

Addressing Poverty and Pollution: California’s SB 535 Greenhouse Gas Reduction Fund

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INTRODUCTION

California — the “Golden State” — is often heralded as a progressive state at the forefront of the environmental movement. While environmental efforts in the state have contributed to advances in the field, much work still needs to be done to attain a fair and equitable distribution of resources and benefits from environmental policies. In 2012, the U.S. Census Bureau found that California had the nation’s highest poverty rate using a measure

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that accounts for the costs of basic necessities, burden of taxes, and availability of support programs.¹ California ranks seventh highest for income inequality in the country.² From 1980 to 2010, incomes for families in the bottom tenth declined 24% while incomes of the wealthiest tenth grew 34%.³ Along with widening income disparities, there is a widening gap in quality of life and life expectancy.⁴ Our zip codes have become a better determinant of our life expectancies than our genetic codes.⁵ These unequal health outcomes are directly relatable to toxic environments and socioeconomic disparities between neighborhoods.⁶ Any serious effort to improve the environment must account for these inequalities.

I grew up in California's "toxic triangle" — the heavily polluted region of Oakland, Bayview-Hunters Point, and Richmond.⁷ Residents from my zip code will live an average of twelve fewer years than those living in surrounding affluent suburban areas.⁸ This gap between the wealthy and the

¹ See KATHLEEN SHORT, SUPPLEMENTAL POVERTY MEASURE: 2011, at 12 (2012), available at <https://www.census.gov/prod/2012pubs/p60-244.pdf>, archived at <http://perma.cc/776L-6G58>. The current official poverty measure used by the U.S. Census Bureau was developed in the 1960s and was first adopted in 1969. KATHLEEN SHORT, SUPPLEMENTAL POVERTY MEASURE: 2010, at 1 (2011), available at http://www.census.gov/hhes/povmeas/methodology/supplemental/research/Short_ResearchSPM2010.pdf, archived at <http://perma.cc/9B75-KDAW>. However, due to several inadequacies relating to its methods, concepts, and usage, the Census Bureau began to consider recommendations on possible alternative measures that address these weaknesses. *Id.* In 2010, the Census Bureau's Interagency Technical Working Group and the Bureau of Labor Statistics further developed the Supplemental Poverty Measure as an alternative measure to publish along with the official poverty measure each year. *Id.* at 2.

² POLICYLINK, CALIFORNIA'S TOMORROW: EQUITY IS THE SUPERIOR GROWTH MODEL 2 (2012) (citing U.S. CENSUS BUREAU, INCOME, POVERTY, AND HEALTH INSURANCE COVERAGE IN THE UNITED STATES: 2010 (2011), available at <https://www.census.gov/prod/2011pubs/p60-239.pdf>, archived at <http://perma.cc/7NBZ-B2T2>), available at http://www.policylink.org/atf/cf/%7B97c6d565-bb43-406d-a6d5-eca3bbf35af0%7D/CA_ESGM_FINAL.PDF, archived at <http://perma.cc/A4QP-EJ93>.

³ SARAH BOHN & ERIC SCHIFF, THE GREAT RECESSION AND DISTRIBUTION OF INCOME IN CALIFORNIA 6 (2011), available at http://www.ppic.org/content/pubs/report/R_1211SBR.pdf, archived at <http://perma.cc/933S-WUZ2>.

⁴ Robert Pear, *Gap in Life Expectancy Widens for the Nation*, N.Y. TIMES (Mar. 23, 2008), http://www.nytimes.com/2008/03/23/us/23health.html?_r=0, archived at <http://perma.cc/65D4-PGBF>.

⁵ See Ctr. on Soc'y & Health, *Life Expectancy Maps*, VA. COMMONWEALTH UNIV., <http://www.societyhealth.vcu.edu/Page.aspx?nav=319> (last visited Mar. 1, 2014), archived at <http://perma.cc/AC3P-VSE9>.

⁶ See generally Ctr. on Soc'y & Health, *Place Matters*, VA. COMMONWEALTH UNIV., <http://www.societyhealth.vcu.edu/Page.aspx?nav=200> (last visited Mar. 1, 2014), archived at <http://perma.cc/P694-F6KY> (containing studies of various geographic areas stating the relationship between environmental hazards and social factors).

⁷ The "toxic triangle" is a term used to refer to Oakland, Hunter's Point, and Richmond, which are low-income communities in the Bay Area, California. *Toxic Triangle*, MEIKLEJOHN CIVIL LIBERTIES INST., <http://mcli.org/our-work/key-issues/toxic-triangle> (last visited Mar. 1, 2014), archived at <http://perma.cc/AR5W-XKKG>. Serious health risks continue to threaten its residents due to the hazardous waste sites located in these areas. *Id.*

⁸ Suzanne Bohan & Sandy Kleffman, *Day 1: Three East Bay ZIP Codes, Life-and-Death Disparities*, INSIDE BAY AREA (Jan. 26, 2010, 11:21 AM), http://www.insidebayarea.com/life-expectancy/ci_13913952, archived at <http://perma.cc/X7ES-FENS> (comparing the life expectancy for zip code 94603 — near my zip code of 94601 — with that of 94597, which has a life

poor is not only in life expectancy, but in quality of life as well.⁹ The toxic triangle has higher than average rates of respiratory disease, cancer, and other preventable illnesses, all tied to pollution.¹⁰ These environmental harms are often coupled with problems stemming from poverty — such as failing school systems, lack of access to healthy food options, and record levels of unemployment.¹¹

Although there is a rising environmental movement — with corresponding social and financial investments in being “green” — the benefits of clean technology have been available and accessible almost entirely to the wealthy few who can afford them. Many in low-income communities are economically locked out of these resources, even though it could be argued that those areas are in greater need of the energy and cost savings from emerging, clean technologies.

As the wealth gap widens, there is a growing disparity between the effects of environmental policies on the ecological haves and have-nots. For instance, the State has levied additional vehicle registration fees on Californians to fund electric vehicle rebates generally used by wealthier consumers.¹² Nevertheless, studies show that these rebates are not critical factors for influencing the purchasing decisions of wealthy consumers.¹³ Bus services needed by low-income residents have been reduced while the investments in high-speed rail¹⁴ and rail-to-airport connections — which are more likely used by higher income “choice riders” — have been growing.¹⁵ Moreover,

expectancy of 87.4 years); *see also* Brittany Schell, *Stories on the Intersection of Health, Wealth and Race in Oakland Neighborhoods*, PULSE OF OAKLAND, <http://www.pulseofoakland.com/> (last visited Mar. 1, 2014), *archived at* <http://perma.cc/A55V-59JW>.

⁹ Steven H. Woolf, Emily Zimmerman & Sarah Simon, *The Inextricable Link Between Neighborhoods and Health*, THE EDGE, http://www.huduser.org/portal/pdredge/pdr_edge_hudpartrpt_110413.html (last visited Mar. 1, 2014), *archived at* <http://perma.cc/Z63P-AQE8>.

¹⁰ Rebecca Bowe, *Drawing a Line in the Toxic Triangle*, S.F. BAY GUARDIAN ONLINE (Apr. 5, 2011, 4:34 PM), <http://www.sfbg.com/2011/04/05/drawing-line-toxic-triangle?page=0>, *archived at* <http://perma.cc/U37N-R9HZ>.

¹¹ *See* Ctr. on Soc’y & Health, *Alameda County: Life Expectancy and Community Opportunity*, VA. COMMONWEALTH UNIV., <http://www.societyhealth.vcu.edu/Page.aspx?nav=235> (last visited Mar. 1, 2014), *archived at* <http://perma.cc/AV52-HKZ8> (containing studies of Alameda County, where the toxic triangle is located, that show the level of unemployment, the quality of schools, and the rate of crime).

¹² *A Green Car Named Desire: Electric Car Subsidies for the Rich Are Now a Drain on California’s Budget*, WALL ST. J. (Sept. 17, 2013), <http://online.wsj.com/news/articles/SB10001424127887323981304579079321154539590>, *archived at* <http://perma.cc/SQ92-Y4QE> (citing a California survey that reveals that typical rebate recipients earn over \$150,000 and that the most popular electric vehicle bought by these consumers has been Tesla’s Model S sports sedan, which runs between about \$70,000 and \$100,000); *see also* C.C. SONG, *ELECTRIC VEHICLES: WHO’S LEFT STRANDED 9–10* (2011), *available at* <http://greenlining.org/wp-content/uploads/2013/02/ElectricVehiclesReport.pdf>, *archived at* <http://perma.cc/HF2B-CM9C>.

¹³ *A Green Car Named Desire*, *supra* note 12.

¹⁴ CAL. DEP’T OF FIN., GOVERNOR’S BUDGET SUMMARY 2014–2015: ENVIRONMENTAL PROTECTION 105 (2014), *available at* <http://www.ebudget.ca.gov/2014-15/pdf/BudgetSummary/EnvironmentalProtection.pdf>, *archived at* <http://perma.cc/CKQ5-4VWV>.

¹⁵ *See, e.g.*, Armand Emamdjomeh, *Could \$70 Million for the Oakland Airport Connector Be Better Spent?*, N.Y. TIMES (Feb. 1, 2010, 12:43 PM), <http://bayarea.blogs.nytimes.com/>

California is seeing the expansion of refineries¹⁶ that avoid regulations and continue polluting our air,¹⁷ putting low-income communities in particular at risk.

