

The Theory and Reality of Community-based Environmental Decisionmaking: The Failure of California's Tanner Act and Its Implications for Environmental Justice

*Luke W. Cole**

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INTRODUCTION

The question of where— at what level of government— environmental decisions should be made is one which has been answered clearly and decisively by the Environmental Justice

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Movement: at the community level.¹ The Movement's principles and practice have focused on the idea that communities should speak for themselves,² that those who must bear the brunt of a decision should have a role in making the decision.³ This idea of local control has a long tradition in American political thought, from the founding of the United States through the Progressive era of the early 1900s,⁴ to ideologically diverse adherents, including not only environmental justice advocates but today's civic republicans,⁵ the Republican party,⁶ Supreme Court justices⁷ and Montana militia members.⁸

The Environmental Justice Movement's principle of self-determination grows in part out of its participants' experiences in bearing the disproportionate impact of environmental hazards. To understand and address this aspect of environmental injus-

1. See First National People of Color Environmental Leadership Summit, *Principles of Environmental Justice* (Oct. 24-27, 1991), reprinted in TOXIC STRUGGLES: THE THEORY AND PRACTICE OF ENVIRONMENTAL JUSTICE, app. at 237-39 (Richard Hofrichter ed., 1993) [hereinafter *Principles of Environmental Justice*].

2. See WE SPEAK FOR OURSELVES: SOCIAL JUSTICE, RACE AND ENVIRONMENT (Dana Alston ed., 1990).

3. See, e.g., *Principles of Environmental Justice*, supra note 1; Charles Lee, *From Los Angeles, East St. Louis and Matamoros: Developing Working Definitions of Urban Environmental Justice* 3/4 RACE, POVERTY & THE ENVIRONMENT 3, 3, 5 (1993); Clifford Rechtschaffen, *Fighting Back Against a Power Plant: Some Lessons From the Legal and Organizing Efforts of the Bayview-Hunters Point Community*, 3 HASTINGS W.-NW. J. ENVTL. L. & POL'Y 407, 418 (1996) ("[T]he desired community decisionmaking process when considering the siting of a new facility would be one in which the local community is 'recognized as an equal partner and sitting at the decision-making table' . . .") (citing Carl Anthony, *Community-Based Approach to Redevelopment: The Case of West Berkeley*, 3 HASTINGS W.-NW. J. ENVTL. L. & POL'Y 371(1996)).

4. See Mark Schlesinger, *Paradigms Lost: The Persisting Search for Community in U.S. Health Policy*, 22 J.HEALTH POL. POL'Y & L. 937, 938 (1997).

5. See generally Frank I. Michelman, *The Supreme Court, 1985 Term—Foreword: Traces of Self Government*, 100 HARV. L. REV. 4 (1986); Jonathan Poisner, *A Civic Republican Perspective on the National Environmental Policy Act's Process for Citizen Participation*, 26 ENVTL. L. 53 (1996); Cass R. Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29 (1985).

6. See, e.g., REPUBLICAN NATIONAL COMMITTEE, CONTRACT WITH AMERICA: THE BOLD PLAN BY REP. NEWT GINGRICH, REP. DICK ARMEY AND THE HOUSE REPUBLICANS TO CHANGE THE NATION (1994) (discussing the legislative strategy to devolve federal control to state and local level); Steven Felsenthal, *Superfund Reauthorization: Program Funding, Dispute Resolution, Local Control and Tax Incentives*, 7 FORDHAM ENVTL. L.J. 515, 539 (1996) (noting that Congressional leaders have recognized the attraction of local control of environmental laws such as Superfund).

7. See *New York v. United States*, 505 U.S. 144 (1992); *United States v. Lopez*, 514 U.S. 549 (1995); *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44 (1996).

8. See Josh Meyer et al., *Militia Members' Threats, Attacks on Officials Escalate Violence*, L.A. TIMES, Apr. 27, 1995, at A-1. See also Margaret Baldwin, *Public Women and the Feminist State*, 20 HARV. WOMEN'S L.J. 47, 51 (1997) (locating the current push for local control within "familiar" calls for decentralization and ethnic nationalism).

tice— poor people and people of color being exposed to greater environmental hazards than wealthy people and white people—we need to look behind these distributional outcomes to the underlying social and institutional processes which produce them.⁹ One starting point is to examine environmental decisionmaking processes that are expressly designed to include local input.¹⁰

This Article examines a California law, popularly known as the Tanner Act,¹¹ which purports to give those bearing the brunt of a decision to permit a toxic waste facility some say in that decision. By looking at the actual experiences of three communities¹² which have encountered the Tanner Act's decisionmaking process, the Article tries to determine what makes a local process work or fail for the affected community.¹³ Examining the re-

9. See Robert Bullard, *Decision Making*, in *FACES OF ENVIRONMENTAL RACISM: CONFRONTING ISSUES OF GLOBAL JUSTICE* 3, 4-6 (Laura Westra & Peter S. Wenz eds., 1995); Sheila Foster, *Justice from the Ground Up: Distributive Inequities, Grassroots Resistance, and the Transformative Politics of the Environmental Justice Movement*, 86 CAL. L. REV. 775, 788-807 (1998) (discussing the need to move beyond distributive paradigm and evaluate environmental decisionmaking processes and socio-economic forces as they influence discriminatory outcomes); SHEILA FOSTER & LUKE W. COLE, *JUSTICE FROM THE GROUND UP* (forthcoming 1999) (discussing institutional discrimination infused in decisionmaking processes and socio-economic forces).

10. See Foster, *Justice from the Ground Up*, *supra* note 9, at 831-35. Other starting points might include examining historical zoning and segregation practices, access to decisionmakers and the political arena, or other socio-economic forces. See generally FOSTER & COLE, *supra* note 9.

11. CAL. HEALTH & SAFETY CODE §§ 25199-25199.14 (1997). The Act was principally authored by Assembly Member Sally Tanner, who lent it her name.

12. In using the term "community," I seek not to essentialize "the community" or to imply that *any* community is monolithic, but merely to describe a group of people in a particular geographic location who share some common experiences. As Angela Harris notes, "[I]t is important to be clear about what one means by 'community.'" Angela P. Harris, *Criminal Justice as Environmental Justice*, 1 J. GENDER, RACE & JUST. 1, 34 (1997). Harris provides a useful definition of the word, which I adopt here:

First, a "community" is something that has the potential to emerge from a "neighborhood," in other words, a geographically defined area within the larger legalized borders of a city, town, or village The value added from the word "community" is partly subjective: the sense of neighborhood residents that they are part of a larger entity with the power to determine its fate. It is also partly objective: a neighborhood is not really a community unless its residents actually have some collective power and are aware of and able to use it.

Id. Harris later adds a second definition, "a group of people with a common race-ethnic identity," *id.* at 38, which is not the sense in which I am using the word in this Article. On the hazards of essentialism, of "the community" or otherwise, see Richard Delgado, *Rodrigo's Twelfth Chronicle: The Problem of the Shanty*, 85 GEO. L.J. 667, 685-686 (1997) [hereinafter *The Problem of the Shanty*].

