valley and elsewhere throughout the Hawaiian Islands (see US Army Environmental Command and US Army Corps of Engineers 2008, secs. 3.9–3.10; Ruelas 2013). Had the Army evoked national security, it’s likely that people within the community, and certainly those backing Mālama Mākua, would have been extremely upset that the Army skirted environmental policy to get their way. Such actions would also have potential negative ramifications for another simultaneous NEPA lawsuit against the Army on the Big Island of Hawaiʻi that was being fought by the same environmental law organization, Earthjustice, and sponsored by some of the same environmental justice and anti-militarization activists as in the Mākua case.\(^\text{24}\)

\textit{The Draft EIS}

Finally, in July 2005, the Army circulated a Draft EIS (DEIS) for its training activities at MMR, nearly a year later than agreed upon in the October 2001 Settlement Agreement. The Army held public hearings and received public comments immediately thereafter, during which they received 71 oral, and 38 written comments (US Army Environmental Command and US Army Corps of Engineers 2008, sec. 1.6). At the start of the comment period, Earthjustice submitted a Freedom of Information Act (FOIA) request to the Army regarding the Army’s claim that only training at Mākua would accomplish the proposed objectives.\(^\text{25}\) In their written comments to the DEIS, Earthjustice noted that they had not received a response to their request within the comment period, and therefore the comment period was too short their comments were incomplete. As a result, the Army held a second round of public hearings and open comment period between


February and April 2007, a year and a half after the DEIS was initially circulated.

Though Earthjustice’s FOIA request and the subsequent extension of the public comment period are relatively mundane points of procedure, they highlight the strategic planning on the part of Earthjustice, both for utilizing the FOIA process to obtain additional information not included in the Army’s NEPA documents, as well as to maintain legal pressure on the Army for complying with the NEPA. By submitting a FOIA request, Earthjustice intended to scrutinize the Army’s claim that training at Mākua was unique in being able to meet the Army’s training and troop preparedness needs, versus the possible alternatives of reduced scale and scope training exercises at Mākua, training at other facilities, or taking no further action. In particular, Earthjustice wanted to substantiate their argument that the no further action alternative was likely sufficient for troop readiness given that the Army had already functioned without full use of the MMR training facility for long periods of time while still deploying troops to combat zones abroad. Furthermore, by noting that their comments were necessarily incomplete due to the lack of response from the Army to the FOIA request, Earthjustice essentially forced the Army’s hand, requiring them to either extend or reopen the comment period, or risk another lawsuit for noncompliance with NEPA and the Administrative Procedures Act (APA). While it is not entirely uncommon for an agency to extend the public comment period during the EIA process, in this case it is clear that Earthjustice was able to force the Army to do so through their strategic FOIA maneuver. The additional public comment period further delayed the Army’s ability to act on the DEIS and gave community members additional time to review and submit comments on the DEIS, and ultimately, prolonged the duration of the TRO pending finalization of the EIA process.

Late in 2005, after circulating the DEIS and concluding the first public comment period, the Army petitioned the court to modify the Settlement Agreement to allow additional training exercises despite still not having completed the full EIA process a year after the date agreed upon in the Settlement Agreement. The Army argued that changed circumstances, namely that the US was engaged in protracted wars in Iraq and Afghanistan, warranted revisiting the terms of the
CHAPTER 4. SACRED ENVIRONMENTS

Settlement Agreement. The court decision points out, however, “The Settlement Agreement was entered into after the attacks of September 11, 2001, and in contemplation of war, the main circumstances the Army identifie[d] as a change.”\textsuperscript{26} In addition to the contractual factors of modifying the Settlement Agreement, the court revealed its underlying interpretation of the material arguments against the Army:

Adequate training is undeniably critical. Without it, soldiers surely face increased risk of injury and death. But the Army does not establish for this court that training will only be adequate if live fire training occurs at Mākua. Mākua is the habitat of numerous endangered species. Associated with Native Hawaiian deities, Mākua Valley is sacred land to Native Hawaiians. The record shows that there are other training venues, that many of the soldiers are scheduled to be trained elsewhere, and that the need for further training at Mākua can only be determined after that other training has occurred. If training at Mākua is essential, it is the Army’s burden on this motion to show that. The Army does not do that.\textsuperscript{27}

It is clear from the court decision that the judge in the case took very seriously her charge to consider the importance of the ESA and NHPA without blindly yielding to the idea of national security. Indeed, throughout the court decision, the judge makes clear that the state of emergency following the September 11, 2001 attacks was the overriding consideration that led both parties to enter into the Settlement Agreement in anticipation of the deployment of troops abroad, and therefore, the Army’s argument that unforeseen conditions warranting a change in the Settlement Agreement was completely unfounded since it knowingly entered the agreement for the sole purpose of utilizing MMR to prepare troops for combat over the three year period in which they agreed to conduct a full EIS. But the judge didn’t stop there. In reiterating the arguments laid out by Mālama Mākua and Earthjustice regarding the sacredness of Mākua Valley and the lack of

clear evidence pointing to the Army’s dependence on live-fire training at MMR for troop readiness, the judge demonstrated the potential flexibility of judicial discretion in interpreting the applicability of the NEPA and related statutes to Kānaka Maoli cultural, and to a limited extent, sovereign claims over the protection of the environment (cf. Gartland 2012). The obvious limitation to this is that the sovereign claims to environmental stewardship depend upon the inviolability of the US state and jurisprudence, and on the framing of culturally significant sites as legible within the purview of the NHPA. But it is nonetheless impressive that the judge so clearly staked out a position that endorsed the cultural significance of Mākua Valley to Kānaka Maoli.

In response to the Army’s request to modify the 2001 Settlement Agreement, Mālama Mākua countered with their own request that the court act to enforce the Settlement Agreement in early 2006. They charged that the DEIS circulated by the Army did not sufficiently cover all of the environmental studies that they had agreed to in the Settlement Agreement and it requested that the Army reinstate access to all of the cultural sites to which the Army had banned access in 2005 (discussed below). After a series of exchanges, the parties were able to resolve the issue outside of the courtroom; Mālama Mākua partially withdrew their complaint in anticipation of a new Joint Stipulation and Partial Settlement (“Joint Stipulation”), which was subsequently certified by the same district court in January 2007. The Joint Stipulation expanded on and reiterated the requirements of the previous Settlement Agreement by requiring the Army to conduct additional surface and subsurface archaeological surveys and to conduct a marine resources study to determine past or probable future contamination of marine resources that Wai‘anae residents depend upon for subsistence. Both the archaeological survey and marine resources survey were to be incorporated into the full EIS for training activities, and both required public comment periods to allow feedback from members of the community.28