We must bridge this divide by bringing resources to low-income communities for reducing pollution and creating the infrastructure for sustainable economic revitalization in these areas. Some examples of this include increasing investments for public transportation operations, modifying rebate and incentive programs so that they better serve working families, and supporting free or subsidized energy efficiency programs in low-income communities. These investments can bring jobs into the communities: jobs that pay well and have a career track. These kinds of programs can help mitigate pollution and poverty at the same time.

This Article looks at the California cap-and-trade program as an illustration of how a program can create environmental winners and losers — those who can afford the clean technology and access environmental benefits versus those who cannot. It will discuss how the Greenlining Institute and other allies came together to pass Senate Bill 535¹⁸ (“SB 535”) to ensure a more equitable allocation of resources. This Article will discuss that law and its limitations, and explain how the law has been implemented.

Part I looks at the current state of environmental inequities in California, arguing that there is a clear “eco-divide.” It discusses how pollution disproportionately harms low-income communities and how environmental responses have ignored or worsened conditions for those communities. Then, Part I looks at California’s cap-and-trade program as an example of just such a failed response.

Part II frames SB 535 as a law that responds to the needs of the most vulnerable communities. If cap-and-trade is an example of how environmental policies can hurt low-income communities and communities of color, then SB 535 is an example of an environmental mandate that creates solutions and investments to counter longstanding issues in education, employ-

2010/02/01/could-70-million-for-the-oakland-airport-connector-be-better-spent/?_php=true&_type=blogs&_r=0, archived at <http://perma.cc/8B3G-6C99>.

¹⁶ Asjylyn Loder, *Unforeseen U.S. Oil Boom Upends Markets as Drilling Spreads*, BLOOMBERG (Jan. 8, 2013, 3:35 PM), <http://www.bloomberg.com/news/2014-01-08/unforeseen-u-s-oil-boom-upends-world-markets-as-drilling-spreads.html>, archived at <http://perma.cc/5W29-QNG3>; see also *Is California Prepared for a Domestic Oil Boom?*, SFGATE (Feb. 26, 2014, 10:20 AM), <http://www.sfgate.com/opinion/editorials/article/Is-California-prepared-for-a-domestic-oil-boom-5269946.php>, archived at <http://perma.cc/P8D9-Z29G> (highlighting the increasing trend in crude oil shipments to California refineries by rail); Anna Vignet, *Chevron Refinery’s Planned Expansion Worries Environmentalists*, KQED News (Aug. 7, 2013), <http://blogs.kqed.org/newsfix/2013/08/07/chevron-california-carbon-trading/>, archived at <http://perma.cc/8PJS-QBPA>.

¹⁷ Steve Hargreaves, *California Could Be Next Oil Boom State*, CNN (Jan. 15, 2013), <http://money.cnn.com/2013/01/14/news/economy/california-oil-boom/>, archived at <http://perma.cc/HPG4-C3XG>.

¹⁸ S. 535, 2011–2012 Reg. Sess. (Cal. 2012), available at http://www.leginfo.ca.gov/pub/11-12/bill/sen/sb_0501-0550/sb_535_bill_20120930_chaptered.html, archived at <http://perma.cc/A8MD-3MQE>.

ment, and economic development. This Part delves into how SB 535 was conceived, how a coalition of advocates worked together to pass the bill, and how the coalition overcame opposition to the law. This Part also analyzes how SB 535 works, its benefits, and its limitations. Lastly, Part II discusses the implications of the law for creating more equitable and sustainable communities for all.

The Article concludes by arguing that California's recent attempt to rectify past inequities in the environmental movement is cause for hope that better days are ahead. The passage of SB 535 is an example of a policy effort that is paying more attention to the resource gaps and needs of low-income communities. It is a start, but woefully insufficient. Greater efforts must be made to persuade all environmental policymakers and advocates — even those who are “mainstream” and not necessarily representing low-income communities and communities of color — to develop policies that are similarly responsive to the nation's highest need communities.

I. CALIFORNIA'S ENVIRONMENTAL MOVEMENT HAS INADEQUATELY ADDRESSED THE NEEDS OF DISADVANTAGED COMMUNITIES

A. *Disproportionate Impacts of Climate Change and Pollution on Disadvantaged Communities*

While swings in climate affect us all, the effects of climate change and pollution disproportionately impact low-income communities.¹⁹ California's communities of color and poor residents are more likely to suffer extreme heat waves and breathe dirtier air.²⁰ Residents of these communities already have poorer access to health care²¹ and healthy foods.²² At the same time, they pay more for basic necessities and have less access to well-paying jobs.²³ As a result, low-income communities and communities of color are less able to bear the burdens of a changing climate.

¹⁹ RACHEL MORELLO-FROSCH ET AL., THE CLIMATE GAP: INEQUALITIES IN HOW CLIMATE CHANGE HURTS AMERICANS AND HOW TO CLOSE THE GAP 5 (2009), available at http://domsife.usc.edu/assets/sites/242/docs/The_Climate_Gap_Full_Report_FINAL.pdf, archived at <http://perma.cc/7JJ-LAAV>.

²⁰ *Id.*

²¹ CATHY SCHOEN ET AL., HEALTH CARE IN THE TWO AMERICAS: FINDINGS FROM THE SCORECARD ON STATE HEALTH SYSTEM PERFORMANCE FOR LOW-INCOME POPULATIONS, 2013 (2013), available at <http://www.commonwealthfund.org/Publications/Fund-Reports/2013/Sep/Low-Income-Scorecard.aspx?page=all>, archived at <http://perma.cc/JMS8-DVCK> (finding that low-income people were more likely to be uninsured or underinsured than those with higher incomes).

²² Joanna Lin, *Nearly 1 Million Californians Living in “Food Deserts,”* CAL. WATCH (May 5, 2011), <http://californiawatch.org/dailyreport/nearly-1-million-californians-living-food-deserts-10122>, archived at <http://perma.cc/XG2H-9TEG>.

²³ U.S. CENSUS BUREAU, NET WORTH AND ASSET OWNERSHIP OF HOUSEHOLDS: 2011 tbl.1 (2013), available at <http://www.census.gov/people/wealth>, archived at <http://perma.cc/KL6Q-VRJR>. The U.S. Census data show that for every dollar that white families have, the median Asian family has about eighty-one cents, the median Latino family has about seven cents, and

A number of different findings suggest that low-income communities and communities of color bear a disproportionate risk of harms from climate change. For instance, African Americans in Los Angeles are nearly twice as likely to die from a heat wave than other Los Angeles residents.²⁴ As climate change worsens and costs of food production increase (for example, from rising water scarcity), low-income and minority families will likely bear the burden of spending even higher proportions of their income on food, electricity, and water.²⁵

People of color are more likely to live near busy roads and highways, leading to higher risks of pollution-based illnesses and harms.²⁶ Nearly twice as many Californians die from traffic-related pollution as from traffic accidents.²⁷ In West Oakland, residents are exposed to particulate matter concentrations nearly three times higher than the regional average.²⁸ “Health studies have shown that asthma rates in West Oakland are five times higher than [those] of people living in the Oakland hills, and cancer risks are threefold compared to other Bay Area cities.”²⁹

Polluting facilities are disproportionately located in communities of color nationally and in California.³⁰ For example, 60% of African Americans and Latinos nationwide live in communities with uncontrolled toxic waste sites.³¹ Penalties for environmental violations in these communities

the median black family has about six cents. *See id.* (calculating the ratios based on each group’s “Net Worth”).

²⁴ MORELLO-FROSCH, *supra* note 19, at 7 (finding that extreme heat events lead to increased illness and death, particularly among the elderly, infants, and African Americans).

²⁵ *Id.* at 5.

²⁶ *Cf.* Cheryl Katz, *Unequal Exposures: People in Poor, Non-White Neighborhoods Breathe More Hazardous Particles*, ENVTL. HEALTH NEWS (Nov. 1, 2012), <http://www.environmentalhealthnews.org/ehs/news/2012/unequal-exposures>, archived at <http://perma.cc/D35Y-LZ9T>.

²⁷ Compare Fabio Caiazzo et al., *Air Pollution and Early Deaths in the United States*, 79 ATMOSPHERIC ENV’T 198, 203 (2013) (stating that there were 5726 annual premature deaths in California due to PM 2.5 and 209 from ozone), with CAL. DEP’T OF PUB. HEALTH, SELECTED DETAIL WITHIN LEADING CAUSES OF DEATH BY SEX AND RACE/ETHNIC GROUP tbl. 5-12 (2009), available at <http://www.cdph.ca.gov/data/statistics/Documents/VSC-2009-0512.pdf>, archived at <http://perma.cc/3K8W-DXHG> (listing 2311 motor vehicle fatalities for males and 889 motor vehicle fatalities for females, totaling 3200 traffic fatalities for California residents).

²⁸ *Particulate Matter*, BAY AREA AIR QUALITY MGMT. DIST. (May 2, 2013), <http://www.baaqmd.gov/Divisions/Planning-and-Research/Particulate-Matter.aspx>, archived at <http://perma.cc/XR4Y-FFQX>.

²⁹ Bowe, *supra* note 10.