13. Although the Tanner Act has been evaluated by two other articles, neither approaches the evaluation from the community's perspective. See Marie A. Kirk & Christine L. Wade, *A Taxing Problem for Environmental Justice: The Tax Money from*

ality behind the theory of community involvement is essential for designing and using laws to achieve environmental justice.

Although environmental justice scholars have hailed the move toward more deliberative environmental decisionmaking processes such as those codified in the Tanner Act,¹⁴ the experiences of three California communities demonstrate that it is not clear that such processes actually produce more fairness in environmental decisionmaking. The Article also notes the paradox that communities trying to use the Tanner Act to exert local control over land use decisions in environmental justice struggles have had to appeal to the federal government in Washington, D.C., for help in effectuating their needs. It concludes that in situations of racial oppression, the informality of the Tanner Act process does not serve communities of color well.

I.

THE THEORY OF THE TANNER ACT: LOCAL INPUT INTO SITING DECISIONS

The Tanner Act was passed by the California legislature in 1986 with the explicit purpose of making the siting of toxic waste facilities easier.¹⁵ It grew out of a multi-year process which assessed the availability of hazardous waste disposal facilities in California. The Act, however, is schizophrenic. It is designed to site toxic waste facilities over local opposition, yet it also purports to give local residents input into the siting decision. In a legislative trade-off, the Act gives ultimate power to site facilities to an appeals board controlled by the Governor, while also including a semblance of local input in the form of a committee of local residents appointed to advise decisionmakers on the facility.¹⁶ The Act also includes a provision whereby a local govern-

Hazardous Waste Facilities, Where it Goes, and What it Means, 16 STAN. ENVTL. L. J. 201 (1997) [hereinafter *A Taxing Problem*]; Michelle L. Schwartz & Mark R. Wolfe, *Reevaluating the California Tanner Act: Public Empowerment v. Efficient Waste Disposal*, 13 CAL. REAL PROP. J. 44 (1995) [hereinafter *Reevaluating the Tanner Act*].

14. See Foster, *supra* note 9; Eileen Gauna, *The Environmental Justice Misfit: Public Participation and the Paradigm Paradox*, 17 STAN. ENVTL. L.J. 3, 57-65 (1998) (exploring the more deliberative aspects of advisory committees); John S. Applegate, *Beyond the Usual Suspects: The Use of Citizens Advisory Boards in Environmental Decisionmaking*, 73 IND. L.J. 903 (1998) (discussing elements of successful citizen advisory boards).

15. CAL. HEALTH & SAFETY CODE § 25199(c) (1997).

16. According to one student of the Act, "The legislation was a compromise which gave industry the prospect of simplified approval and a powerful appeals mechanism, in return for which citizens' groups obtained far more access to the decision process than before." Paul P. Craig, *Siting a Liquid Hazardous Waste Incinerator: Experience with California's Tanner Act*, 12 J. ENVTL. POLY ANALYSIS 363 (1993) [hereinafter *Siting a Liquid Hazardous Waste Incinerator*].

ment can tax up to 10 percent of a toxic waste facility's gross revenue.¹⁷ This Article, however, focuses solely on the community input provisions of the Act.¹⁸

The Tanner Act was enacted in part because, as the California Legislature specifically concluded, then-existing "procedures for approving hazardous waste facilities d[id] not provide meaningful opportunities for public involvement and [were] not suitably structured to allow the public to make its concerns known and to cause these concerns to be taken into consideration."¹⁹ Prior to the Tanner Act, the only "procedures for approving hazardous waste facilities" were review by the local jurisdictions under the California Environmental Quality Act²⁰ (CEQA) and review by the state under the Health and Safety Code. Finding both of these mechanisms inadequate, the Legislature devised a new process for public participation "to establish specific means to give the concerned public a voice in decisions relating to the siting and issuance of permits for hazardous waste facilities" ²¹

The "specific means" to ensure better public participation is the Act's requirement that a local assessment committee (LAC) assist local governments in their decisionmaking process²². Under the Tanner Act, when a local government agency is considering a proposal for the permitting of a toxic waste facility, the agency must empanel an LAC to negotiate with the facility proponent on behalf of local residents. The primary function of an LAC is to "advise "the appointing legislative body . . . of the terms and conditions under which the proposed hazardous waste facility project may be acceptable to the community"²³ and to provide "any additional information which the committee deems appro-

17. CAL. HEALTH & SAFETY CODE § 25173.5(a) (1997).

18. See Kirk & Wade, *A Taxing Problem*, *supra* note 13, at 218-219, for an evaluation of the Tanner Act's tax provisions. The Tanner Act's 10% tax on hazardous waste facilities' gross revenues, designed to mitigate the impact of the facilities on their host communities, has largely failed to meet this goal. See *id.* at 219. Kirk and Wade found that—like the LAC process—the tax section of the Tanner Act has been subverted by county governments interested in the revenue from the tax, little to none of which is then spent in the communities actually hosting the toxic facility. See *id.* at 225-226. Perhaps not coincidentally, two of the counties that Kirk and Wade found to be ignoring the letter of the Tanner Act were Kings and Kern Counties. See *infra* Part II.B. & II.C.

19. CAL. HEALTH & SAFETY CODE § 25199(a)(3) (1997).

20. *Id.* §§ 21000-21177 (1997).

21. *Id.* § 25199(c) (1997).

22. See *id.* § 25199.7(d) (1997).

23. *Id.* § 25199.7(d)(2) (1997).

priate.”²⁴ An LAC is purely an advisory body and makes recommendations to the local decisionmaking body for its independent consideration.²⁵

To increase the extent and quality of public participation, the Legislature directed that LACs be composed of seven individuals chosen by the local agency to ensure that the LAC is “broadly constituted to reflect the makeup of the community”²⁶ An LAC must include three representatives of the “community at large, two representatives of environmental or public interest groups, and two representatives of affected businesses and industries.”²⁷ To further enhance public participation, the Tanner Act requires an LAC to do all of the following:

- Identify, through dialogue with the facility proponent, “measures that should be taken . . . to protect the public health, safety, and welfare, and the environment”²⁸ and any “special benefits or remuneration the facility proponent will provide . . . as compensation for the local costs associated with the operation of the facility” that are borne by the local community.²⁹
- “Represent generally, in meetings with the project proponent, the interests of the residents of the city or county and the interests of adjacent communities.”³⁰
- Hire technical consultants if the LAC “finds that it requires . . . independent advice to adequately review” and evaluate the toxic waste project³¹ and to assist it “in its meetings and discussions with the facility proponent to seek agreement on the terms and conditions under which the project will be acceptable to the community.”³²

24. *Id.* § 25199.7(d)(2)(E) (1997).

25. *See id.*; *Laidlaw Env'tl. Serv., Inc. Local Assessment Committee v. County of Kern*, 51 Cal. Rptr. 2d 666, 670 (Ct. App. 1996).

26. CAL. HEALTH & SAFETY CODE § 25199.7(d)(2) (1997).

27. *Id.* § 25199.7(d)(1) (1997).

28. *Id.* § 25199.7(d)(2)(A)(i) (1997).

29. *Id.* § 25199.7(d)(2)(A)(ii) (1997).

30. *Id.* § 25199.7(d)(2)(B) (1997).