CHAPTER 4. SACRED ENVIRONMENTS

The 2007 Joint Stipulation and Partial Settlement

On its face, the new Joint Stipulation was not a significant departure from earlier settlements between the two parties. Essentially, Mālama Mākua and Earthjustice were simply making sure that the Army followed through with additional portions of the EIS agreed upon in the 2001 Settlement Agreement but which were not adequately addressed in the 2005 DEIS. Rather, what makes this development in the case interesting is the matter of cultural access to sites within the MMR left. One of the provisions of Mālama Mākua’s request for enforcement of the Settlement Agreement was that cultural access to sacred sites within the MMR be restored after having been unilaterally declared off-limits by the Army in January 2005. The original 2001 Settlement Agreement granted residents of the Wai‘anae area, including Mālama Mākua and Hui Mālama ʻO Mākua, access to cultural sites located within the MMR. In the immediate aftermath of the Settlement Agreement, the Army granted access to over a dozen such cultural sites. The only condition under which the Army was allowed to modify access to the MMR was in direct consultation with Mālama Mākua and other Kānaka Maoli cultural practitioners. It further required that the Army prioritize the clearing of UXO within the MMR to increase access to these and other cultural sites. The Army’s unilateral decision to rescind access to cultural sites previously open to community members due to safety concerns from UXO was in direct violation of the terms of the Settlement Agreement (Hoover 2007).29 Thus, the request made by Mālama Mākua for enforcement of the Settlement Agreement was intended both as a way of maintaining pressure on the Army to complete the EIA process through the archaeological survey and marine resources study, and as a way of working toward the broader objectives of Hawaiian placemaking in Mākua by forcing the Army to improve and restore access to cultural sites within the MMR that

CHAPTER 4. SACRED ENVIRONMENTS

had unjustly been banned the previous year. However, the directives within the Joint Stipulation were confined solely to those parts of the Settlement Agreement dealing with the EIA process, and explicitly excluded any provisions for, and thus leaving unresolved and legally still in effect, Mālama Mākua’s complaint about the Army’s ban on access to cultural sites within the MMR.30

It wasn’t until 2008, when the Army had still not completely restored access to all of the cultural sites, that Mālama Mākua exercised their option left open by the Joint Stipulation to renew their legal complaint that the Army was in violation of the Settlement Agreement by not restoring access to all of the cultural sites. The court sided with Mālama Mākua, not because the Army’s revocation of access to cultural sites due to safety concerns violated the Settlement Agreement, per se, but because their decision to modify public access to cultural sites was made unilaterally and without prior consultation with Kānaka Maoli practitioners. The immediate outcome from this decision was a court order for the Army to prepare quarterly reports updating both the court and Mālama Mākua of their progress toward identifying “high priority” sites for UXO clearance, as well as their plans for and progress toward the clearance activities.31 Over the next year, the two parties returned to the court on several further occasions to debate the scope, timing, and content of the Army’s quarterly progress reports and identification of sites for UXO clearance, all without much actual progress toward the clearance of UXO or restoration of access to cultural sites.32 Resolving these conflicts over UXO clearance, the court issued an order in

January 2009 requiring the Army to identify high priority sites for UXO clearance; the Army acquiesced, and after two rounds of public review and comments, published its final list of 22 sites that would be given first priority for UXO clearance (US Army Garrison, Hawai‘i 2009b). 33

Surveying the cultural sites and clearing UXO proved to be an extremely slow process, and though access to a limited number of cultural sites was temporarily reinstated, the accidental detonation of UXO resulted in complete closure of the MMR to cultural site visits as well as maintenance workers until April 2016 (US Army Garrison, Hawai‘i 2016). Once the Army finalized its list of high priority sites for UXO clearance in 2009, they began contracting people to conduct ground surveys of those sites in search of UXO and other potential safety hazards (US Army Garrison, Hawai‘i 2009b). The UXO clearance process involves numerous steps, including the initial ground and/or subsurface survey, identifying potential safety hazards associated with a particular site, conducting safety reviews, getting requisite permits for clearing UXO, and then actually disposing of the UXO in an appropriate manner. Each time an “anomaly” is discovered through the site surveys, the Army potentially needs to consult the NHPA and ESA and request approvals from various agencies before acting to further identify, dispose of, or detonate the uncovered munitions. These intermediate bureaucratic steps are necessary to ensure the safety of both personnel and archaeological and ecological resources in the presence of potentially deadly explosives and other munitions (US Army Garrison, Hawai‘i 2010a). Additionally, the process was repeatedly hampered by the environment itself; roads and trails washed out by heavy rains encumbered access for both contractors and cultural practitioners, and thick vegetation required pruning to maintain access (e.g., US Army Garrison, Hawai‘i 2009a; US Army Garrison, Hawai‘i 2014).

All of the steps involved in clearing UXO that slowed progress ultimately proved to be

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wholly warranted as the risks of inadvertently detonating UXO became clear when, in April 2015, two civilian workers employed to prune vegetation near one of the cultural sites were hospitalized with injuries suffered after previously undiscovered UXO accidentally detonated (US Army Garrison, Hawai`i 2015c; Cole 2015). As a result of the explosion, the Army halted further activities throughout the MMR, including UXO clearance and cultural site visits (US Army Garrison, Hawai`i 2015b). The MMR remained closed for one year while the Army conducted an investigation into the explosion and consulted with the US Army Technical Center for Explosives Safety on their plans for future UXO clearance throughout the MMR. Limited access to cultural sites by the public resumed in April 2016, as did vegetation management activities related to further UXO clearance (US Army Garrison, Hawai`i 2016).

The conflict between Mālama Mākua and the Army regarding the clearance of UXO from the MMR and reopening all of the high-priority cultural sites to public access is significant to this case for two reasons. First, maintaining access to cultural sites is central to the Kānaka Maoli placemaking process and the broader objective of reclaiming Mākua Valley as a Hawaiian place of peace, healing, and engaging in cultural practices. Second, because access to the MMR is for cultural site visits is included as a provision of the 2001 Settlement Agreement and subsequent court enforcement orders, the Army is legally obligated to complete UXO clearance and eventually reinstate access to all of the cultural sites identified as being a high priority by the Army in consultation with members of Mālama Mākua, Hui Mālama ’O Mākua, and the greater Wai`anae and Kānaka Maoli communities. The legal obligation means that, even when a final EIS is published and a Record of Decision recorded per the NEPA, 2001 Settlement Agreement, and 2007 Joint Stipulation, they will still not be allowed to commence any of the proposed live-fire training activities until the district court determines that all of the conditions of the Settlement Agreement are met, including clearance of UXO and allowing access to cultural sites within the MMR. Essentially, this means that the case brought by Mālama Mākua against the Army under the NEPA to compel the preparation of a full EIS was parlayed into a much broader case requiring the Army to take affirmative steps toward making Mākua Valley a Hawaiian place, and holding
them legally accountable beyond the scope of the official EIA process.