³⁰ MORELLO-FROSCH ET AL., *supra* note 19, at 10–11 (finding that 62% of California residents living within six miles of a polluting facility are people of color, as compared to the 38% who are non-Hispanic white); see also J. STEPHEN POWELL, POLITICAL DIFFICULTIES FACING WASTE-TO-ENERGY CONVERSION PLANT SITING 39 (1984), available at <http://www.ejnet.org/ej/cerrell.pdf>, archived at <http://perma.cc/V3EH-24EC> (revealing that in 1984, when the California Waste Management Board asked a consultant to find localities least likely to oppose waste incineration plants, the consultant reported that the least likely to oppose would include lower socioeconomic status neighborhoods — while areas most likely to oppose would be those populated by liberal and highly educated persons).

³¹ BENJAMIN E. CHAVIS, JR. & CHARLES LEE, UNITED CHURCH OF CHRIST, TOXIC WASTE AND RACE IN THE UNITED STATES xiv (1987), available at <http://www.ucc.org/about-us/archives/pdfs/toxwrace87.pdf>, archived at <http://perma.cc/CRU4-N7HC>. In 2007, the United

are five times lower than penalties for the same violations in white communities.³² Neighborhoods with waste incinerators have 89% more people of color than the national average.³³

The damage caused by these polluting facilities may be further aggravated in ethnically diverse areas where residents have limited English proficiency. Residents who do not speak or read English fluently may not be immediately warned in cases of emergencies. Warning systems designed to provide protection may not work or may not warn non-English speakers. For example, when the Chevron refinery in Richmond, California, had an accident in March of 1999, many of the nearby residents were Laotian. They did not receive adequate notification about the dangers, nor were they cautioned to stay indoors.³⁴

The economic and social costs of pollution are profound. To take one more example, an economic analysis of school absences and ozone levels in Southern California estimates that \$68 million a year could be saved if ozone levels in the South Coast Air Basin³⁵ were further reduced.³⁶

These economic and environmental costs can compound existing burdens faced by residents in these communities. The aggregate of the factors described above creates a heightened need for environmental policies that address underserved communities' full environmental burden.

B. Many Environmental Policies and Resources Bypass Low-Income Communities

Despite the disproportionate environmental harms disadvantaged communities face, many environmental policies and programs have not addressed the needs of these communities — instead, they have bypassed these communities or made their overall harms more severe. While there has been a strong push for investment in environmental resources, many of these

Church of Christ published an update to the report stating that current findings show that the percentage has increased. ROBERT D. BULLARD ET AL., UNITED CHURCH OF CHRIST, TOXIC WASTES AND RACE AT TWENTY VIII (2007), available at <http://www.ucc.org/justice/pdfs/toxic20.pdf>, archived at <http://perma.cc/8X7D-WND2>.

³² Marianne Lavelle & Marcia Coyle, *Unequal Protection: The Racial Divide in Environmental Law*, 15 NAT'L L. J. 4 (1992), available at <http://www.ejnet.org/ej/nlj.pdf>, archived at <http://perma.cc/7K7C-A6B2>.

³³ Irwin Weintraub, *Fighting Environmental Racism: A Selected Annotated Bibliography*, 1 ELEC. GREEN J. 1, 2 (1994).

³⁴ Jessica Tovar, *Richmond Residents Not Alerted About Chevron Refinery Fire on Monday 1-15*, EAST BAY (Jan. 18, 2007, 1:32 PM), available at <http://www.indybay.org/news/items/2007/01/18/18348797.php>, archived at <http://perma.cc/Q6VW-9M5Z>. Residents later won a multilingual warning system to warn residents of dangers. *Id.*

³⁵ The California Air Resources Board has divided the state into fifteen air basins, which are areas of similar meteorological and geographical conditions, in order to better manage air pollution. See CAL. AIR RES. BD., DESCRIPTIONS OF CALIFORNIA AIR BASINS, available at <http://www.arb.ca.gov/desig/airbasins/60100-60114.pdf>, archived at <http://perma.cc/PM5-J3EN>.

³⁶ Jane Hall et al., *Economic Valuation of Ozone-Related School Absences in the South Coast Air Basin of California*, 21 CONTEMP. ECON. POL'Y 407, 414 (2003).

types of programs ignore the socioeconomic realities and needs of low-income communities. Many of these communities have consistently high levels of unemployment,³⁷ little economic industry,³⁸ and few opportunities for increasing self-sufficiency.³⁹ Residents of these communities need jobs that foster long-term financial independence, programs that address the increasing costs of basic necessities, and environmental investments that reduce pollution and improve their quality of life. Environmentalism can be a vehicle for advocates for low-income communities to bring resources and solutions to these communities immediately.

This Article looks at California's climate policies as a case study. As I explain below, California's process of implementing cap-and-trade after the passage of Assembly Bill 32⁴⁰ ignored advocates' concerns regarding the program's potential harms to low-income communities and communities of color. Advocates reacted by simultaneously pushing back on the development of the cap-and-trade program and seeking creative solutions to mitigate potential harms and create cobenefits to remedy the deep problems in these communities.

1. Assembly Bill 32 and the Development of California's Cap-and-Trade Program.

California's Assembly Bill 32 ("AB 32"), codified as the Global Warming Solutions Act,⁴¹ provides that the State shall return to 1990 levels of greenhouse gas ("GHG") emissions by 2020.⁴² This goal amounts to a 30% decrease in GHG emissions from business-as-usual emission level projections.⁴³ This is akin to every Californian reducing her annual carbon footprint from fourteen tons to ten tons by 2020.⁴⁴ Environmental and environmental justice advocates lauded the State's significant commitment to reduce GHG emissions and provisions within the law aimed at ameliorating

³⁷ See APPLIED RESEARCH CTR., RACE AND RECESSION: HOW INEQUITY RIGGED THE ECONOMY AND HOW TO CHANGE THE RULES 14 (2009) (finding that over a thirty-seven-year period, unemployment rates for people of color rarely fell below 9.3%, the highest recession-level rate of white unemployment).

³⁸ POLICYLINK, *supra* note 2; U.S. CENSUS BUREAU, *supra* note 2.

³⁹ Michael Luo, *In Job Hunt, College Degree Can't Close Racial Gap*, N.Y. TIMES (Nov. 30, 2009), http://www.nytimes.com/2009/12/01/us/01race.html?_r=1&_archived_at=http://perma.cc/7DDM-56TM (pointing to lack of access to jobs even when black men have a college degree); see also BOHN & SCHIFF, *supra* note 3, at 6.

⁴⁰ Assemb. 32, 2005–2006 Reg. Sess. (Cal. 2006).

⁴¹ CAL. HEALTH & SAFETY CODE § 38550 (2014).

⁴² Cal. Assemb. 32. AB 32 was jointly authored by Speaker Fabian Nunez and Senator Fran Pavley.

⁴³ CAL. AIR RES. BD., CLIMATE CHANGE SCOPING PLAN ES-1 (2008), available at http://www.arb.ca.gov/cc/scopingplan/document/adopted_scoping_plan.pdf, archived at <http://perma.cc/3RCV-Q2ZF>.

⁴⁴ *Id.*

harms faced by disadvantaged communities.⁴⁵ Yet this early enthusiasm was short-lived as the AB 32 implementation came to include developing a cap-and-trade program.⁴⁶

Cap-and-trade is a market-based compliance mechanism that aims to limit GHG emissions.⁴⁷ Companies that emit more than their allotted allowances have to purchase more permits and/or “offsets” (emissions reductions offsite).⁴⁸ Companies that emit less than they are allotted can trade or sell their allowances.⁴⁹ As the cap declines, this theoretically creates an increasing motivation for companies to reduce their GHG emissions by greening their operations.

Environmental justice advocates opposed implementing a cap-and-trade program in California.⁵⁰ They believed the success of this market mechanism had been oversold by economists and should be viewed with skepticism.⁵¹ There was also a concern that cap-and-trade might lead to “hot spots,” areas with heavy localized emissions.⁵² Humans exposed to high concentrations of pollutants have a greater risk of experiencing health problems.⁵³ The cap-and-trade program can therefore aggravate health problems or increase the risk of negative side effects for people living near

⁴⁵ Interview with Rafael Aguilera, Principal Consultant, Verde Group (Jan. 17, 2014). Rafael Aguilera was one of the primary advocates for AB 32. At the time, he worked for the Environmental Defense Fund. The Environmental Defense Fund was one of the cosponsors for AB 32.

⁴⁶ *S-20-06*, CA.GOV, <http://gov.ca.gov/news.php?id=4484> (last visited Mar. 16, 2014), archived at <http://perma.cc/DB2P-MFXC> (stating that on October 18, 2006, within a month of signing AB 32, Governor Arnold Schwarzenegger issued an executive order that directed his administration to develop a market-based compliance mechanism that permitted trading with other jurisdictions).

⁴⁷ *How Cap and Trade Works*, ENVTL. DEF. FUND, <http://www.edf.org/climate/how-cap-and-trade-works> (last visited Jan. 25, 2014), archived at <http://perma.cc/LD8A-HUSY>.