31. *Id.* § 25199.7(g)(1) (1997). The costs of such consultants are to be paid by the facility proponent, not the local agency. *See id.* § 25199.7(g)(2). Schwartz and Wolfe opine that this provision exists because the legislature recognized “that local citizens might not always possess the knowledge and expertise to negotiate effectively with facility proponents[.]” Schwartz & Wolfe, *Reevaluating the Tanner Act*, *supra* note 13, at 45.

32. Schwartz & Wolfe, *Reevaluating the Tanner Act*, *supra* note 13, at 45. The structure of the law itself, with its focus on “conditions under which the project will be acceptable to the community,” puts opponents of toxic waste facilities in a difficult situation. For many facing the prospect of living near a toxic waste facility, there are no conditions under which such a facility is acceptable. Opponents of a facility are

Thus, in theory, the LAC should be a diverse, representative group of community residents empowered to hire their own consultants and negotiate with the facility proponent. The LAC process should thus lead to authentic participation, making the permit process transparent and, in Anne Simon's words, "permeable."³³

Unfortunately, the Act's reality is somewhat divorced from its ringing theory of improved public participation and community empowerment. The LAC process itself has an uneven record of effectiveness. As the case studies in the next section make clear, there are good LACs, bad LACs, and eviscerated LACs, depending on a variety of local circumstances. Through exploring the experiences of three California communities, several insights can be drawn.

II.

THE GOOD, THE BAD AND THE UGLY: THREE EXPERIENCES AS COMMUNITIES TRY TO USE THE LAW

The Tanner Act has led to the creation of LACs in communities throughout the state, from Imperial County in the south to San Francisco in the north, to oversee permit processes for toxic waste facilities and provide comment on county hazardous waste management plans.³⁴ Here, I briefly discuss three communities' experiences with the LAC process, trying to discern what made the process work in one community and fail in two others.

One way to evaluate the Tanner Act is to see whether, in the language of the statute itself, the LAC in each community gave "the concerned public a voice in decisions relating to the siting and issuance of permits for hazardous waste facilities."³⁵ To an-

thus left with two choices: ignore or boycott the LAC process and thus risk not getting any favorable conditions through the LAC process if the facility is ultimately approved, or take part in the LAC process and perhaps compromise the overall opposition to the facility. Nevertheless, some groups have aggressively taken part in similar administrative fora to demand changes in permits such as testing and monitoring of emissions from a facility. See Peggy M. Shepard, *Issues of Community Empowerment*, 21 *FORDHAM URB. L.J.* 739, 741 (1994) (discussing successful demands by a West Harlem community group). The dilemma of whether or not to take part in administrative environmental decisionmaking processes is further explored in Luke W. Cole, *Macho Law Brains, Public Citizens, and Grassroots Activists: Three Models of Environmental Advocacy*, 14 *VA. ENVTL. L.J.* 687, 694-703, 705-708 (1995); Lawrence E. Susskind, *Overview of Developments in Public Participation*, in *PUBLIC PARTICIPATION IN ENVIRONMENTAL DECISIONMAKING 2*, 3 (Elissa Lichtenstein & William T. Dunn eds., 1994).

33. See Anne Simon, *Valuing Public Participation*, 25 *ECOLOGY L.Q.* 758.

34. *CAL. HEALTH & SAFETY CODE* § 25199.7(d) (1997).

35. *Id.* § 25199(c) (1997).

swer this question, I am relying on the opinions of community residents who took part in the LAC process (the Tanner Act's "concerned public"³⁶), LAC members in each of the three communities, and first-hand knowledge of two of the LAC processes.³⁷

A. *The Good: A Tanner Success Story in Martinez*

The Martinez LAC was empanelled by the Martinez City Council to review a proposal by Rhone-Poulenc to expand its sulfuric acid recycling plant in the town into a commercial toxic waste incinerator—the largest such incinerator in the western United States.³⁸ The LAC was "very technically skilled," according to member Paul Craig.; Among its seven members were a biochemist, an engineer, an expert on environmental policy, and a staff person from the local utilities district.³⁹

In Martinez, according to local residents and a member of the LAC, the LAC process worked as it was designed. Active and engaged members took part in the four-year LAC process, educated themselves, and were educated by the LAC's consultants. The LAC hired several consultants,⁴⁰ one of which produced a well-researched 150-page study for the LAC on the impact of the proposed toxic waste incinerator on property values.⁴¹ That study fed the already-strong community opposition to the facility.

36. *Id.* § 25199(c) (1997).

37. I represented residents of Kettleman City in their successful struggle against Chem Waste's incinerator and residents of Buttonwillow in their fight against the expansion of the Laidlaw toxic dump.

38. Telephone interview with Cathy Ivers in Martinez, CA (April 30, 1998) [hereinafter "Ivers interview"] (Ms. Ivers attended almost every LAC meeting over the four-year term of the LAC); Schwartz & Wolfe, *Reevaluating the Tanner Act*, *supra* note 13, at 46.

39. Telephone interview with Paul Craig, member of the Martinez LAC, in Martinez, CA (May 7, 1998) [hereinafter "Craig interview"].

40. Settlement Agreement and Mutual Release between the City of Martinez and Rhone-Poulenc Basic Chemicals Co., October 26, 1992, ¶ I (on file with the author) [hereinafter Settlement Agreement] ("At the LAC's request many presentations and other activities were funded and/or conducted by [Rhone-Poulenc], addressing issues which have ranged over such diverse topics as the nature and control of fugitive emissions to the sociological factors which may affect a community's perceptions.").

41. GRUEN GRUEN & ASSOCIATES, ECONOMIC AND FINANCIAL ASSESSMENT OF THE IMPACT OF THE PROPOSED OPERATION OF A HAZARDOUS WASTE STORAGE AND INCINERATION FACILITY IN MARTINEZ, CALIFORNIA: A REPORT TO THE MARTINEZ LOCAL ASSESSMENT COMMITTEE (February 1990). The Assessment predicted that residential property values "are likely to decrease by about 2 percent over what they would be without the project" and that the incinerator would make would-be home buyers think of the community as more industrial. *Id.* at xii.

Martinez's elected officials strongly supported the LAC,⁴² giving it such latitude and so many technical assistance grants that Rhone-Poulenc at one point protested and refused to pay any further fees.⁴³ The City Council remained officially neutral throughout the LAC process, but did indicate a hostility to incineration in general when it passed, unanimously, a resolution stating that it was illegal to import any toxic waste from outside Martinez for incineration.⁴⁴

The Martinez LAC process was interrupted in June 1992 by a devastating, and deadly, accident at the Rhone-Poulenc plant, in which one worker was killed and another critically injured during normal maintenance operations.⁴⁵ "Their facility, and credibility, were badly damaged," says Cathy Ivers, a Martinez resident who attended most of the LAC meetings.⁴⁶ A few months later, under increased community pressure, Rhone-Poulenc agreed to drop the incinerator proposal.⁴⁷ The company

42. *Open Letter to City Residents*, MARTINEZ NEWS-GAZETTE, Sept. 12, 1992, at 4 (open letter from the Mayor, Vice Mayor, and three City Council members praising the LAC for its "conduct and professionalism"). See also Ann Abreu, *Many Feel Local Opposition Real Reason R-P Plan Killed*, MARTINEZ NEWS-GAZETTE, Sept. 3, 1992, at 1, 2 (noting city council praise for the LAC); Ann Abreu, *R-P Drops Plans for Toxic Waste Incinerator*, MARTINEZ NEWS-GAZETTE, Sept. 1, 1992, at 1-2 ("City officials were unanimous in applauding LAC for their dedication and tenacity.").