*The Archaeological Survey and Marine Resources Study*

Mālama Mākua and Earthjustice continued pressing the Army through legal avenues and community input during public feedback periods to complete the archaeological survey such that it addressed the entire site and not just in places convenient to the Army, and that the marine resources study be conducted in such a way that it tested for toxins introduced to the environment from training exercises in a range of aquatic species that was consistent with the subsistence diets of Waiʻanae residents. Following the Joint Stipulation in 2007, the Army circulated their Archaeological Subsurface Survey and Marine Resources Study required under the 2001 Settlement Agreement. Mālama Mākua and Earthjustice objected to the sufficiency of these studies, and over the course of the next two years, pursued a legal remedy by requesting that the court enforce the Settlement Agreement by requiring the Army to redo parts of each study. Meanwhile, the Army published a Final EIS and Record of Decision (ROD) for training at the MMR in June and July, 2009, respectively (see US Army Environmental Command and US Army Corps of Engineers 2009; US Army Environmental Command and US Army Corps of Engineers 2009). In November 2009, the district court issued a decision favoring Mālama Mākua that required the Army to conduct additional archaeological surveys and marine resource studies, but which also denied Mālama Mākua’s request that the additional studies’ inclusion within the Final EIS should cause another iteration of the EIA process with regard to the circulation and public comment on the Final EIS and reissuance of the ROD. This decision meant that while the Army

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35 *Mālama Mākua v. Gates*, “Order Clarifying Remedy for Defendants’ Previously Determined Breach of Paragraph 8(B) of the Settlement Agreement; Order Denying Plaintiff’s Motion to Enforce Settlement Agreement; Order Denying Defendants’ Motion for Summary Judgment”,

161
was still responsible for completing the studies and conducting public review as part of the EIA process and Joint Stipulation, their obligation to do so was covered under the provisions of the Settlement Agreement and Joint Stipulation as a matter of contract law, not as part of their statutory obligations under the NEPA. The court further clarified this point, stating that once the studies were completed and incorporated into the Final EIS, Mālama Mākua could still seek legal recourse under the NEPA based on the Army’s decision to revise, amend, or reissue the Final EIS and ROD.

In 2014 and 2015, the Army published the “Archaeological Subsurface Survey in Areas B through F at Mākua Military Reservation, Mākua Ahupuaʻa, Waiʻanae District, Oʻahu Island, Hawaii” (2015) and “Mākua Marine Resources Supplemental Study Report” (2015a), respectively. These two documents, which have each been subjected to the public feedback and subsequent revision processes, are intended to fulfill the Army’s court-ordered obligation to revise the impacts to archaeological and marine resources. As of this writing, it is unclear how or whether the Army plans to proceed regarding the incorporation of these two documents into the EIS, and whether or not they will issue a new ROD. However, one thing that is clear is that the court ordered restriction on live-fire training remains in effect, meaning that no live-fire training exercises were conducted at MMR from late 2004 through the first half of 2016.

“A Mosquito Biting a Rogue Elephant as it Crashes through the Forest”

In an interview with the Honolulu Weekly, Sparky Rodrigues, president of Mālama Mākua, described his organization in relation to the Army as “a mosquito biting a rogue elephant as it crashes through the forest. We’re tiny, but we’ve been able to make it stop to itch” (Black 2010). Like a rogue elephant on the loose, the Army seemed to blindly bulldoze its way toward regaining use of Mākua Valley for live-fire training despite the time, money, and political costs of trying to
CHAPTER 4. SACRED ENVIRONMENTS

justify its proposal and lack of clear evidence of the need to risk the ecologically, historically, and culturally significant resources specific to the particular site, instead of selecting an alternative site. Meanwhile, the persistence of Mālama Mākua, its allies, and the legal team from Earthjustice were successful in not only making the Army “stop to itch,” but in so doing, make inroads toward the broader goal of returning control of Mākua either to the State of Hawai‘i, as happened with Kahoʻolawe, or to the Kānaka Maoli families displaced by the US military.

The archaeological survey and marine resources study required by the 2007 Joint Stipulation are prime examples of the types of concessions won from the Army through the persistence of those fighting to save Mākua. Originally negotiated as specific requirements for the EIS in the 2001 Settlement Agreement, the need for these two studies persisted as points of contention over the fifteen-year period following the 2001 settlement agreement due to the Army’s repeated delays and the subsequent push back from community members whenever the Army published inadequate versions of the studies. The marine resources study is particularly notable because of its explicit environmental justice implications. The primary community concern expressed throughout the public feedback forums related to the uptake of munitions-related toxins in marine creatures gathered and consumed as part of a subsistence diet amongst Waiʻanae residents. More than just a strategic tactic deployed by the coalition to cause further delays to the EIA process, the point of contention in the marine resources study asserted the importance of marine species to local Kānaka Maoli ways of life in the context of their marginality within the political economy of Oʻahu. The testing of marine life for toxins is an environmental health justice issue linked to the ongoing forms of dispossession, displacement, and environmental violence faced by Waiʻanae residents due to uneven development related to the continued military occupation of the region, state policies criminalizing informal beach settlements used by many Kānaka Maoli, and the prevalence of other toxins within the area in addition to the runoff from decades of munitions use in the Valley (Niheu, Turbin, and Yamada 2007). Ensuring that the Army documented and addressed concerns regarding the infiltration of toxics in marine life consumed by local residents meant another level of accountability for the
impacts of past and potential future training at the MMR, even if the EIA process doesn’t require the Army to take any specific actions to correct this impact.\textsuperscript{36}

The environmental justice implications of holding the Army accountable for polluting marine resources also reflect important maneuvering on the part of the Mākua coalition in relation to the racial environmental state. By raising the issue of marine resources in terms of their importance within the subsistence diet of local Kānaka Maoli residents, the coalition was able to transfer the discourses and logics governing the Valley’s militarized land uses to alternate conceptions of Mākua as embedded within a larger human ecosystem that emphasize Kānaka Maoli survival. The campaign succeeded in shifting the geographies and scales of their struggle by directly linking physical impacts to the Mākua Valley environment to the human-marine ecosystems beyond the site boundaries and to communities whose stakes in this conflict extend beyond the uses of the Valley itself for cultural and religious purposes. This geographical maneuver on the part of the coalition fighting for Mākua takes advantage of the ways that the physical environment often exceeds and is unconstrained by political geographies of control and territoriality to tap into the environmental regulations that mediate the state’s actions.