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ Environmental justice advocates signed a declaration stating: “[T]he California Environmental Justice Movement will oppose efforts by our state government to create a carbon trading and offset program, because such a program will not reduce greenhouse gas emissions at the pace called for by the international scientific community, it will not result in a shift to clean sustainable energy sources, it will support and enrich the state’s worst polluters, it will fail to address the existing and future inequitable burden of pollution, it will deprive communities of the ability to protect and enhance their communities, and because if our state joins regional or international trading schemes it will further create incentives for carbon offset programs that harm communities in California, the region, the country, and developing nations around the world.” *The California Environmental Justice Movement’s Declaration on Use of Carbon Trading Schemes to Address Climate Change*, EJ MATTERS, <http://www.ejmatters.org/declaration.html> (last visited Feb. 10, 2014), archived at <http://perma.cc/YP27-E4C6> [hereinafter *EJ Movement’s Declaration*].

⁵¹ *Id.*

⁵² See *Cap and Trade Frequent Questions*, EPA, <http://www.epa.gov/captrade/faqs.html> (last visited Mar. 1, 2014), archived at <http://perma.cc/THL8-3A38> (responding to a “frequent question” about whether there would be “hot spots” by asserting that emissions trading has “not adversely affected attainment of air quality standards”).

⁵³ *Air Quality Index (AQI) — A Guide to Air Quality and Your Health*, AIRNOW, <http://www.airnow.gov/?action=aqibasics.aqi> (last visited Mar. 1, 2014), archived at <http://perma.cc/UP67-QZ5L>.

polluting facilities if those facilities use trading, offsets, and other tools to increase emissions. Many California environmental justice organizations signed onto a declaration to “fight at every turn all efforts to establish a system of carbon trading and offset use in California” for these reasons.⁵⁴

Despite these objections, the Schwarzenegger Administration pushed for a cap-and-trade policy.⁵⁵ His Administration argued that this was the most cost-effective way to get California to implement a climate policy and avoid leakage, the movement of businesses to other states to avoid regulations. Speaker Fabian Nunez, who had taken leadership on AB 32 as the primary author, opposed including mandatory language on cap-and-trade.⁵⁶ Speaker Nunez did so knowing he would lose environmental justice advocates’ support if such a mandate for cap-and-trade were included in the law.⁵⁷ Governor Schwarzenegger threatened to veto the bill if it did not mandate a cap-and-trade program.⁵⁸ The Administration and the Legislature continued to be opposed on this issue.⁵⁹ Ultimately, the bill arrived on the Governor’s desk and was signed into law with the question of whether there would be a market-based mechanism left to the implementing agency’s discretion.

Environmental justice advocates were initially excited that this law (1) did not have a mandatory market-based mechanism;⁶⁰ (2) encouraged the State to direct revenues to disproportionately impacted communities;⁶¹ (3) allowed for the possibility of levying fines against industries that violated regulations;⁶² and (4) mandated the convention of an Environmental Justice Advisory Committee (“EJAC”) to help implement AB 32.⁶³ EJAC was envisioned to have unprecedented access to and interaction with the California Air Resources Board (“ARB”) staff and influence in the implementation

⁵⁴ *EJ Movement’s Declaration*, *supra* note 50.

⁵⁵ Margot Roosevelt, *California Pushes Cap-and-Trade Plan*, L.A. TIMES (Nov. 24, 2009, 1:58 PM), <http://latimesblogs.latimes.com/greenspace/2009/11/california-cap-and-trade-plan.html>, archived at <http://perma.cc/ZE66-CEB9>.

⁵⁶ Interview with Rafael Aguilera, *supra* note 45.

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ W. Michael Hanemann, *How California Came to Pass AB 32, the Global Warming Solutions Act of 2006* 22 (Dep’t of Agric. & Res. Econ. and Policy, Working Paper No. 1040, 2007). The Governor and the Legislature were opposed on two other issues — which agency would lead AB 32 implementation and whether a “safety valve” should be included to allow the Governor to relax the emissions cap if extraordinary economic circumstances required it. *Id.*

⁶⁰ Market-based compliance mechanisms allow the market to solve the problem of allocating resources. See CAL. HEALTH & SAFETY CODE § 38562 (2014). To the extent that environmental justice advocates thought market-based compliance mechanisms were effective tools for reducing GHG emissions, they supported a carbon tax or fee, which would provide price certainty and avoid trading. Interview with Marybelle Nzegwu, Lead Attorney for the Association of Irrigated Residents in *Ass’n of Irrigated Residents v. California Air Resources Board*, No. CPF-09-509562 (Jan. 14, 2014).

⁶¹ HEALTH § 38565.

⁶² *Id.* § 38580.

⁶³ *Id.* § 38591.

phase of California's landmark global warming law.⁶⁴ Furthermore, EJAC was to have a longstanding role at ARB, as the law did not provide a termination date for its existence.⁶⁵

AB 32 designated ARB as the lead agency for its implementation.⁶⁶ It required ARB to prepare a Scoping Plan outlining the State's strategy to meet the reductions needed by 2020.⁶⁷ This Scoping Plan would propose a set of measures to reduce California's GHG emissions, improve the environment, reduce dependence on oil, diversify energy sources, save energy, create new jobs, and enhance public health.⁶⁸

AB 32 required that ARB pursue strategies for achieving the maximum technologically feasible and cost-effective reductions in GHG emissions from sources or categories of sources of greenhouse gases by 2020.⁶⁹ In doing so, the new law required that ARB make sure that activities undertaken would not disproportionately harm low-income communities and would consider overall societal benefits, including reductions in other air pollutants, diversification of energy sources, and other benefits to the economy, environment, and public health.⁷⁰ AB 32 provided no mandates or metrics, however, on how ARB was to prevent vulnerable communities from bearing disproportionate harm.

The language in AB 32 ultimately allowed ARB the discretion to design a market-based mechanism.⁷¹ However, the law required that ARB first examine such a program's potential to worsen "hot spots" and design a mechanism to "prevent any increase in the emissions of toxic air contaminants or criteria air pollutants."⁷² The Legislature also required that ARB maximize additional environmental and economic benefits, which were important for environmental justice advocates.⁷³ As a result of AB 32, ARB began a process to develop a Scoping Plan to identify potential solutions to reach the 2020 goal.⁷⁴

In 2008, ARB's Scoping Plan identified cap-and-trade as a program that California would pursue. The creation of the cap-and-trade program itself

⁶⁴ RAFAEL AGUILERA, AB 32 AND EJ: A SUMMARY FOR POLICYMAKERS 3 (2010) (on file with Harvard Law School Library).

⁶⁵ See Interview with Rafael Aguilera, *supra* note 45.

⁶⁶ HEALTH § 38510.

⁶⁷ CAL. AIR RES. BD., *supra* note 43, at ES-1.

⁶⁸ *Id.*

⁶⁹ HEALTH § 38561.

⁷⁰ *Id.* § 38562(b)(2), (6).

⁷¹ *Id.* § 38562(b)(9)(c).

⁷² *Id.* § 38570. The "capped sectors" will be subject to some direct regulation, such as improved building-efficiency standards and vehicle-efficiency measures. Additional reductions needed to bring emissions within the cap will be accomplished through price incentives created by emissions-allowance prices.

⁷³ *Id.* § 39712(b)(1); see also Letter from Angela Johnson Meszaros & Jane Williams, Co-Chairs, Env'tl. Justice Advisory Comm., to Mary D. Nichols, Chairman, & James Goldstene, Exec. Officer, Cal. Air Res. Bd. (May 7, 2008), available at http://www.arb.ca.gov/cc/ejac/letterto_mn_jg_analyses.pdf, archived at <http://perma.cc/X37L-YYV3>.

⁷⁴ CAL. AIR RES. BD., *supra* note 43, at ES-1.

included a multiyear stakeholder process.⁷⁵ ARB created two subcommittees — the Economic and Allocation Advisory Committee (“EAAC”) and the Economic and Technology Advancement Advisory Committee (“ETAAC”)⁷⁶ — to advise the State on the implementation of AB 32.⁷⁷ The cap-and-trade program began in 2012, with an enforceable compliance obligation beginning with 2013 GHG emissions.⁷⁸

The breadth and coverage of California’s program makes it the world’s most comprehensive cap-and-trade program.⁷⁹ The program covers approximately 350 businesses, representing 600 facilities.⁸⁰ These regulated facilities are responsible for 85% of the state’s GHG emissions.⁸¹ The remaining 15% of GHG emissions come from sources that are difficult to monitor and regulate, including agricultural sources.⁸² In 2013, the program started regu-

⁷⁵ See *Public Meetings*, CAL. AIR RES. BD., <http://www.arb.ca.gov/cc/capandtrade/meetings/meetings.htm> (last visited Mar. 1, 2014), archived at <http://perma.cc/SD43-UMQN> (listing meetings with various stakeholders).

⁷⁶ *Advisory Groups and Committees*, CAL. AIR RES. BD., <http://www.arb.ca.gov/cc/committees/committees.htm> (last visited Mar. 1, 2014), archived at <http://perma.cc/VT7S-X5VG>.