43. Rhone-Poulenc's failure to pay some \$450,000 in fees led local officials to deem its application withdrawn. See Louise Solomon, *Incinerator Plans Burn Out in Martinez*, PLEASANT HILL-MARTINEZ RECORD, Sept. 3, 1992, at 1.

44. Ivers interview, *supra* note 38; Craig, *Siting a Liquid Hazardous Waste Incinerator*, *supra* note 16, at 386. The City Council was acting to pre-empt a citizen initiative, put on the local ballot by petition, which would have similarly banned incineration. See *id.* After the incinerator proposal was withdrawn, elected officials expressed relief. See Erin Hallissy, *Plans Dropped for Toxic Waste Incinerator: Martinez Mayor, Community Organizers Cheer Company's Decision*, S.F. CHRON., Sept. 1, 1992, at A-11; Ann Abreu, *R-P Drops Plans for Toxic Waste Incinerator*, MARTINEZ NEWS-GAZETTE, Sept. 1, 1992, at 1.

45. See Daniel Borenstein, *Huge Acid Spill Ignites: Two Workers Burned at Plant in Martinez*, CONTRA COSTA TIMES, June 23, 1992, at 1A, 4A. The fire, which "sent flames 200 feet into the air and billowing black smoke drifting toward East County," forced the closing of several major freeways and the evacuation of thousands of residents, according to news accounts. *Id.*; see also Larry Hatfield & Don Martinez, *Acid Spill Feared in Martinez Blaze: Chemical Plant Spews Toxic Cloud: 'Possibly Toxic' Substance Burns 2, Closes Highways, Bridges in Region*, S.F. EXAMINER, June 22, 1992, at A-1, A-11. Although Rhone-Poulenc had earlier tried to have the State of California intervene and take over the permitting process from Martinez, the Mayor of Martinez suggested that the fire underscored the need for public input into the permitting process. "This incident points out the fact that we should not be short-circuiting the system, but whould [sic] keep local control." Ann Abreu, *Explosions Rock Rhone-Poulenc Plant*, MARTINEZ NEWS-GAZETTE, June 23, 1992, at 2.

46. Ivers interview, *supra* note 38. Ivers notes that the accident happened during routine operations even before the proposed incinerator was built.

47. See Donna Hemmila, *Rhone-Poulenc Withdraws Plan for Incinerator: Foes*

set up a foundation to contribute to the Martinez community,⁴⁸ a foundation which operates to this day.⁴⁹

Did the LAC live up to its Tanner Act mandate, to “give the concerned public a voice in decisions relating to the siting and issuance of permits for hazardous waste facilities”?⁵⁰ “Absolutely,” says LAC member Craig. “It absolutely did that,” echoed Ivers. “I think we all got off on going down there and feeling we had as much right to speak as those people in the suits.”⁵¹ Martinez residents also knew that the LAC was the only forum in which they would be able to express their views on the proposed incinerator.⁵² LAC member Craig summarized his evaluation: “On balance, the Tanner process seems to me to be lending a significant element of rationality and public exposure to the siting process. The process is slow, cumbersome and very time consuming, but it does meet all other reasonable tests for opening the decision process to detailed public scrutiny.”⁵³

From the perspective of the “concerned public” and an LAC member, then, the Martinez LAC can be judged a success.⁵⁴

B. *The Bad: An LAC as a “Rubber Stamp” in Kings County*

A second case study comes from the proposal by Chemical Waste Management, Inc. (Chem Waste) to build and operate a toxic waste incinerator at its existing toxic waste dump near Kettleman City, Kings County, just off Highway Five in the San Joaquin Valley.⁵⁵ The County appointed an LAC to consider

Claim Fire a Key Factor in Firm's Decision, CONTRA COSTA TIMES, Sept. 1, 1992, at 1.

48. See Settlement Agreement, *supra* note 40, at ¶ 3.2.1.

49. See Ivers interview, *supra* note 38. Ms. Ivers serves on the board of the foundation.

50. CAL. HEALTH & SAFETY CODE § 25199(c) (1997).

51. Ivers interview, *supra* note 38. Community residents made a considerable commitment to taking part in the LAC process, and report actually enjoying the experience. “I looked so forward to Monday nights—it was better than whatever was on television,” says Ivers. “It was the Birkenstock crowd vs. the suit crowd.” *Id.*

52. See Ivers interview, *supra* note 38.

53. See Craig, *Siting a Liquid Hazardous Waste Incinerator*, *supra* note 16, at 386. Craig amplifies, “The process had been unbelievably time consuming. Frustrations have been high, and frequent. Yet there is no doubt that the process is allowing the public to have input. It is an open process. An enormous amount of information has been placed in the public domain.” *Id.* at 383.

54. Schwartz and Wolfe regard the Martinez LAC as a failure, as the facility was not sited. See Schwartz and Wolfe, *Reevaluating the Tanner Act*, *supra* note 13, at 46. In evaluating the Tanner Act, I am more neutral about the *outcome*, if the *process* that the Act codifies works as designed.

55. For a more complete discussion of this case (but not the LAC), see Luke W. Cole, *The Struggle of Kettleman City: Lessons for the Movement*, 5 MD. J. CONTEMP. LEGAL ISSUES 67 (1993-94) [hereinafter *Kettleman City*]. See also Luke W. Cole,

Chem Waste's proposal, and the LAC met on a regular basis for some eighteen months, ultimately recommending a series of conditions to the Kings County Board of Supervisors that were accepted in their entirety. On paper, at least, the LAC fulfilled its function of providing advice to the Board and including public input in the Board's ultimate decision. But did the LAC "give the concerned public a voice in decisions relating to the siting and issuance of permits for hazardous waste facilities?" The answer, from residents of Kettleman City and a member of the LAC itself, is a resounding "no."⁵⁶

In Kings County, the LAC operated not as a vehicle for public input, but as a wholly-owned subsidiary of county government, according to those who took part in the process. At each meeting, County staff presented proposed recommendations to LAC members that were almost always approved.⁵⁷ The LAC paid little heed to the testimony of local residents and did not seek to examine any impacts of the dump other than accepting the County's Environmental Impact Report (EIR), a document later determined by a state court to be inadequate.⁵⁸ "It was more of a rubber stamp," says LAC member Joe Maya.⁵⁹

The LAC appeared to Kettleman City residents to be hand-picked by the County, such that only supporters of the project were chosen. "When you interviewed for the LAC, if you said anything negative you were tossed out," says Maya.⁶⁰ According to Maya, one strong opponent was denied a seat on the LAC, and the County "lost" the application of another opponent.⁶¹ The re-

Empowerment as the Key to Environmental Protection: the Need for Environmental Poverty Law, 19 *ECOLOGY L.Q.* 619, 674-679 (1992).

56. Even Chem Waste, the facility proponent, recognized the LAC's failure. "While this [LAC] process might appear to be comprehensive and responsive to the community's needs, it failed to achieve community understanding and support." Chuck McDermott, *Balancing the Scales of Environmental Justice*, 21 *FORDHAM URB. L.J.* 689, 703 (1994).