In addition to their pressure on the Army regarding marine resources, the coalition also made significant progress toward the broader social movement objective of resuscitating Mākua as a sacred Hawaiian place for peace and healing that is accessible to Kānaka Maoli cultural practitioners. Along with their allies, the members of Mālama Mākua have used their legal and legislative campaign as a way of asserting Kānaka Maoli claims to the Mākua Valley through their placemaking practices. The coalition has steadily accrued a number of legal footholds that gradually paved the way to various forms of cultural, historical, ecological, and subsistence uses of the land. Together, these represent a different ontological relationship to the land than that

\textsuperscript{36}\textit{Even if the EIA process does not directly address the health risks associated with the toxic runoff from munitions, residents might have other avenues of recourse available under, for example, the National Pollutant Discharge Elimination System under the US Clean Water Act.}
exercised by the military—as opposed to the view of the land as simply a space to be transformed into additional training grounds and scarred by explosions and wildfires, Mālama Mākua, Hui Mālama ‘O Mākua, and their allies have fostered a nurturing and caring relationship to the land that views people as mutually dependent stewards of the land and its resources—the literal translation of the Hawaiian word *mālama* is “to care for,” and that is precisely what this coalition continues to do in Mākua.

One of the important activities that community organizers have engaged in is an annual overnight celebration marking the Makahiki season celebrating the Hawaiian god Lono. Makahiki traditionally begins after the fall harvest around October or November, lasts for approximately four months, and celebrates the year’s harvest with a period of peace during which war is taboo (Lasky 2010). Since 2002, following the Stipulation Order granting public cultural access to MMR, members of the various organizations in coalition with Mālama Mākua have held the celebration in Mākua Valley as an important aspect of their broader work in caring for Mākua (Cole 2002; Adamski 2003). According to Hui Mālama ‘O Mākua member William Aila, Jr., “The idea of having people connect back to the land is very important for the future generations. Young people, especially living in a city, don’t have a sense of place, a sense of being…We disrespect the land, we disrespect our gods, our elders, ourselves. We are here because of that connection to the land” (qtd. in Adamski 2003). The Makahiki ceremony brings Kānaka Maoli back to Mākua, and in so doing, helps them develop their own sense of place and belonging while also establishing Mākua as an enduring place for Kānaka Maoli and their cultural practices. Momi Kamahele describes this process through her own experience: “We practice this because of what Lono symbolizes in our culture, in terms of peace, in the wealth of the land. It feels good when you do something to preserve and to heal. When I chant it is a powerful expression of that feeling.” In another interview, Aila expands on the significance of celebrating Makahiki at Mākua:

This is part of everyday life, the changing of the season, and also the changing of the mindset of Hawaiian people to one of peace — wars were stopped at this time of year. It [the celebration] is very important because it brings back into focus the
role of sharing, and that it’s important to treat the land well. And more importantly, we get to live the culture. (qtd. in Cole 2002)

The last part of Aila’s quote is particularly striking because it hints at the heart of the community’s struggle to reclaim Mākua. For many community members, the struggle isn’t just about stopping the military’s destructive environmental practices or preserving endangered species, sacred spaces, and archaeological sites. It’s about the broader movement to maintain Kānaka Maoli cultural practices and relationships with the land that were disrupted by colonial settlement, military occupation, and commercial exploitation across the Islands. Aila captures this sentiment when he explains: “The worst thing I hear is when modern people say ‘Hawaiians used to do’ in the past tense as if Hawaiians have mystically gone away. Hawaiians are here and are learning about their culture. They exist today and will continue to exist tomorrow” (qtd. in Adamski 2003). In the context of the ongoing Hawaiian cultural renaissance that has grown into a multifaceted social movement amongst Kānaka Maoli and their allies since the 1970s, the struggle to reclaim Mākua condenses many of the goals of the broader movement within a geographical struggle over the process of placemaking within Mākua through the reproduction of Kānaka Maoli cultural practices and worldviews (see Kajihiro 2009; Lasky 2010; Oliveira 2014). This sentiment is captured in Marie Alohalani Brown’s analysis of Anne Keala Kelly’s filmic narrative Noho Hewa: The Wrongful Occupation of Hawai‘i. Brown explains the importance of a kanikau (mourning chant) performed at Mākua as “both a testimony and a protest against the US military occupation of Hawai‘i and its use of the land it appropriated”:

The kanikau is…an eloquent reminder of the Native Hawaiian presence…because of our relationship with the ‘āina, praying for its recovery also works to ease our own pain. Furthermore, this kanikau underscores the Native Hawaiian perspective of the ‘āina as a living entity. These chanthers are acting as witnesses for Mākua Valley. Not only are they speaking to her; they are speaking for her. Because the ‘āina cannot speak for itself, it cannot offer its own testimony, at least not in ways that have import juridically or politically, as this group is doing for her. Their kanikau recognizes that she has been ravaged. And while there were few actual witnesses to the events that inspired the kanikau and its actual performance, the
number of witnesses grows as more and more people see the documentary. (Brown 2014, pg. 381)

So where does the revival of cultural practices at Mākua and movement to reclaim Mākua from military occupation stand given the Army’s record of dragging its feet on the EIA process and repeated attempts to limit or ban public access to the Mākua Valley? In 2011, an outgoing Army commander of the US Army in the Pacific announced, and his replacement confirmed, that a plan was in place to shift live-fire training that had been proposed for Mākua over to nearby Schofield Barracks and the Pōhakuloa Training Area, another (highly contested) training facility located on the Island of Hawaiʻi (Cole 2011; McAvoy 2011). Both commanders made clear that the transition would occur over a number of years pending successful construction of new training courses large enough to facilitate the types and sizes of training activities originally slated for the MMR, and that until that transition occurred, the Army would continue to pursue implementing live-fire training at the MMR (McAvoy 2011). 37 This announcement reinforces the position maintained by Earthjustice since the 2001 Settlement Agreement that Mākua Valley was not the only feasible alternative that would meet the Army’s training objectives. At the same time, the statement issued by the incoming commander, Lt. Gen. Francis J. Wiercinski, made clear the Army’s attempts to walk the line between maintaining its public image as a responsible environmental steward and cultural mediator, without conceding its position as staunchly committed to its militaristic raison d’être:

We’re going to be very respectful of culture. We’re going to be very respectful of

37Over the more than two decades that Mālama Mākua has been interacting with the Army, leadership within the Army has changed hands every few years, from the Secretary of Defense all the way down to the local Army Garrison Commander—indeed, the court decisions document these changes as the Secretary of Defense has passed from William Cohen, to Donald Rumsfeld, Robert Gates, Chuck Hagel, and most recently, Ashton Carter. Every time new leadership or Army representatives take over, particularly the Army Garrison Command, the relationship between the military and community groups has to be reestablished and the Army command has to develop an understanding of the complex environmental, cultural, and political issues at play (Dodge 2014a).
the environment. In fact, I don’t think anybody does it better than us when it comes to protecting the environment and being cognizant and protective of culture sites. But in the end I also have to be protective of our greatest resource — our sons and daughters. And you know what? We’re good enough. We can do all three of those things. (qtd. in McAvoy 2011)

Looking back to the earlier court ruling that granted Mālama Mākua a TRO in 2004, it becomes more readily apparent why the Army may have chosen not to evoke national security and a state of national emergency to bully its way through or around the NEPA process or to seek an executive or legislative exemption to the same effect. Claiming a national security exemption with blatant disregard for Kānaka Maoli historical sites and cultural practices, as well as endangered native species, would squander whatever political cachet the Army had developed in establishing its numerous environmental management programs across the islands, including its work at Kahoʻolawe (see US Army Garrison, Hawaiʻi 2010b; Ruelas 2013). By instead complying with the NEPA and acting in relatively good faith to meet at least the minimum requirements of the NHPA, ESA, and the demands of local residents and Kānaka Maoli community members, the Army could maintain its public appearances as a good resident of the islands and maintain its political support from people such as the late US Senator Daniel Inouye, who was a longtime vocal proponent of the military presence across the State of Hawaiʻi and at Mākua in particular.