⁷⁷ The ETAAC was formed to “advise (ARB) on activities that will facilitate investment in and implementation of technological research and development opportunities including, but not limited to, identifying new technologies, research, demonstration projects, funding opportunities, developing state, national, and international partnerships and technology transfer opportunities, and identifying and assessing research and advanced technology investment and incentive opportunities that will assist in the reduction of greenhouse gas emissions. The committee may also advise the ARB on state, regional, national, and international economic and technological developments related to greenhouse gas emission reductions.” *Economic and Technology Advancement Advisory Committee (ETAAC)*, CAL. AIR RES. BD., <http://www.arb.ca.gov/cc/etaac/etaac.htm> (last visited Mar. 1, 2014), archived at <http://perma.cc/UK3T-HR BW>. EAAC is comprised of “economic, financial, and policy experts with various backgrounds and experiences. [They] provide[] advice on allocation of allowances and use of their value. [EAAC] evaluated the implications of different allowance allocation strategies such as free allocation, auction, or a combination of both. The committee members also will help advise ARB on its revised economic analysis.” *Economic and Allocation Advisory Committee*, CAL. CLIMATE CHANGE PORTAL, <http://www.climatechange.ca.gov/eaac/> (last visited Mar. 17, 2014), archived at <http://perma.cc/85ZX-HM4B>. EJAC advises ARB in developing the AB 32 Scoping Plan and other pertinent matters in implementing AB 32. *Environmental Justice Advisory Committee*, CAL. AIR RES. BD., <http://www.arb.ca.gov/cc/ejac/ejac.htm> (last visited Mar. 1, 2014), archived at <http://perma.cc/VPJ9-9DEH>.

⁷⁸ *Cap-and-Trade Program*, CAL. AIR RES. BD., <http://www.arb.ca.gov/cc/capandtrade/capandtrade.htm> (last visited Mar. 1, 2014), archived at <http://perma.cc/FMF5-F8ED>.

⁷⁹ “California does not have the first emissions trading program in the United States, although California’s program is certainly the most ambitious. The multistate Regional Greenhouse Gas Initiative (RGGI) was the pioneer, but California’s cap-and-trade program is more substantial due both to the size of [the] state’s economy and the number of sectors covered. By 2015, California’s program will expand to be about twice as large as RGGI.” Lucas Bifera, *California Marks First Anniversary of Cap-and-Trade*, ENERGY COLLECTIVE (Nov. 14, 2013), <http://theenergycollective.com/lucas-bifera/304301/california-marks-first-anniversary-cap-and-trade>, archived at <http://perma.cc/3X6Q-BLJ7>.

⁸⁰ CAL. AIR RES. BD., OVERVIEW OF ARB EMISSIONS TRADING PROGRAM (2011), available at http://www.arb.ca.gov/newsrel/2011/cap_trade_overview.pdf, archived at <http://perma.cc/MXG7-CFTG>.

⁸¹ *Id.*

⁸² See DALLAS BURTRAW, DAVID McLAUGHLIN & SARAH JO SZAMBELAN, CALIFORNIA’S NEW GOLD 3 (2012), available at <http://www.rff.org/documents/RFF-DP-12-23.pdf>, archived at <http://perma.cc/M5V2-A247>.

lating electric utilities and large industrial facilities.⁸³ In 2015, it will cover the fuels sector, including the distributors of transportation, natural gas, and other fuels.⁸⁴ The California program is designed to link with similar trading programs in other states and regions.⁸⁵ The cap was set in 2013 at 2% below the emissions level forecast for 2012. The cap declines in 2014 by 2% and declines 3% annually from 2015 to 2020.⁸⁶

2. *Criticisms of California's Cap-and-Trade Program.*

Many businesses were initially opposed to the creation of a cap-and-trade program. They argued that it would be too costly and that it would push them to relocate their business out of state.⁸⁷ As the State continued to move towards this program, however, industry saw “the writing on the wall” and began to work towards creating a program they could live with: a program friendlier towards businesses.⁸⁸ Business interests pushed for giving regulated industries free allowances, more flexibility in meeting regulations through offsets, and postponing the implementation timeline for cap-and-trade for a few years. This advocacy was effective.⁸⁹ The final program allowed for many free allowances to regulated industries. Industries could also avoid cleaning up on-site emissions by purchasing offset credits, which meant they did not have to clean up on-site so long as they were investing in a “green” project elsewhere.⁹⁰ The cap-and-trade program thus became more lenient towards businesses than originally anticipated. These compromises, however, meant that individual communities living near polluting facilities would be jeopardized by continued and potentially increased exposure to harmful copollutants such as particulate matter, nitrogen oxides, and air toxins released by the burning of fossil fuels.

As the regulatory process unfolded, environmental justice advocates and some environmental organizations repeated to ARB the issues they had raised against cap-and-trade before AB 32 became law. They argued that the program would fail to protect communities located next to major pol-

⁸³ OVERVIEW OF ARB EMISSIONS TRADING PROGRAM, *supra* note 80.

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ Brian Koenig, *California Businesses Protest Forthcoming Cap-and-Trade Program*, NEW AM. (Sept. 21, 2012, 3:45 PM), <http://www.thenewamerican.com/tech/environment/item/12930-california-businesses-protest-forthcoming-cap-and-trade-program>, archived at <http://perma.cc/VJ4X-MRCP>.

⁸⁸ CalChannel, *Cap-and-Trade Conference — Panel 4*, YOUTUBE (May 6, 2013), <https://www.youtube.com/watch?v=CFQXIMkm5Y0>, archived at <http://perma.cc/QF5Y-XWGG>; see also Letter from Catherine H. Reheis-Boyd, President, W. States Petroleum Ass’n, to Kevin Kennedy, Assistant Exec. Officer, Cal. Air Res. Bd. (June 7, 2010), available at http://www.arb.ca.gov/lists/may-17-allocation-ws/24-cap_and_trade_workshop_comments.pdf, archived at <http://perma.cc/ZV26-T6AJ>.

⁸⁹ See BURTRAW ET AL., *supra* note 82, at 7.

⁹⁰ See *Compliance Offset Program*, CA.GOV, <http://www.arb.ca.gov/cc/capandtrade/offsets/offsets.htm> (last visited Mar. 10, 2014), archived at <http://perma.cc/QTG6-AYZ6>.

luters because cap-and-trade would allow these polluters to avoid cleaning up their on-site emissions.⁹¹ Many believed that while the capped sectors would be subject to some direct regulation, the law would be insufficient to arrive at the emission reductions needed to clean up these communities because the major polluters would be allowed to avoid reducing their emissions by purchasing offsets.⁹²

Advocates were also concerned that ARB's reliance on price incentives to bring emissions down would be ineffective because most of the cap-and-trade allowances were to be given away for free.⁹³ Then, a regulated facility could continue its emissions at current levels by purchasing relatively inexpensive credits.⁹⁴ Thus, a community near such a source would continue bearing a higher burden of pollution exposure and not receive any associated cobenefits from reduced emissions.⁹⁵ This would then lead to "hot spots" in communities where factories would choose to purchase allowances rather than reduce their emissions.⁹⁶ A cap-and-trade program thus signaled to polluters that they could continue polluting at the cost of the lives and welfare of community residents on their fence lines. Advocates pointed to failed pilots in Los Angeles as an indication that cap-and-trade on a statewide level would create similar problems — especially for communities of color.⁹⁷ In Los Angeles, a pollution-trading program, the Regional Clean Air Incentives Market ("RECLAIM"), led to further concentration of pollution in the poorer areas while letting industries bypass emission-reduction obligations.⁹⁸

⁹¹ *Climate Justice in California*, CTR. ON RACE, POVERTY & THE ENV'T, <http://www.crpej.org/crpe/index.php/campaigns/climate-justice/california> (last visited Apr. 9, 2014), archived at <http://perma.cc/38EQ-LX34>.

⁹² *Id.*

⁹³ *California Cap and Trade*, CTR. FOR CLIMATE & ENERGY SOLUTIONS, <http://www.c2es.org/us-states-regions/key-legislation/california-cap-trade> (last visited Feb. 10, 2013), archived at <http://perma.cc/Z4WX-69LF> (stating that the portion of emissions covered by free allowances varies by industry, but the free allowances will initially account for about 90% of a business's overall emissions).

⁹⁴ See Silvio Marcacci, *California Cap and Trade Comes to a Crossroads as Carbon Prices Fall*, CLEAN TECHNICA (Aug. 27, 2013), <http://cleantechnica.com/2013/08/27/california-cap-and-trade-comes-to-a-crossroads-as-carbon-prices-fall>, archived at <http://perma.cc/322B-XKEQ> (discussing the market pressures driving down costs of permits).

⁹⁵ SHANKAR PRASAD & TIM CARMICHAEL, CONCEPTUAL FRAMEWORK TO LESSEN THE IMPACTS ON COMMUNITIES WHEN SHAPING MARKET-BASED MECHANISMS TO REDUCE GHGs 25 (2008), available at <http://pubs.awma.org/gsearch/em/2008/8/prasad.pdf>, archived at <http://perma.cc/TWL3-5TC7>.

⁹⁶ Richard Toshiyuki Drury et al., *Pollution Trading and Environmental Injustice: Los Angeles' Failed Experiment in Air Quality Policy*, 9 DUKE ENVTL. L. & POL'Y F. 231, 251 (1999).

⁹⁷ Interview with Marybelle Nzegwu, *supra* note 60. Nzegwu noted that AB 32 required ARB to "consider all relevant information pertaining to greenhouse gas emissions reduction programs in other states, localities, and nations." *Id.* (quoting CAL. HEALTH & SAFETY CODE § 38561(c) (2014)). As such, the findings and report by Drury, *supra* note 96, significantly informed arguments in the case.