57. Joe Maya, a member of the LAC for its entire two-year existence, notes one conflict of interest in the staffing of the LAC that would later hamper the LAC empanelled in Kern County, as well. "Our attorney was the County Counsel, who was in Chem Waste's hip pocket because he figured the more money the project brought in, the bigger the [County's] budget would be." Interview with Joe Maya in Kettleman City, CA (May 6, 1998).

58. *El Pueblo para el Aire y Agua Limpio v. County of Kings*, No. 366045, 22 *Env'tl. L. Rep.* 20357 (Cal. Super. Ct., Sacramento County, Dec. 30, 1991).

59. Maya interview, *supra* note 57.

60. *Id.*

61. *Id.* Maya, who later became an outspoken opponent of the project, laughed when recounting how he was chosen for the LAC. "I told them I was for it [the project], so I was chosen. When they found out I was against it, they couldn't do a damn thing about it." *Id.*

sult of the County's selection process was that just one resident of Kettleman City, who was also the LAC's only Latino member, was chosen for the committee, despite the fact that Kettleman City hosted the dump and the proposed incinerator and is 95 percent Latino.⁶² "The County had already decided" on the incinerator, says Kettleman City resident Mary Lou Mares, so the LAC was composed of "people from out of town. Joe [Maya] was the token Hispanic from Kettleman City."⁶³

The LAC conducted almost all of its meetings far from Kettleman City, forty miles away in the county seat of Hanford. This stifled participation by Kettleman City residents, clearly those most interested in the project. "We didn't go to the LAC meetings because they weren't [here] in the community," notes Jesus Camacho, a long-time Kettleman City resident.⁶⁴ Another resident active in the six-year fight against the incinerator proposal was not even aware of the existence of the LAC.⁶⁵ "The County knew people in Hanford didn't give a damn one way or the other, so they felt safe [in Hanford]. They had the home-field advantage," says Maya.⁶⁶ The LAC held just one meeting in Kettleman City during its two-year deliberations.

Even Chem Waste's management recognized the racial politics at work in the LAC process. Chem Waste's vice president noted:

Despite the best intentions of the Tanner Act process, in this case it may have failed to provide sufficient inclusion for those most directly affected by the incinerator plans. Kings County has a population of 110,000 of which 34% is Hispanic. Kettleman City, the town nearest the facility, has a population of 1411—almost all are Hispanic. At the time of these proceedings, none of the five members of the Kings County Board of Supervisors were Hispanic. Of the seven members of the LAsC [sic], only one was from Kettleman City. Of the \$7,000,000 CWM pays annually in taxes to the county, little of it is spent in Kettleman City. Thus it can be seen that those most affected by the site need better access to the process of siting and to the services afforded by the site. Otherwise, as in this case, community opposition will be fierce and

62. Maya felt it was a mistake to have only one Kettleman resident on the LAC. "It would be good to have Kettleman City residents on the LAC, then you would have people with a lot more interest— as it was, nobody but two of us questioned anything about the project." *Id.*

63. Interview with Mary Lou Mares in Kettleman City, CA (May 6, 1998).

64. Interview with Jesus Camacho in Kettleman City, CA (May 6, 1998).

65. See interview with Maricela Alatorre in Kettleman City, CA (May 6, 1998).

66. Maya interview, *supra* note 57.

the chances for success lessened.⁶⁷

When the County ultimately approved the incinerator project, it adopted the LAC's recommendations. The outcome of the permitting process was that the residents of Kettleman City felt excluded and ultimately sued the County under the California Environmental Quality Act, the Tanner Act, and civil rights laws.⁶⁸ The only Kettleman City resident on the LAC was a plaintiff in that suit. The residents prevailed in state court,⁶⁹ and Chem Waste scrapped the incinerator project while the case was on appeal.⁷⁰ With a member of the LAC successfully suing the County to block the project, with only one LAC meeting held in Kettleman City, and with only one member of the LAC from Kettleman City, the LAC process in Kings County can only be judged a failure.

C. *The Ugly: An LAC Sues Kern County*

The third case study grows out of waste disposal giant Laidlaw, Inc.'s proposal to double the capacity of its toxic waste dump near Buttonwillow, in western Kern County, California. Kern County empanelled an LAC in early 1992 to consider Laidlaw's proposal, and the LAC met six times before being suspended unilaterally by the County in July, 1992. The LAC was re-empanelled at the end of September, 1994 and told to finish its work so that the County could complete the permitting process by the beginning of December, 1994.⁷¹

Residents and LAC members agree that the Kern County LAC process was a disaster. While the meetings were held in Buttonwillow, the process began with no residents of Buttonwillow on the LAC. Although Buttonwillow is over fifty percent Latino, and Kern County as a whole is some twenty-eight percent Latino, not a single Latino was appointed by the County to the seven-member LAC. Dozens of community residents, primarily Spanish-speaking Latinos, attended the LAC meetings held once a month for six months until July, 1992. At the first six meetings, residents pressed the County to provide Spanish translation for the majority of attendees who spoke no English.⁷² Laid-

67. McDermott, *Balancing the Scales*, *supra* note 56, at 704.

68. *See id.* at 703. *See also* El Pueblo para el Aire y Agua Limpio, 22 *Envtl. L. Rep.* 20357.

69. *See id.*

70. *See Cole, Kettleman City*, *supra* note 55, at 80.

71. *See Kern County Local Assessment Committee-Laidlaw, Meeting Minutes*, Sept. 27, 1994 at 6 (on file with author).

72. *See, e.g.*, Kern County Local Assessment Committee-Laidlaw, Meeting Min-

law finally agreed to provide such translation in June, 1992.⁷³ Kern County then suspended the LAC in July, 1992.

During that suspension, the draft and final Environmental Impact Reports (EIRs) on the dump expansion were completed, but not sent to most LAC members. In the twenty-seven months that the LAC did not meet, two members resigned and one died. Despite applications from Latino Buttonwillow residents, the County selected two replacements from outside the community, both of whom were white. In a move that confirmed to Buttonwillow residents that the County was racially biased in selecting members for the LAC, one white Buttonwillow resident, whose application had not been submitted during the LAC application process (as the Latinos' applications had) was also selected.⁷⁴ When another white member of the LAC resigned in protest and said that a Latino from Buttonwillow should be appointed,⁷⁵ the Board finally appointed Eduardo Montoya, a farmworker foreman from Buttonwillow, to the LAC in September 1994.⁷⁶

After a twenty-seven month hiatus, the County reconvened the LAC in late September, 1994 and told the Committee it had ten weeks to complete its business.⁷⁷ The LAC requested technical assistance grants for translation of documents into Spanish for one of its members and consultants for independent advice on seismic issues and landfill liners, after public comment indicated concern in those areas. County staff actively opposed every request and the Board of Supervisors turned down every request. The LAC never received a technical assistance grant.⁷⁸

utes, May 14, 1992 at 2 (audience member states, "Again, we ask you today to provide an interpreter. You are here to respond to all sides. Most of the people that are here do not understand what you are saying.") (on file with author).