The year 2016 marked the 40th anniversary of the campaign to reclaim Mākua Valley as a Kānaka Maoli place. Though it seems that the Army has finally decided that further pursuing live-fire training at the MMR is neither necessary nor in its best political and public relations interests, it remains to be seen whether or not they would consider further conceding rights to or control over the land to Kānaka Maoli or the State of Hawaiʻi. Regardless of whatever may happen when the Army finally meets all of its legal obligations under the various court orders, settlement agreements, and the NEPA process, Mākua Valley is unlikely to return to a state of constant bombardment and environmental destruction as it was prior to the interventions and organizing efforts of Mālama Mākua and its allies. The NEPA process provided an important
procedural scaffolding upon which Earthjustice was able to build a robust legal defense of Mākua involving the ESA, NHPA, and judicial rulings enforcing settlement agreements. In turn, this legal platform, combined with the tireless organizing efforts of community members, have established new traditions over a fifteen-year period supporting cultural practices within, and Kānaka Maoli relationships to the Mākua Valley that are unlikely to be unmade in the near future.

Interestingly, the battle over Mākua has been taken up within the Hawai‘i House of Representatives, with legislation being introduced—and subsequently left to die or tabled for subsequent sessions—to establish a Mākua Valley reserve (Jordan 2011; Jordan et al. 2014; Jordan et al. 2015) and to compel the Army to finalize its EIS, discontinue its use of Mākua, and clean it up in preparation for returning it to the families displaced by the military (Jordan et al. 2016). In theory, the bill version introduced in the Hawai‘i House of Representatives (HB1430 in the 2015-2016 legislature) would establish a Mākua Valley Commission to oversee management of a Mākua Valley Reserve upon expiration of the existing lease held by the Army, and subsequently transfer control over the land back to the State of Hawaii, and presumably, the State’s Department of Land and Natural Resources. Significantly, this bill calls for the Commission to be composed of seven members, most of whom represent Kānaka Maoli organizations, both within and outside of Hawaiian government positions. The other piece of legislation, a House Concurrent Resolution, is more of a non-binding request to the Army reinforcing all of the same demands made by Mālama Mākua and its allies.

While these bills are still purely speculative, and full control over the Valley wouldn’t occur until at least 2028 when the US Army’s lease expires, they provide an interesting proposition since the bill as proposed would establish formal oversight and management guidelines for the Valley outside of military control, and explicitly for non-commercial activities in furtherance of Kānaka Maoli cultural practices. It should be noted as well that the legal footing for such legislation is as-yet uncertain since much of the land in question is likely held in fee-simple title or sovereign control by the US federal government. The legislation as proposed is
vague and fails to address the property in question or the property regime governing this transfer of control. Despite these legal ambiguities, the bills, which are essentially offered up each session of the state legislature, typically passes through committees until ultimately being tabled.

In any case, these proposals are significant because they acknowledge the efforts of Mākua organizers and former Valley residents in their fights to reclaim Mākua as an important site for Kānaka Maoli cultural practices by codifying their role in land stewardship and governance. Additionally, they have been proposed in a climate of uncertainty regarding the future of the Army’s presence in Hawai‘i since, in 2013, the Army announced its plans—and published a programmatic environmental assessment—to significantly reduce the number of troops stationed on O‘ahu (US Army Environmental Command 2013; Pignataro 2015). Backlash against the Army seems fairly prevalent within the State’s legislature, and even a number of the house representatives who signed on to previous versions of the aforementioned bills seem to have withdrawn support for latter incarnations, and some even signed on to a joint resolution (HCR3/SCR3) “Strongly Opposing the United States Army’s Proposed Reduction of Schofield Barracks and Fort Shafter Bases.” Amidst the proposed reduction in troops over the next several years, it seems unlikely that legislative action will lead to any significant gains for those supporting the return of Mākua to Kānaka Maoli, but at the same time, the announcement could be indicative that the Army’s future role at Mākua will be conducive to meeting the objectives of the Mākua community organizers.

As a case study in community organizing around the NEPA and EIA process, Mālama Mākua and its allies were able to turn a relatively simple demand for the Army to fulfill its statutorily mandated procedural requirements under the NEPA, into a powerful movement to reclaim Mākua valley from military occupation that extends far beyond the limitations of NEPA review or judicial intervention within the NEPA process. Aspects of the movement incorporate anti-military and pro-peace sentiment, Kānaka Maoli claims for sovereignty, Kānaka Maoli cultural renaissance, environmental justice and health concerns, and ecological and biodiversity
conservation efforts that the coalition argues are inseparable from the worldviews prompting their actions. It is impressive that the Mākua community organizers have compelled the Army to commit funds, limited as they might be, to cleanup, conservation, and environmental restoration at the MMR on top of halting further activities that contribute to the destruction of environmental resources.

The Mākua campaign has contributed to ongoing efforts within Hawaiʻi to revive Kānaka Maoli cultural practices as a source of pride and cultural identity against a history of settler colonial institutions and practices reinforcing white racial and cultural domination. Whereas Kānaka Maoli traditions and cultural practices were once the targets of the racialized violence of colonialism, capitalism, and a US military-backed coup d’état, they now provide both an impetus and legal basis for the assertion of Kānaka Maoli claims to Mākua stewardship. This campaign initially depended on the legal and institutional framework of the NEPA legislation to gain traction, but has since been able to sustain itself through a combination of legal maneuvering on the part of Earthjustice, community input during public forums and comment periods, and the organizing efforts of community organizations that have instantiated the revival of cultural practices within Mākua Valley and around the Waiʻanae Coast. That is, while NEPA provided an entry point for this struggle, the campaign has only endured because the community has maintained its pressure on the Army and has continued to innovate their strategies to tap into other aspects of the racial environmental state. For example, the NHPA, which dovetails with NEPA in establishing an armature for racially and culturally sensitive modes of governance over the built environment, provided the legal basis for substantiating claims about historically significant archaeological sites and culturally significant sacred sites. These sites, in turn, are cognizable by the racial environmental state as a result of the longer history of Kānaka Maoli struggles for recognition of Hawaiian sovereignty by the US government.  