⁹⁸ Drury et al., *supra* note 96, at 251–55, 260, 272.

Another critique of the cap-and-trade system was that it allowed polluters too much leeway to avoid cleaning up on-site pollution through the use of offsets. According to ARB guidance:

An *offset* is a credit that represents a reduction or removal of greenhouse gases by an activity that can be measured, quantified, and verified. Individual offset projects can be implemented to generate offset credits, which can then be sold and used by a covered entity as a compliance instrument in the Cap-and-Trade Regulation.⁹⁹

California allows regulated industries to meet up to 8% of their compliance obligation by investing in offsets.¹⁰⁰

Proponents of the system have argued that offsets are pivotal for regulated industries to buy into the system¹⁰¹ — otherwise the system would be too regimented to allow for compliance. They have argued that restricting offsets to 8% would be sufficient to ensure that industries do not use this as a loophole to avoid cleaning up on-site emissions.¹⁰² Opponents have argued that because companies are merely required to reduce their emissions by 15%, an 8% offset would be over half of their total emissions-reductions target.¹⁰³ This would essentially allow industrial polluters to avoid cleaning up their act in neighboring communities.¹⁰⁴ Moreover, opponents have noted that these offset programs have created perverse schemes in other countries.¹⁰⁵ For example, a company in China generated significant profits by

⁹⁹ CAL. AIR RES. BD., CHAPTER 6: WHAT ARE THE REQUIREMENTS FOR OFFSET CREDITS AND HOW ARE THEY ISSUED? (2012), available at <http://www.arb.ca.gov/cc/capandtrade/guidance/chapter6.pdf>, archived at <http://perma.cc/6ERD-PEH9>.

¹⁰⁰ *Id.*

¹⁰¹ See ENVTL. DEF. FUND, THE ROLE OF OFFSETS IN CALIFORNIA'S CAP-AND-TRADE REGULATION: FREQUENTLY ASKED QUESTIONS (2012), available at <http://www.edf.org/sites/default/files/OffsetsPercentagesFAQFinal%20041612.pdf>, archived at <http://perma.cc/J4JQ-73K5>.

¹⁰² *Id.* In 2013, the Greenlining Institute and other organizations sought to pass a law that would require offsets to be completed in-state. Preeti Vissa, *Making History on Climate Change*, HUFFPOST GREEN (Aug. 7, 2013, 6:46 PM), www.huffingtonpost.com/preeti-vissa/making-history-on-climate-change_b_3721952.html, archived at <http://perma.cc/Y5J4-C8D9> (praising S. 605, 2013–2014 Reg. Sess. (Cal. 2013)).

¹⁰³ Cf. Alan Ramo, *The California Offset Game: Who Wins and Who Loses?*, 20 HASTINGS W.-NW. J. ENVTL. L. & POL'Y 109, 151–55 (2014) (discussing reservations about the effectiveness of the maximum offset limits and total reductions needed under AB 32).

¹⁰⁴ *Id.* at 131–32.

¹⁰⁵ Maureen Nandini Mitra, *California's Interest in Overseas Carbon Offsets Schemes Makes Some Greens See Red*, EARTH ISLAND J. (July 24, 2013), http://www.earthisland.org/journal/index.php/elist/eListRead/california_interest_in_overseas_carbon_offset_schemes_makes_greens_see_red/, archived at <http://perma.cc/K8X7-ZLNJ>; *Offsetting*, FRIENDS OF THE EARTH EUR., <http://www.foeeurope.org/offsetting> (last visited Mar. 1, 2014), archived at <http://perma.cc/Q7CJ-QUSQ>; see also Anne C. Mulkern, *Offsets Could Make Up 85% of Calif.'s Cap-and-Trade Program*, N.Y. TIMES (Aug. 8, 2011), <http://www.nytimes.com/gwire/2011/08/08/08greenwire-offsets-could-make-up-85-of-califs-cap-and-tra-29081.html>, archived at <http://perma.cc/72TJ-B4L9>.

burning hydroflouorocarbons (HFCs) as an offset project.¹⁰⁶ The high profits led to the creation and expansion of factories producing HFCs for the sole purpose of destroying them to generate offsets.¹⁰⁷ Advocates have also expressed concerns that California's offset projects would incentivize companies to buy land and displace indigenous communities in the participating states of Chiapas, Mexico and Acre, Brazil.¹⁰⁸ These potential unintended consequences, coupled with the diversion from needed on-site emission reductions, led many Californian environmental justice advocates, community-based organizations, and international indigenous groups to oppose offsets.¹⁰⁹

3. *Environmental Justice Advocates' Push for Accountability.*

AB 32 included language giving environmental justice communities a seat at the table in shaping implementation efforts. As mentioned above, the law required that ARB convene an Environmental Justice Advisory Committee ("EJAC").¹¹⁰ EJAC is "comprised of representatives from communities in the state with the most significant exposure to air pollution, including . . . communities with minority populations or low-income populations, or both."¹¹¹ This committee is tasked with advising ARB in developing the Scoping Plan.¹¹²

EJAC was to represent the communities most exposed to air pollution and affected by climate change. While EJAC members were respected leaders in California and their advisory role was important, the bill did not create any external accountability metrics or requirements for ARB. There was no mandate requiring that ARB incorporate EJAC members' input into the final Scoping Plan.¹¹³ Indeed, members of EJAC reported feeling that their rec-

¹⁰⁶ Keith Bradsher, *Outsize Profits, and Questions, in Effort to Cut Warming Gases*, N.Y. TIMES (Dec. 21, 2006), <http://www.nytimes.com/2006/12/21/business/21pollute.html>, archived at <http://perma.cc/7HA2-SH5U>.

¹⁰⁷ *Id.*

¹⁰⁸ *Local Communities in Chiapas Oppose REDD: "Why Do the Wealthy Want to Impose Their Will by Force?"*, REDD-MONITOR (Oct. 9, 2012), <http://www.redd-monitor.org/2012/10/09/local-communities-in-chiapas-oppose-redd-why-do-the-wealthy-want-to-impose-their-will-by-force/>, archived at <http://perma.cc/QX78-EYX6>; Chris Lang, *Indigenous Peoples Speak Out Against California's Carbon Offsets Scheme: "You Cannot Trade Pollution for Nature,"* NO REDD+ (Oct. 19, 2012), <http://no-redd.com/indigenous-peoples-speak-out-against-californias-carbon-offsets-scheme-you-cannot-trade-pollution-for-nature/>, archived at <http://perma.cc/EDV4-D7EK>.

¹⁰⁹ Letter from Activist San Diego et al. to Governor Jerry Brown & Mary D. Nichols, Chairman, Cal. Air Res. Bd. (July 10, 2012), available at http://libcloud.s3.amazonaws.com/93/ca/b/2271/Letter_to_Governor_and_ARB_re_CA_REDD_final.pdf, archived at <http://perma.cc/XH83-U463>.

¹¹⁰ CAL. HEALTH & SAFETY CODE § 38591(a) (2014).

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ *See id.*

ommendations were ignored or undervalued.¹¹⁴ In a letter to both the ARB Chair and the Executive Officer, they expressed their “deep and continuing concern” about the Board’s failure to address issues critical to the environmental justice community.¹¹⁵ They wrote that staff had not responded to their priority questions and concerns raised at the beginning of the implementation process.¹¹⁶

Advocates and EJAC members pushed ARB to exercise due diligence in analyzing potential market-based mechanisms, gleaning lessons and pitfalls from other models, and determining how such lessons could be applied to California to avoid disproportionate impacts on disadvantaged communities.¹¹⁷ As the Scoping Plan was nearing its final draft, EJAC members saw that ARB was not conducting the analysis required by law.¹¹⁸ In their letter to ARB leadership, they argued that AB 32 required ARB to conduct research into other models, including lessons learned from other models, and apply that research in designing a program that did not disproportionately impact disadvantaged communities.¹¹⁹ They concluded that the “complete lack of a rigorous methodology for considering the law’s requirements is deeply troubling and can only lead to a failure to have the information available to truly understand, avoid or minimize impacts of AB 32’s implementation on low-income communities and communities of color in California.”¹²⁰ Even after the letter was sent, ARB did not begin the necessary analysis to explore alternative market-based compliance mechanisms.

In light of this, some environmental justice advocates felt they needed to use litigation to ensure environmental justice concerns remained integral to California’s climate change law and to force ARB to review the market mechanisms’ impact on vulnerable communities.¹²¹ Five out of eleven EJAC members joined together in filing a suit against ARB, *Association of Irrigated Residents v. California Air Resources Board*.¹²² The plaintiffs maintained that ARB was required to “design any market-based compliance mechanism to prevent any increase in the emissions of toxic air contaminants or criteria air pollutants” and “consider the potential for direct, indirect, and cumulative emission impacts from [market-based compliance mechanisms], including localized impacts in communities that are already

¹¹⁴ See Letter from Angela Johnson Meszaros & Jane Williams to Mary Nichols, *supra* note 73.

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ Interview with Marybelle Nzegwu, *supra* note 60. Cf. HEALTH § 38561(d) (establishing a committee to advise ARB on the effect of technological advances).