73. See Sub-committee Report, Spanish-English Meeting Interpretation Sub-committee, June 11, 1992; Kern County Local Assessment Committee-Laidlaw, Meeting Minutes, June 25, 1992, at 1-2 (on file with author).

74. See Complaint Under Title VI of the Civil Rights Act of 1964 at 40, *Padres Hacia una Vida Mejor v. Laidlaw, Inc.*, U.S. Department of Housing and Urban Development (filed December 12, 1994).

75. See Petition For Writ of Mandamus and Complaint for Injunctive and Declaratory Relief at 27, *Padres Hacia Una Vida Mejor v. County of Kern* (Cal. Super. Ct. filed January 13, 1995).

76. See Kern County Local Assessment Committee-Laidlaw, Meeting Minutes, Sept. 27, 1994 at 1 (on file with author).

77. See *id.* at 6.

78. "The County blocked every option we had," says LAC member Montoya. "Every single thing we asked the County to do for us, they denied it." Interview with Eduardo Montoya in Buttonwillow, CA (May 7, 1998). Mr. Montoya was a member of the LAC from September through December, 1994 and was a plaintiff in the LAC's lawsuit against Kern County. See *Laidlaw Envtl. Serv., Inc. Local Assessment Committee v. County of Kern*, 51 Cal. Rptr. 2d 666, 668 (Ct. App. 1996).

The LAC also battled County staff about control of meetings, from setting the agenda, to conducting the meetings, to hiring outside consultants. Piqued by the County staff's continuing opposition to the LAC's requests for independent consultants, the LAC tried unsuccessfully to set its own agenda. "We spent our time arguing with the County," says LAC member Montoya. "We never got a chance to run the meetings ourselves."⁷⁹

The LAC's frustration was shared by the public attendees, who watched as meetings were taken up with conflict between LAC members and the County staff, while opportunities for public comment dwindled. "The public could see the LAC was trying to do something and the County was blocking them. The public didn't have input," says Montoya. "The County didn't want the public to know what was going on."⁸⁰

Not surprisingly, the LAC was unable to arrive at any "conditions of approval" in the short time it was given. At the hearing on the dump expansion project in December, 1994, the Board of Supervisors disbanded the LAC over the protests of Buttonwillow residents and LAC members.⁸¹ "The Board knew beforehand that they would approve the dump," says LAC member Montoya. "They were just going through the motions."⁸²

Buttonwillow residents felt personally insulted and betrayed by the Board's action. Particularly hurt were those who had devoted countless hours preparing for, attending, and testifying at the thirteen LAC meetings that were held over the thirty-six month permitting process.⁸³ "If I had to do it again, I wouldn't go through a process like that," says Rosa Solorio-Garcia, who attended every LAC meeting. "It was a real slap in the face."⁸⁴ Dennis Palla, a farmer from Bakersfield sympathetic to Buttonwillow residents who served on the LAC, says "It's sad because literally the input from the people who are going to be directly

79. Montoya interview, *supra* note 78.

80. *Id.*

81. "The Board ended the [LAC] process almost before it started," lamented LAC member Montoya. *Id.* "Looking back on it, the whole committee process was just a travesty," says local farmer Dennis Palla, who also served on the LAC. "It was doomed from the beginning. . . . We had very little time to do what we were supposed to do. It was just a rubber stamp." Interview with Dennis Palla in Bakersfield, CA (August 9, 1995).

82. *Id.* Montoya was bitter about the experience with the County: "The Board doesn't care what people in Buttonwillow think. They did what the Planning Department recommended to do, not what the LAC recommended to do." *Id.*

83. Interview with Rosa Solorio-Garcia in Buttonwillow, CA (May 7, 1998). "We believed we could make a difference, but as the process went longer and longer we realized it wouldn't matter." *Id.*

84. *Id.*

affected has just gone by the wayside.”⁸⁵

Beyond removing any role for the community in the dump decision, the County's actions in disregarding and disbanding the LAC have had the (perhaps intended) outcome of stifling future public participation in County decisions by Buttonwillow residents. “If something comes up in Buttonwillow again, people are not going to take part, they're not going to become involved,” says Solorio-Garcia.⁸⁶ This long-term impact on civic participation is the exact opposite of the empowered community involvement envisioned by the Tanner Act.⁸⁷

The LAC itself ultimately sued the County and, in the only published decision interpreting the Tanner Act's LAC provisions, lost.⁸⁸ Local residents, a Buttonwillow community group, and nearby farmers also sued the County in two suits which were consolidated by the court.⁸⁹ At the state trial court level, the plaintiffs in these consolidated suits were successful in arguing that the County had violated the Tanner Act in suspending the LAC for twenty-seven months, refusing to award technical assistance grants, and disbanding the LAC before all state and lo-

85. Palla interview, *supra* note 81. Palla, a self-described conservative Republican, continues, “that's unfortunate. Very, very unfortunate. In fact, it makes me bitter.” Palla's disillusionment with the county led him, along with other members of the LAC, to file suit against the county. See *infra* note 88.

86. *Id.* See also Luke W. Cole, *Environmental Justice and the Three Great Myths of White Americana*, 3 HASTINGS W.-NW. J. ENVTL. L. & POL'Y 449, 454 (1996):

[T]here's a kind of false expectation that can be created by the government coming in, even when the government purports to be on your side. The raising of false expectations teaches these communities to distrust government and not to participate in its processes—which then exacerbates the problem of community powerlessness. The community is then blamed for not participating, when the government is actually the cause of that non-participation.

Id.

87. Buttonwillow residents' experience is, unfortunately, not isolated:

Many groups have taken part in the permitting process for a proposed facility, and earnestly presented damning evidence about a company, project, or technology that all experts agree is bad, only to see the permit approved by their elected representatives. Such communities learn the hard way that the public participation process is not designed to hear and address their concerns, but instead to manage, diffuse, and ultimately co-opt community opposition to projects.

Cole, *Macho Law Brains*, *supra* note 32, at 701.

88. See *Laidlaw Envtl. Serv., Inc. Local Assessment Committee v. County of Kern*, 51 Cal. Rptr. 2d 666, 671 (Ct. App. 1996).

89. See *Palla v. County of Kern*, No. 227735-RDR (Cal. Super. Ct., Apr. 29, 1996); *Padres Hacia una Vida Mejor v. County of Kern*, No. 229670-RDR (Cal. Super. Ct., Apr. 29, 1996).

cal permit processes had been completed.⁹⁰ The residents' victory was narrowed on appeal to the one issue of disbanding the LAC before its statutory life had expired.⁹¹ Despite the Court's order directing the County to reinstate the LAC, the County never complied.

III.

SEARCHING FOR MEANING: THEMES IN THE CASE STUDIES

The lesson that emerges from these three case studies is that the Tanner Act is not working to satisfy the need for community input into toxic waste facility decisionmaking.⁹² Table I offers some insight as to how the successful Martinez LAC situation differed from the failures of the Kings County and Kern County LACs.