38Many people within the movement for Kānaka Maoli sovereignty and Hawaiian independence reject the idea of recognition by the US government as an indigenous tribe or dependent nation, and instead assert their status as an internationally recognized sovereign state under US
CHAPTER 4. SACRED ENVIRONMENTS

In recognizing the significant gains of the Mākua coalition, it is worth considering that perhaps the state’s recognition of Kānaka Maoli cultural practices and sacred sites vis-à-vis the NHPA and the NEPA signal a sort of “neoliberal multiculturalism” that serves to maintain the military presence throughout Hawai‘i by conceeding cultural site access and token environmentalism in place of the ability to conduct live-fire training, while still maintaining control of Mākua Valley, and also reinforcing their position of control over other sites throughout the State, in particular Schofield Barracks and Pōhakuloa (see Melamed 2011). The state in this case, deploys its ability to be culturally sensitive to Kānaka Maoli concerns exactly because such concessions allow the maintenance of the settler state under the thumb of military power, even though that power isn’t being wielded as a direct threat of violence against Kānaka Maoli—even though their training activities do enact various forms of racialized “slow violence” in the form of toxins and cultural destruction—but rather, in the form of military political power and federal funding that help drive the formal Hawaiian economy (Nixon 2011).

Rather than in the sense of domination or absolute sovereign control over space that the Army claimed in its militarized exploitation of the land, Mālama Mākua, Hui Mālama ‘O Mākua, and their allies have taken legal actions, mobilized community members in protests, submitted comments to the Army expressing their concerns about the military use of Mākua Valley, and engaged in cultural activities to strengthen and rebuild ties with the land. By directly engaging the modes of environmental governance employed by the racial environmental state in the forms of the NEPA, ESA, and NHPA policies and the legal recourses for enforcing them under the APA, the coalition has won victories affecting what activities and land uses can and cannot take place in the Valley, asserting new relationships of control over the land that finally supplant the regime of de facto martial law that seemingly governed the Valley since its initial military occupation in the 1920s. In its place is a more liberal regime of environmental governance that accedes partial control and access to the Valley for non-militaristic uses in order to sustain the legitimacy of occupation (Sai 2008).
broader military claims to land throughout Hawai‘i.

Despite this, and to avoid ending on a cynical note, the significant victories won by Mālama Mākua and its allies have resulted in tangible changes to Mākua Valley and give continuing hope for securing future victories for Kānaka Maoli struggles across Hawai‘i. And the fact that the state recognizes the importance of Kānaka Maoli culture as a matter of public interest and overriding environmental concern (see above) is a direct result of the combined efforts at Mākua, Kahoʻolawe, Pōhakuloa, and countless other placemaking struggles to reestablish Hawaiʻi as a Kānaka Maoli space. Reiterating Rodrigues’ analogy, the community’s persistence in holding the Army to their legal obligations wasn’t necessarily going to prevent the Army from crashing through the forest, but at least they have slowed it down, opened new “wounds” in terms of opportunities for resistance, and forced the elephant to consider whether it really needs to get to the other side of the forest by leveraging public scrutiny of and dissent to the Army’s use of Mākua Valley.
5 Conclusion

My intention for this project was to address the question of why the EIA process has endured as a relatively durable mechanism for public intervention into governmental functions, and how it functions within racialized conflicts over the production of space. To this end, I set out to tell two aspects of the NEPA story. The first part of the story is about the ways that the NEPA framework, and the EIA process in particular, gets taken up as a platform for political action and integrated as part of a legal strategy within social movement and community organizing. In addition to legislative action, direct action, and non-state alternatives, legal action is one of the avenues for working toward social change and redirecting state capacities. By examining case studies in which community organizers engaged the EIA process, I showed how the process fits within the racial environmental state apparatus, and in turn some of the possibilities and limitations for engaging the process as a means for achieving social change. Understanding the EIA process in this way also helped reveal the underlying logics that make it an important, and thus enduring, mechanism for maintaining the legitimacy and hegemonic power of the state despite the potential avenues it provides for public intervention into and disruption of state functions. One of the important revelations for someone previously unfamiliar with the operation of environmental law, was that the modes of intervention available within the EIA process are circumscribed by the web of state regulations and policies that provide supplemental legal footing on which to base claims or arguments.

The other part of this story looks at the ways in which the NEPA legislation has shaped the contours of the racial environmental state. This includes the manner through which state
institutions operate under NEPA, the judiciary enforces aspects of NEPA, and conflicts between agencies or between different state priorities are mediated within the EIA process. Though the NEPA legislation does not on its face deal explicitly with race, and not all NEPA conflicts entail racialized conflict, racial conflicts are often wrapped up within the EIA process, and environmental justice considerations—as an institutional framework for considering the entanglement of race, class, and environment—had been added as a requisite component of the EIA process after President Clinton passed Executive Order 12898 (see below). Out of the statutory obligations of state agencies, through public pressure, and by the very fact that the production of nature under capitalism is quite often racialized, the EIA process results in the state producing scientific knowledge detailing and weighing impacts to racialized environments.

Each of the case studies examined in this dissertation deals with racialized conflicts over the production of the environment and differing visions of place. In each case, the conflicts were resolved through a combination of administrative procedure, court intervention, and community organizing to gain popular and political support. Because the EIA process is primarily procedural and enforced through the judiciary, I relied heavily on court proceedings and agency reports for my data, and developed an analysis of each case that traced the policy and court rulings back to their implications for social and environmental justice struggles over the production of space and reshaping the racial environmental state.

In the first case study that looked at New York’s West Side Urban Renewal Area, conflict erupted out of competing visions for state-sponsored community development in terms of the racial and class composition of an urban neighborhood. In this case, the EIA process was transformed into an institutional mechanism for mediating conflicting racial and social welfare priorities, but also diminished as a means for judicial intervention into the decision making process. Largely as a result of the case law that derived from this case, the NEPA legislation was stripped of its substantive imperatives regarding the incorporation of environmental values into agency decision making, but in its place came the procedural requirement for agencies to consider
CHAPTER 5. CONCLUSION

how impacts caused by physical changes to the environment affect environmental justice communities, though the official language of environmental justice wouldn’t be incorporated until President Clinton enacted Executive Order 12898 in 1994.