¹¹⁸ Interview with Marybelle Nzegwu, *supra* note 60.

¹¹⁹ See Letter from Angela Johnson Meszaros & Jane Williams to Mary Nichols, *supra* note 73.

¹²⁰ *Id.*

¹²¹ Interview with Marybelle Nzegwu, *supra* note 60.

¹²² No. CPF-09-509562, 2011 WL 312702, slip op. at 1 (Sup. Ct. Cal. Jan. 24, 2011) (granting in part petition for writ of mandate).

adversely impacted by air pollution.”¹²³ The plaintiffs also argued that ARB had neglected to do so in reaching its decision to include a cap-and-trade program in the Scoping Plan.¹²⁴

Environmental justice advocates won on their claim that ARB failed to do an analysis of the alternative market-based compliance mechanisms and, therefore, failed to comply with the California Environmental Quality Act (“CEQA”).¹²⁵ However, the court also found the creation of a cap-and-trade program to be permissible under AB 32 and found that such a program could be included in the Scoping Plan.¹²⁶ The court then enjoined cap-and-trade implementation until an adequate CEQA analysis had been prepared.¹²⁷

II. UNRESOLVED ISSUES IN AB 32 LED TO SENATE BILL 535

A. *Advocacy History Behind SB 535*

While AB 32 included language that made explicit the intent to avoid increased harms to disadvantaged communities and to direct increased investments to these communities,¹²⁸ it did not contain mandates or specific language to gauge distributional effects.¹²⁹ Shankar Prasad, the Deputy Secretary for Science and Environmental Justice at the California Environmental Protection Agency (“CalEPA”), recognized the need for follow-up legislation to realize AB 32’s promises to disadvantaged communities. In particular, he wanted to make sure that a portion of revenues generated by the cap-and-trade mechanism would be allocated to low-income communities that have higher pollution burdens and are more vulnerable to the impacts of climate change. He left CalEPA and joined the Coalition for Clean Air as an Executive Fellow, where he led efforts to pass a law requiring the intentions of AB 32 to be realized.¹³⁰

¹²³ Complaint at 12–13, *Ass’n of Irrigated Residents*, No. CPF-09-509562, 2011 WL 312702 (alteration in original) (quoting CAL. HEALTH & SAFETY CODE § 38570(b)(1)–(2) (2014)).

¹²⁴ *Ass’n of Irrigated Residents*, 2011 WL 312702, slip op. at 22–24. At the time the lawsuit was filed, the Scoping Plan proposed to allow covered facilities to satisfy up to 49% of their compliance obligations through the purchase of international offsets. CAL. AIR RES. BD., *supra* note 43, at 37.

¹²⁵ *Ass’n of Irrigated Residents*, 2011 WL 312702, slip op. at 28–33.

¹²⁶ *Id.* at 13.

¹²⁷ *Id.* at 33.

¹²⁸ HEALTH § 38565.

¹²⁹ *See id.* AB 32 required ARB to ensure that the GHG-reduction efforts would “direct public and private investment toward the most disadvantaged communities in California and provide an opportunity for small businesses, schools, affordable housing associations, and other community institutions to participate in and benefit from statewide efforts to reduce [GHG] emissions.” *Id.*

¹³⁰ *Clearing the Air March 2008*, COALITION FOR CLEAN AIR, http://www.ccair.org/news/letter/CCA-Clearing-The-Air-March-2008.html#Article_3_long (last visited Jan. 24, 2014), archived at <http://perma.cc/4UTN-4MZ3>.

The Coalition for Clean Air proceeded to organize an alliance to cosponsor the legislation. The cosponsoring organizations represented communities throughout California. The cosponsors included the Center on Race, Poverty and the Environment; the California Environmental Justice Alliance; the Ella Baker Center for Human Rights; the Greenlining Institute; the California NAACP; and the Natural Resources Defense Council.¹³¹ This alliance represented communities of color, environmental justice organizations, civil rights organizations, small and minority-owned businesses, and mainstream environmental organizations.

Together, our organizations advocated for a community benefits trust fund, a fund that would invest monies generated by the cap-and-trade program in ways that would provide direct benefits to underserved communities. We wanted to make sure that the AB 32 language allocating “investment toward the most disadvantaged communities” would be realized.¹³² Policies could not assure long-term resource allocation to vulnerable communities without such a mandate. Under AB 32, a change in administrative or elective leadership could halt or reverse policies designed to benefit these communities.¹³³ Therefore, the SB 535 cosponsors advocated creating a mandate that would realize AB 32’s goal of directing cap-and-trade revenues to disproportionately impacted communities.

¹³¹ *Bill Analysis: Hearing on S.B. 535 Before the S. Rules Comm.*, 2011–2012 Reg. Sess. 4 (Cal. 2012), available at http://leginfo.ca.gov/pub/11-12/bill/sen/sb_0501-0550/sb_535_cfa_20120831_214311_sen_floor.html, archived at <http://perma.cc/8BFS-QMR4>. Asian Pacific Environmental Network (“APEN”) is an environmental justice organization focusing primarily on Asian and Pacific Islander communities. *Mission Vision & History*, ASIAN PAC. ENVTL. NETWORK, <http://apen4ej.org/who-we-are/mission-and-vision/> (last visited Mar. 1, 2014), archived at <http://perma.cc/4SMS-MMTM>. They have fought and won against major polluters, including Richmond’s Chevron refinery. *Richmond*, ASIAN PAC. ENVTL. NETWORK, <http://apen4ej.org/what-we-do/organizing/Richmond/> (last visited Mar. 1, 2014), archived at <http://perma.cc/HS5D-DGC8>. The Coalition for Clean Air is an organization that advocates for clean air for all Californians. *Our Story*, COALITION FOR CLEAN AIR, <http://ccair.org/our-story/mission-and-vision> (last visited Mar. 1, 2014), archived at <http://perma.cc/RA4L-NXQ4>. The Ella Baker Center is an Oakland-based nonprofit with a mission to advance racial and economic justice for low-income people and people of color. *About Us*, ELLA BAKER CTR., <http://ellabakercenter.org/about/about-us> (last visited Mar. 1, 2014), archived at <http://perma.cc/WNS7-5P7D>. The Greenlining Institute is a policy, research, organizing, and leadership institute working for racial and economic justice. “The Greenlining Coalition is perhaps America’s oldest and most diverse coalition of Asian/Pacific Islander, African American, and Latino community leaders organized around a common purpose and a struggle. Beyond ethnic diversity, the coalition represents diverse constituencies and includes faith-based organizations, minority business associations, community development corporations, health advocates, traditional civil rights organizations, and ethnic media outlets.” *The Greenlining Coalition*, GREENLINING INST., <http://greenlining.org/about-greenlining/the-greenlining-coalition/> (last visited Apr. 9, 2014), archived at <http://perma.cc/E42T-MS3Q>. The “NAACP’s principal objective is to ensure the political, educational, social and economic equality of minority citizens of the United States and eliminate race prejudice.” *About the California State Conference NAACP*, CAL. STATE CONFERENCE NAACP, <http://www.ca-naacp.org/about/overview> (last visited Mar. 1, 2014), archived at <http://perma.cc/8LBP-V27R>.

¹³² Interview with Shankar Prasad, Clinical Professor, Robert F. Wagner Sch. of Pub. Serv., N.Y. Univ. (Dec. 3, 2013).

¹³³ *Id.*

Our groups approached then-Assemblymember Kevin de León to author the bill.¹³⁴ De León had a strong commitment to environmental justice and clean air for his heavily polluted East Los Angeles district.¹³⁵ He had also previously authored a bill that would have created an advisory committee to inform ARB's distribution of cap-and-trade revenues.¹³⁶ While that advisory committee proposal was not successful, his legislative efforts and commitment to the issue led us to believe he was the best author for the bill.¹³⁷

The first community benefits trust bill, AB 1405,¹³⁸ soon encountered obstacles. De León attributes the opposition to "the institutional lack of political will." There was a "lack of support from the Administration and particularly [ARB] Chair Nichols."¹³⁹

After years of political navigating and advocacy, AB 1405 moved through both houses and reached Governor Schwarzenegger's desk in 2010. The Governor, however, vetoed the bill.¹⁴⁰ He noted that while the State had made a commitment to ensure that climate change impacts and accompanying reduction efforts would not disproportionately impact low-income communities, he felt that the existing ARB processes had fulfilled this commitment.¹⁴¹ He believed the law was "premature" because there was no money yet in the cap-and-trade account, and that "there [would] be a time to have this discussion."¹⁴² Advocates, including us at the Greenlining Institute, felt this rationale was insincere. A law guiding the allocation of funds would work best if it was in place at the outset — before the funds were actually in the pot. Despite the veto, advocates recognized the importance of this law and continued their efforts in the following legislative cycle.

In November 2010, Assemblymember de León was elected to the California Senate and former Governor Jerry Brown was elected Governor.¹⁴³ The gubernatorial change created hope that the bill would be signed into law. In his previous terms as Governor, Brown had engaged in progressive

¹³⁴ *Id.*; Interview with Nidia Bautista, Dir., Coal. for Clean Air (Jan. 21, 2014).