90. See *id.*, slip op. at 10-12.

91. See *Palla v. County of Kern*, No. F026533, slip op. at 73 (Cal. Ct. of Appeal, Jul. 23, 1997).

92. Schwartz and Wolfe note that the "Act also sought to provide a means to avoid litigating permit decisions by allowing affected communities to voice their concerns to developers *before* any permits are issued and construction begins." Schwartz & Wolfe, *Reevaluating the Tanner Act*, *supra* note 13, at 44. By this standard, the LACs in Kings and Kern Counties were abject failures; Kern County's handling of the LAC process drew not one but three lawsuits, including one by the LAC itself.

TABLE ONE
LAC Processes and Outcomes in
Three Tanner Act Communities

	Martinez	Kettleman City	Buttonwillow
Officials' Stance On Lac	strongly supportive	supportive	hostile
Officials' Stance On Project	neutral (against) ⁹³	for	for
Community Participants' Stance On Project	against	against	against
Lac Stance On Project	neutral	for	neutral > against
Lac's Receipt Of Grants	grants received	grants received	grants denied
Lac's Production	produced recommendations and report	produced recommendations	unable to complete work
Community Participants' Stance On Lac	participated	largely ignored	participated
Active Life Of Lac	4 years	2 years	7 months ⁹⁴
Project Outcome	project cancelled	project defeated in court	project upheld in court
Community Participants' View Of Lac Process	successful	failure	failure

93. LAC member Paul Craig notes that the City Council was "extremely careful never to comment" on its views on the project, but that "as individuals living in the community they were not enthusiastic." Craig interview, *supra* note 39. The City Council was also pleased when the project was finally withdrawn by Rhone-Poulenc. See, e.g., Ann Abreu, *R-P Drops Plans for Toxic Waste Incinerator*, MARTINEZ NEWS-GAZETTE, Sept. 1, 1992, at 1 (City Council member described as "ecstatic"); Erin Hallissy, *Plans Dropped for Toxic Waste Incinerator: Martinez Mayor, Community Organizers Cheer Company's Decision*, S.F. CHRON., Sept. 1, 1992, at A-11.

94. Members of the LAC argue that its actual working life was only *two* months, as the LAC met for five months in early 1992, before any of the environmental review documents were prepared, before being suspended for 27 months by Kern County. The LAC was reempanelled in late September 1994, when the County informed it that it would have to provide recommendations to the Board within 10 weeks. See Kern County Local Assessment Committee-Laidlaw, Meeting Minutes, Sept. 27, 1994 at 6 (on file with author).

The moral of the story appears to be that mechanisms designed to give power to the local level only operate if decision-makers and the participating public have a commitment to the process. In Martinez, elected officials and the community bought into the LAC idea, and it was successful. The community felt included, and the LAC produced reports and recommendations. In the other two cases, either the community or the officials did not take the process seriously or, worse, actively subverted the process. These cases ended in lawsuits against the County by members of the LAC or the LAC itself. Thus, commitment by both the public and decisionmakers appears to be a key ingredient in success. But this is only the beginning of the analysis.⁹⁵

The Tanner process is designed to achieve community input and provide a vehicle for community residents' voices to be heard. It should thus theoretically escape the problems of other informal methods of dispute resolution, such as mediation, which as Trina Grillo observes can be destructive for participants "because it requires them to speak in a setting that they have not chosen and often imposes a rigid orthodoxy as to how they should speak, make decisions, and be."⁹⁶ Why then did the process break down in two out of the three cases? Perhaps the answers are most easily found in Table II, which gives the demographics of the communities in question, the LAC, and the decisionmakers. By examining the relative homogeneity of Martinez, and the reflection of Martinez' population in both the

95. Several other factors found in Table I distinguish the Martinez situation from those in Kern and Kings Counties. The Martinez City Council strongly supported the LAC in its wide-ranging investigation of the impacts of the proposed incinerator; in Kern County, the Board of Supervisors denied every request from the LAC for technical assistance grants. In Martinez, the LAC remained publicly neutral throughout the process. LAC member Paul Craig believed that "for the LAC to be credible, members must avoid taking strong positions on the proposal." Craig, *Siting a Liquid Hazardous Waste Incinerator*, *supra* note 16. Craig sees the necessity for neutrality as a detriment to getting skilled people to serve on an LAC, especially years into the process: "as the review process continues most local citizens have developed commitments. There is a real shortage of non-committed, qualified persons to serve on the Committee." *Id.* In Kings County, the LAC supported the project; in Kern County, the LAC's neutrality evolved into exasperation with County officials, which led the LAC to recommend that the Board of Supervisors reject the dump proposal. This request was framed in the alternative, with the LAC requesting more time to finish its work, and, if that were not granted, recommending that the County disapprove the project. LAC members were first and foremost committed to the LAC process, however, and had not previously opposed the facility. "That's why we wanted more time, to find out about the project," explained LAC member Eduardo Montoya. Montoya interview, *supra* note 78.

96. Trina Grillo, *The Mediation Alternative: Process Dangers for Women*, 100 YALE L.J. 1545, 1549-1550 (1991).

LAC and the decisionmakers, a contrast between it (as the successful case study) and Buttonwillow and Kettleman City emerges. Buttonwillow and Kettleman City are overwhelmingly communities of color, while the LACs and decisionmakers in both cases were overwhelmingly white. In some situations, this disparity might not matter; in Buttonwillow and Kettleman City, it was central to the failure of the LACs.

TABLE TWO
Community and Decisionmaker Demographics
in Three Tanner Act Communities⁹⁷

	Martinez	Kettleman City	Buttonwillow
Decision-Makers	100% white	100% white	100% white
Lac Members	100% white	86% white , 14% Latino	91% white, 9% Latino ⁹⁸
Host Community	88% white, 12% people of color	95% Latino	35% white, 53% Latino, 12% Black

One of the major complaints growing out of both the Kings and Kern County LACs was that the LACs were not representative of the local community; this lead to tension and distrust between the public and the LAC. "The intention is to have local people," says Joe Maya of the Kings County LAC. "That's why the word 'local' is in the name, Local Assessment Committee."⁹⁹ Maya feels that more people would have participated in the Kings County LAC process if more Kettleman City residents— who host the toxic dump— had been appointed to the LAC and if the LAC had met in Kettleman City, rather than 40 miles away in the County seat of Hanford.¹⁰⁰ The Martinez LAC, because it only involved a city, drew members from a more compact geographic, and thus more homogenous, area than the Kings or Kern County LACs. This homogeneity may have increased its effectiveness and responsiveness to public input.

97. Based on census data. See BUREAU OF THE CENSUS, U.S. DEPARTMENT OF COMMERCE, 1990 CENSUS OF POPULATION, 1 GENERAL POPULATION CHARACTERISTICS, CALIFORNIA 42, 69, 79 (1990).

98. The Buttonwillow LAC had 11 members over its 36-month tenure, one of whom was Latino. The Latino was appointed 34 months into the LAC process, and served for 10 weeks before the LAC was disbanded by the County. See Local Assessment Committee, Meeting Minutes Nov. 22, 1994; Kern County Local Assessment Committee-Laidlaw, Meeting Minutes, Sept. 27, 1994 at 6 (on file with author).