The second case study explored a campaign that made use of the EIA process as an organizing strategy and to prevent the construction of a prison in California’s Central Valley. The campaign combined legislative and legal tactics, including the use of the EIA process as a way of intervening in the state’s further transformation of the Central California landscape into a carceral space. By building a movement around an environmental justice framework that appealed to a broad constituency through the range of environmental issues that mattered most to each constituent group—from ecological conservation, to traffic congestion, to groundwater use, to the local and statewide economy—the campaign organizers were able to use the racial environmental state’s institutional and administrative mechanisms to delay and almost avert the expansion of California prison system. The stakes of the campaign were more than just the individual prison; the fight in Delano was part of the campaign organizers’ broader strategy of prison abolition, aimed at dismantling the carceral state’s investments in policies, practices, and physical infrastructure to control and punish racialized populations marked as surplus to the reproduction of capital, and instead promote alternative investments in those populations through education, health care, and economic development. This case highlights the ways in which the racial environmental state on the one hand operates through the production of carceral spaces to facilitate particular flows of people and capital, while on the other hand, it provides a mechanism in the EIA process for challenging the expansion of the carceral state.

The final case study in this dissertation followed the history of a campaign-turned-social movement to reclaim Mākua Valley from the US military as a Kānaka Maoli place. In this case, the Army’s resistance to fully engaging the EIA process in a timely fashion led to the indefinite postponement of their proposal for live-fire training in Mākua Valley after local activists teamed up with an environmental law organization to use the NEPA legislation as the basis for a lawsuit
against the Army. The NEPA legislation, along with the Endangered Species Act and the National Historical Preservation Act, operate in concert to regulate permissible land uses in light of the Kānaka Maoli claims regarding historical, cultural, and religious uses of the Valley. The racial environmental state mediates these placemaking claims against the frequently irrefutable claims of national security under the entrenched War on Terror. The legal case brought under the NEPA legislation opened the door to broader forms of organizing after a cleverly crafted settlement agreement early in the campaign conceded to a temporary and partial resumption of live-fire training in exchange for key concessions from the Army in terms of their commitments under NEPA and opening the site to the public. The former of these concessions has allowed the legal campaign to endure well beyond the duration of the settlement agreement, while the latter has allowed Kānaka Maoli to begin the process of reclaiming the Valley through their cultural and religious practices. This case study serves as a prime example of the capaciousness of the racial environmental state as a malleable framework for social change through environmental justice principles.

The Institutionalization of Environmental Justice

The legislative intent behind NEPA was never for it to be a public policy that deals explicitly with race or racial issues. Other legislation passed throughout the middle of the 20th century, such as the Fair Housing and anti-Jim Crow portions of the Civil Rights Acts of the mid-1960s are far more explicit about their intentions for reshaping spatial dimensions of the racial state. The expansive character of NEPA, however, situates it as an extremely important factor in the actual implementation of certain aspects of Fair Housing legislation, for example, as shown in Chapter 2. It also provides an entirely different framework for considering how racialized geographies are produced through the political and juridical category of environment. Certainly the category of environment as a political analytic precedes NEPA, but NEPA instantiates entirely new institutional arrangements that span the breadth of state institutions. And given the political
opening left in the wake of Civil Rights legislation, both state and non-state actors turned to NEPA for a framework for engaging struggles over racialized space because of the flexibility of environment as an analytical category. From the start, NEPA operated in an environmental justice capacity, providing a mechanism, via the EIA process, for racially differentiated populations to engage the state to shape the ways in which their environments were made safe, healthy, and otherwise supportive of life.

By the time Bill Clinton signed Executive Order 12898 in 1994, shifts in state logics around environmental justice had already begun to sediment, as the EPA and other federal and state agencies were already implementing, if unevenly and inconsistently, internal policies for assessing impacts to racially and culturally differentiated communities, as part of NEPA, Civil Rights legislation, and otherwise. And because of the public disclosure function of EIA and the legal protections from Title VI of the Civil Rights Act, the goal of preventing overt forms of distributive discrimination was already coded into the policies of the EPA and other federal agencies. So then the question remains as to why Clinton felt it necessary to pass an executive order whose function in many was already outmoded by existing juridical and procedural precedent. Clinton’s executive order brought into public focus the need for official representational antiracism within state institutions. That is, to maintain the legitimacy of liberal democracy in the face of growing resistance from organizing around issues such as environmental racism, state institutions needed to adopt mechanisms for including and considering culturally, racially, and economically differentiated populations. It acknowledges the various forms of critique environmental justice advocates raised against the state and capitalism by acknowledging the spatial inequalities of environmental racism. However, through its institutionalization of a previously radical framework for engaging spatialized social justice, it diffuses the more radical critiques of structural racism by insisting on a particular vision of environmental justice premised on neoliberal multiculturalism and liberal democratic principles of recognition, inclusion, participation, and disclosure as sufficiently aspirational for continued capitalist growth.
CHAPTER 5. CONCLUSION

Executive Order 12898 attaches environmental justice, as a form of official state antiracism, to the broader project of modeling racial liberalism as a universalized component of contemporary racial capitalism, at the same post-1992 Rio Conference moment that EIA was becoming a universal model for environmental policy across the world. By establishing sets of guidelines, procedures, and a juridical framework through which racialized environmental knowledge is produced, disseminated, and brought to public scrutiny, the EIA process, amended by Executive Order 12898, was institutionalized as one of the many state mechanisms implicated in the government of racialized space. State-sanctioned forms of environmental antiracism further entrench the ways in which racial liberalism is entwined in the universalizing discourse of US capitalist modernity by foregrounding the representational aspects of racial justice while brushing aside the forms of environmental racism most inextricably tethered to global capitalism and contemporary forms of racial domination (cf. Melamed 2011). Environmental justice thus became politically viable at the local scale and within the national context while simultaneously naturalizing the “off-shoring” of environmentally racist pollution and resource extraction regimes, and the masking of other forms of environmental racism such as policing practices and access to adequate housing, health care, and clean water. Under the Executive Order 12898 and the NEPA legislation, race serves as one of the ways of understanding and empirically “knowing” environmental geographies, who is impacted, how, and whether or not those impacts are acceptable under the liberal racial regime of official forms of environmental justice. Within this system, the environment is the nexus of geographical expression of power, production, resources, and waste. The NEPA legislation links environment to the production of space.

Environmental impact assessment thus forms a basis for the ascent of a sort of US environmental imperialism through its universalizing lens of environmental techno-science and liberal antiracism as rationalizing principles for managing space and racialized populations. It allows for the abstraction of racialized material difference and to a certain degree, the masking of imperialist relations through its formalized environmental knowledge systems and liberal public participation mechanisms. The effect is that uneven capitalist development projects and property
relations are legitimized through racial and environmental knowledge produced through the EIA process, and the pluralistic-democratic mechanisms—public feedback and disclosure—contained therein. Despite this, the implementation of EIA is always grounded in, and dependent on, locally situated knowledges and institutional capacities arising from both state and non-state actors. Thus, just because the mechanisms facilitating the spread and implementation of EIA are linked to the structures of global capitalism and US empire, its institutional apparatuses are not necessarily fixed in service of those forces. Indeed, the universalizing tendencies of EIA as global knowledge and governance system might help to reveal some of the ruptures within the imperialist logics of global capitalism exactly because it makes legible the similar forms of oppression and domination that derive from the EIA apparatus.