99. Maya interview, *supra* note 57.

100. *Id.*

In Martinez, participants in the LAC process felt empowered; they had as much right to speak as anyone else.¹⁰¹ In Kettleman City and Buttonwillow, on the other hand, the residents felt silenced. Trina Grillo has postulated that the orthodoxy of a process "is imposed through subtle and not so subtle messages about appropriate conduct and about what may be said."¹⁰² In Buttonwillow, this theory was played out to a tee. When community participants pressured the LAC to request Spanish translation of documents, which the LAC did, the Kern County Board of Supervisors told the LAC (and the public) in no uncertain terms that the LAC could not provide translation.¹⁰³

Under the terms of the Tanner Act itself, the LAC processes in Kings County and particularly in Kern County were clearly failures. The LACs there did not "give the concerned public a voice in decisions relating to the siting and issuance of permits for hazardous waste facilities."¹⁰⁴ By not offering meaningful participation to community residents, the LACs fundamentally failed the communities they were supposed to help. As Sheila Foster notes, "meaningful participation by those most affected by environmental decisions is a crucial component of assessing the fairness of environmental decisions."¹⁰⁵

The LACs also failed under more traditional criteria, as well. John Applegate proposes four central qualities of a good public participation process: broad representation, openness, procedural fairness and dialogue.¹⁰⁶ Applying these criteria to the Kings and Kern County LACs, both fail in all four areas. Only in the Martinez LAC are Applegate's qualities found. The failure of local governments in Kern and Kings Counties to set up open, representative, and fair processes points to a central flaw in the Act: there is no enforceable way to make local governments fol-

101. See *supra* notes 51-53 and accompanying text.

102. See Trina Grillo, *The Mediation Alternative*, *supra* note 96.

103. See, e.g., Local Assessment Committee, Meeting Minutes, October 11, 1994, at 2 (County Counsel informs LAC that "the LAC does not have any independent authority to require the translation of documents into a language other than English nor may it hire any consultant for that purpose without the approval of the Board of Supervisors, and . . . the Board took action yesterday to indicate that it is its policy that it will not translate the documents nor will it hire a consultant for that purpose."); Memorandum to Laidlaw Environmental Services (Lokern) Inc. Local Assessment Committee from Board of Supervisors, County of Kern (October 11, 1994). See also Local Assessment Committee-Laidlaw, Meeting Minutes, May 14, 1992 at 2 (County official tells Spanish speakers, "We can't do it any other way at this time, except in English.").

104. CAL. HEALTH & SAFETY CODE § 25199(c) (1997).

105. Foster, *supra* note 9, at 833.

106. See Applegate, *supra* note 14, at 952-53.

low its mandate. As Schwartz and Wolfe note:

The legislative history of the Tanner Act suggest that the Tanner process was intended, in part, to address [the] disparity in interests between cities or counties and local communities by providing a means of local community input into the process. But when local agencies appoint LACs that fail to include residents of communities adjacent to proposed facilities, the Tanner process can become meaningless.¹⁰⁷

IV.

THE PARADOX OF FAILING TO GAIN LOCAL POWER

While the environmental justice movement has persuasively argued for the principle of local control over and input into land use decisions,¹⁰⁸ the irony of two of these case studies is that local residents had to appeal to state and federal power sources when they were denied a role in local decisionmaking. In Kings County, residents sued the County in state court and federal district court to vindicate their rights.

In Kern County, community residents in Buttonwillow and nearby areas had to resort to extreme measures to make their voice heard in the permitting process. Three separate lawsuits were filed against the County for subverting the Tanner process, including one by the LAC itself¹⁰⁹ One group of residents sued the County and filed an administrative complaint with the U.S. Department of Housing and Urban Development, charging that the County had violated Title VI of the Civil Rights Act of 1964 in approving the facility despite its discriminatory impact on the people of Buttonwillow, who are over sixty percent people of color.¹¹⁰

Unfortunately, this seeming paradox can be explained simply. Although the environmental justice movement strongly believes in local input into environmental decisionmaking, that belief is not always shared by those making environmental

107. See Schwartz & Wolfe, *Reevaluating the Tanner Act*, *supra* note 13, at 47.

108. See sources cited *supra* notes 2 - 4.

109. The LAC's suit was ultimately rejected by the Court of Appeal on standing grounds. *Laidlaw Env'tl. Serv., Inc. Local Assessment Committee v. County of Kern*, 51 Cal. Rptr. 2d 666, 671 (Ct. App. 1996). The Court ruled that the LAC, as an appointed body that existed at the whim of the Board of Supervisors, was a "subordinate ministerial appendage" of the Board and thus could not legally sue itself (the Board). *Id.* at 669. This is the only reported decision interpreting the public participation provisions of the Tanner Act.

110. Complaint before the U.S. Department of Housing and Urban Development at 10, *Padres Hacia una Vida Mejor v. County of Kern* (filed December 12, 1994). The complaint is still under active investigation by HUD.

decisions— here, Kings and Kern Counties. Much as advocates in an earlier movement for self-determination— the Civil Rights Movement— had to appeal to the federal government to help resolve local disputes and force local decisionmakers to include them,¹¹¹ the environmental justice movement must sometimes look far beyond local decisionmakers to find a sympathetic reception.

In addition, the very formality of the legal process— although it is outside the community and thus outside community residents' control¹¹²— may ironically afford community residents more protection than the informal Tanner Act process when that process is run by racist or insensitive decisionmakers. “[I]nformality increases power differentials,”¹¹³ explains Richard Delgado:

It's not simply because of the greater discretion the decisionmaker wields, although this does open the door for prejudice even wider than it is in court. Rather, it's because all the hallmarks of formality you find in the courtroom— the flags, the robes, the judge sitting on high, the codes of evidence and procedure— all of these remind everyone present that the values that are to prevail are those of the American Creed: fairness, equal treatment, a day in court for everyone.

Americans subscribe to two sets of values: the noble ones we apply during occasions of state, on the Fourth of July, when everyone is watching. During these times, the same person who might at other times— say, in a bar or private club— tell an ethnic joke or do something hurtful to a woman or minority, will behave in truly egalitarian fashion. Formality triggers the former values and tends to assure a better result, all other things being equal.¹¹⁴

Thus, the experience in these three LAC processes suggests that true community control of environmental decisionmaking may only come through using more formal means of participation.

CONCLUSION

As with many laws, the spirit and intent of the Tanner Act has been subverted by some local agencies, which have seen its

111. See, e.g., *United States v. Duke*, 332 F.2d 759 (5th Cir. 1964).

112. See Luke W. Cole, *Remedies for Environmental Racism: A View from the Field*, 90 MICH. L. REV. 1991, 1996 (1992).

113. Delgado, *The Problem of the Shanty*, *supra* note 12, at 680.

114. *Id.* at 681; see also PATRICIA WILLIAMS, *THE ALCHEMY OF RACE AND RIGHTS* (1991).

requirements as *pro forma* hoops to be jumped through (Kings County) or strictures to be ignored or actively contradicted (Kern County). Recourse to the courts to enforce the Tanner Act has thus far proven futile, perhaps because of flaws in the crafting of the Act itself. The informality of the LAC process, and the lack of enforceable requirements in the Tanner Act for participation by the public led to community disenfranchisement in the Kings and Kern County LAC processes. Ultimately, local input into, and control of, land use decisions can only occur when local residents force it to become reality— either by pressuring their legislatures to put some teeth into the Tanner Act and similar statutes, or by electing officials who are accountable to their constituents.