NEPA at 50: An Agenda for Future Research

As the National Environmental Policy Act approaches its 50th anniversary, retrospective analyses of its legacy and speculative visions of its future are bound to begin appearing across a range of academic, popular, and political, and legal spheres. The two questions that many of these reflections will likely look to address are whether the NEPA legislation has been successful in achieving its intended purposes—however that is described, and what the Act’s broader impact has been on environmental policy more generally, both within the US and internationally. In terms of the former of these questions, there is likely to be renewed debate as to the intention of the legislation: was it really intended to create substantive “improvements” to environmental conditions within the US, or was it intended to merely cause bureaucrats to think differently about their responsibilities to people and the environment. Scholars including one of the first environmental politics scholars and a co-author of the NEPA legislation, Lynton Caldwell, stood firmly by the position that the Act was intended primarily as a prescriptive mechanism for “redirecting national policy through procedural reform,” based on a particular moralistic and values-driven approach to the environment (1998, ix; Bartlett and Kurian 1999). Caldwell also
viewed the Act as having an unrealized potential for significant substantive impacts on both the environment and on environmental considerations within government functions, however this is more of a minority viewpoint, particularly given the impact court decisions such as *Strycker’s Bay* had in gutting the EIA process of its substantive requirements, and of the realities of the institutional, political, and organizational structures have in shaping both the content and outcomes of the EIA process (Bartlett and Kurian 1999). This latter viewpoint hints at the broader implications of the NEPA legislation on public administration, the planning and development processes, and political action beyond the substantive objectives of the Act, and theorizes, among other things, the impact assessment model as a general mechanism of government (e.g., Taylor 1984).

This research contributes to the scholarship about the broader implications of the NEPA legislation that is less concerned with the intentionality behind the Act or its successes or failures as an Act rooted in a particular vision for the environment or the state’s role in managing the environment. My primary focus is on the implications of the Act for the ways that racialized environments are produced through conflicts within and in relation to the state. The three case studies I examined provide a lens into some of the issues that arise out of public engagement with the EIA process. They are not intended to be representative nor exhaustive of the ways in which this engagement has played out in practice over the nearly half-century since the NEPA legislation was passed. Rather, they are a middle distance reading of the legal, political, cultural, and social processes that shape the ways that people use, and the state responds to, organized efforts making use of the EIA process to shape their racialized environments through different ideas of place, belonging, domination, and belonging.

This research reveals several prospective areas for further examination. First is a deeper theoretical interrogation and explication of the racial environmental state. This dissertation utilized the concept of the racial environmental state as a way of understanding how the NEPA legislation changed existing forms of state control over racialized space. The racialization of the
environment its counterpart, the management of racialized populations via environmental
geography, through practices and processes of statecraft, in addition to being central to my
understandings of the EIA process, are (much) more broadly, foundational to the flows of capital
and workings of empire and coloniality. Developing better geographical understandings of the
state’s investments in race and environment is crucial in looking to the possible futures of global
resistance to capitalist domination of environmental and climate change discourses.

One of the current limitations of this project is that the data are primarily from legal and
limited archival sources. Developing the case studies further through the incorporation of oral
histories, ethnography, or additional archival materials would add different dimensions to the
narratives and would likely reveal insights into the organizational back stories that can only be
glimpsed in the current study. Such investigation would likely reveal the ways that each campaign
operated in relation to the racial environmental state by engaging state apparatuses on the one
hand, and trying to change the state’s operation on the other. For instance, in the case of Mālama
Mākua, it is clear from interviews with lead organizers that complex interpersonal relationships
were developed and nurtured between the various organizations opposed to the Army’s use of
Mākua Valley and some of the people within the Army command and other military divisions
responsible for carrying out archaeological and environmental studies and conducting
conservation work within the training grounds (e.g., Aila and Dodge 2012). Learning more about
the nuances of these interpersonal relationships could provide rich detail about the difficulties or
opportunities made possible through the workings of state institutions on an individual scale. My
own experience as an environmental engineer situated between environmental regulators and
“polluters,” for example, informs me that a tremendous amount of work and negotiation occurs off
the official records and outside of courtrooms or public hearings, and that the outcomes of such
negotiations can have dramatic impacts on the things that happen on the record.

But further examination of the specific case studies highlighted in this dissertation is only
one possibility for further developing this project. While such work would give a richer
accounting of the nature of individual campaigns, another avenue of investigation might be to expand the scope of the types of cases I examine in detail, or alternatively, using some sort of empirical analysis to generalize across a much broader range of cases. What types of conclusions might be inferred through a longitudinal analysis of all NEPA or other EIA-type cases submitted for public review or challenged in court? Relatively early in the life of the NEPA legislation, Serge Taylor (1984) looked briefly at the types and quantities of NEPA cases that were challenged in courts or which encountered delays due to public intervention. Given the impacts of case law precedents on the possible scope of legal challenges under the NEPA legislation, repeating a similar analysis today would likely reveal significantly different results. On the other hand, expanding the scope of cases examined in detail would provide additional insights into the use of the EIA process as a site for political intervention, and as the three existing case studies have shown, additional ways that the EIA process provides a mechanism for shifting state discourses around race and environment. Interesting areas for additional case studies might include cases in which a US agency was involved in a proposal for explicitly transborder or international projects (e.g., the Keystone XL oil pipeline between Canada and the US), cases directly resulting in new legislation, and cases in which environmental justice concerns came in direct conflict with ecological concerns.

Expanding on both of the above possibilities for further research, one of the projects I have already begun planning for is an ethnographic project involving environmental justice community organizations. The project aims to develop understanding of the ways that the shifting contours of the racial environmental state under already-institutionalized environmental justice policies and rapidly developing climate change and adaptation policies are affecting the abilities or capacities for community organizations to engage in social and environmental justice activism, advocacy, and community development work. While not directly about the EIA process, this next project aims to build on the racial environmental state framework developed through my research on the NEPA legislation in order to uncover other ways that community organizers utilize the state’s capacities for racial and environmental regulation in their efforts toward social justice that go
CHAPTER 5. CONCLUSION

beyond EIA litigation. As this dissertation reveals, legal strategies are often one in an arsenal of approaches to reaching social and environmental justice goals, so this project seeks to fill in those other gaps to see what other strategies look like that engage the state as a means of changing it.
## Appendix A: California State Prisons, 2016

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**APPENDIX A. CALIFORNIA STATE PRISONS, 2016**

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<td>2005</td>
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<td>2013</td>
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<td>2,304</td>
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Data Sources:


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1The Northern California Women’s Facility closed in 2003.

186
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