¹³⁵ See *Biography*, KEVIN DE LEÓN REPRESENTING THE 22ND DISTRICT, <http://sd22.sen.ate.ca.gov/biography> (last visited Mar. 1, 2014), archived at <http://perma.cc/NA7M-X679>.

¹³⁶ Assemb. 2869, 2007–2008 Reg. Sess. (Cal. 2008). This bill was sponsored by Global Green.

¹³⁷ Interview with Nidia Bautista, *supra* note 134.

¹³⁸ Assemb. 1405, 2009–2010 Reg. Sess. (Cal. 2009).

¹³⁹ Interview with Kevin de León, California State Senator (Jan. 23, 2014).

¹⁴⁰ Veto Letter from Governor Arnold Schwarzenegger to Members of the California State Assembly (Sept. 30, 2010), available at http://www.leginfo.ca.gov/pub/09-10/bill/asm/ab_1401-1450/ab_1405_vt_20100930.html, archived at <http://perma.cc/XZ5U-FXBC>.

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ Governor Brown was elected for his third gubernatorial term in 2010. See *Jerry Brown Biography*, CA.gov, http://gov.ca.gov/m_about.php (last visited Mar. 1, 2014), archived at <http://perma.cc/8QJ-LSBG>.

environmental politics.¹⁴⁴ Further, he had been more supportive of AB 32 than the other gubernatorial candidates.¹⁴⁵ Our coalition hoped that this more progressive Governor would receive this bill differently than his predecessor. However, ARB had privately expressed concerns to us about laws that would infringe its authority and freedom to allocate and administer GHG-emission-reduction funds. Thus, it was not a given that the change in Governor would make the community benefits trust bill a law.

We renewed our efforts to pass the bill. Senator de León reintroduced the bill, now numbered SB 535. The cosponsors met with the authors, legislators, and the Brown Administration to create legislation that would provide the Administration with enough autonomy to allocate revenues,¹⁴⁶ while also ensuring that this was not a “blank check” for the funding. The Greenlining Institute and other environmental advocates simultaneously worked with Assembly Speaker John Perez in developing a complementary policy to SB 535. Ultimately, Senator de León worked with Speaker Perez to develop a companion law that would direct how the funds would be spent and to firm up the language of SB 535.¹⁴⁷

SB 535 passed in 2012.¹⁴⁸ It took four years — from the introduction of AB 1405 to the passage of SB 535 — for the policy to become law. A number of stakeholders helped along the way. When the bill passed, over 200 organizations stood in support. These stakeholders represented a broad swath of California’s landscape, including the environmental, environmental justice, health, business, labor, immigrant, housing, and transportation sectors, faith organizations, and local elected leaders. There was some opposition to the bill, including from the California Chamber of Commerce and the California Manufacturers and Technology Association.¹⁴⁹ These groups did not specify the grounds of their opposition, but it was presumably an extension of their general opposition to cap-and-trade.

After the passage of SB 535 some cosponsors, including the Greenlining Institute, the Coalition for Clean Air, and the Asian Pacific Environmental Network, turned their attention to implementing the law.

¹⁴⁴ See *Jerry Brown Advocates Early Support for AB 32 Implementation*, PLANNING REPORT (Sept. 28, 2007), <http://www.planningreport.com/2007/09/28/jerry-brown-advocates-early-support-ab-32-implementation>, archived at <http://perma.cc/C6L4-6GBL>.

¹⁴⁵ Colin Sullivan, *Jerry Brown Defends Embattled State Climate Law but Is Open to “Adjustments,”* N.Y. TIMES (Apr. 30, 2010), <http://www.nytimes.com/cwire/2010/04/30/30cli-matewire-jerry-brown-defends-embattled-state-climate-49756.html>, archived at <http://perma.cc/CJY2-RV4J>.

¹⁴⁶ See *infra* notes 152–60 and accompanying text.

¹⁴⁷ Assemb. 1532, 2011–2012 Reg. Sess. (Cal. 2012), available at http://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201120120AB1532, archived at <http://perma.cc/PT9F-R3DK>.

¹⁴⁸ S. 535, 2011–2012 Reg. Sess. (Cal. 2012), available at http://www.leginfo.ca.gov/pub/11-12/bill/sen/sb_0501-0550/sb_535_bill_20120930_chaptered.html, archived at <http://perma.cc/A8MD-3MQE>.

¹⁴⁹ *Bill Analysis: Hearing on S.B. 535 Before the S. Rules Comm.*, 2011–2012 Reg. Sess. 5 (Cal. 2011), available at http://leginfo.ca.gov/pub/11-12/bill/sen/sb_0501-0550/sb_535_cfa_20120831_214311_sen_floor.html, archived at <http://perma.cc/BDN5-ZEVP>.

B. Implementing SB 535

Enacting a law is the first step, but the real work and challenge begins at the implementation stage. This section explains how the SB 535 funds will be allocated, how advocates and leaders shaped that process, and how stakeholders and the State identified “disadvantaged communities” for the purpose of directing the funds into those areas. First, an understanding of the law is necessary.

1. Understanding SB 535.

SB 535 was signed into law at the end of 2012. SB 535 requires that at least 25% of cap-and-trade auction revenues be invested in programs that *benefit* disadvantaged communities, and that at least 10% of the funds be invested *within* those geographic areas.¹⁵⁰ These 25% and 10% funding pots can — but need not — overlap. The exact amounts for both the 25% and the 10% will vary depending on the auction revenues generated. Auction revenues are determined on the open market and, therefore, the total amount invested in and benefitting disadvantaged communities is somewhat unpredictable.¹⁵¹

SB 535 passed alongside its companion bill, AB 1532.¹⁵² AB 1532 mandated a public process to determine how the monies from AB 32 would be allocated.¹⁵³ Under AB 1532, the Department of Finance (“DOF”) must develop a three-year plan (the “Investment Plan” or “Plan”) in consultation with ARB and state agencies.¹⁵⁴ The Investment Plan identified priority investments for the programs to receive auction proceeds. These priority investments were not decided in a vacuum. The statute requires that ARB host public forums and invite public participation and comments on the programs to be prioritized in the Plan.¹⁵⁵ These comments were intended to inform the drafting of the Investment Plan by the DOF and ARB. The statute also provides guiding principles for the Investment Plan. The Plan must (1) identify

¹⁵⁰ See *id.* at 2.

¹⁵¹ *The 2012–13 Budget: Cap-and-Trade Auction Revenues*, LEGIS. ANALYST’S OFF. (Feb. 16, 2012), <http://www.lao.ca.gov/analysis/2012/resources/cap-and-trade-auction-revenues-021612.aspx>, archived at <http://perma.cc/DG8U-3DK7>.

¹⁵² Assemb. 1532, 2011–2012 Reg. Sess. (Cal. 2012), available at http://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201120120AB1532, archived at <http://perma.cc/8PPJ-GDGG>. The laws were cojoined, meaning that the legislature had to pass both laws for either to have effect. AB 1532 (Perez) and SB 535 (de León) were a policy package to ensure transparency and accountability in investments of GHG-reduction funds to help tackle the climate crisis, facilitate the clean energy economy, and establish a policy to benefit our underserved communities. *Bill Analysis: Hearing on Assemb. B. 1532 Before the S. Comm. on Env’t. Quality*, 2011–2012 Reg. Sess. (Cal. 2012), available at http://www.leginfo.ca.gov/pub/11-12/bill/asm/ab_1501-1550/ab_1532_cfa_20120829_085638_sen_comm.html, archived at <http://perma.cc/QB7C-8PZU>.

¹⁵³ *Hearing on Assemb. B. 1532*, *supra* note 152.

¹⁵⁴ Cal. Assemb. 1532.

¹⁵⁵ *Id.*

near-term and long-term GHG-emission-reduction goals and targets; (2) analyze gaps in current State strategies for meeting GHG-reduction goals; and (3) identify priority investments that facilitate GHG reduction.¹⁵⁶

SB 535 funds will be directed at various sectors that reduce GHG emissions.¹⁵⁷ Under the current process, the State first identifies potential program investments in its Investment Plan.¹⁵⁸ Then, the DOF allocates funding to the programs through the annual budget process. Once the budget passes, the funding is made available to the agencies overseeing the particular programs. Administering agencies must make yearly reports to the DOF about the status of the funded programs and fulfillment of the funding guidelines.¹⁵⁹ The DOF then reports to the legislature on how agencies fulfilled the criteria for funding disadvantaged areas.¹⁶⁰

Immediately after the passage of SB 535, the Greenlining Institute and others began organizing to ensure that the goals of SB 535 and AB 1532 would be realized and translated into jobs and investments in priority disadvantaged communities. Advocates formed the appropriately named “SB 535 Coalition,” led by the Greenlining Institute, the Asian Pacific Environmental Network, the Coalition for Clean Air, and Public Advocates.¹⁶¹ The SB 535 Coalition created webinars to inform leaders across the country about the new laws and their potential impact, as well as the new investments they would bring to disadvantaged communities. The Coalition also created online surveys for community leaders about what investments would have the greatest effect in their communities. Respondents listed programs that they believed would reduce GHG emissions, as well as those that would create jobs, improve the quality of life in the community, and support local economies. The Coalition continued to inform the broad public about the new laws, the cap-and-trade program, and how they could participate.

The SB 535 Coalition organized the attendance of environmental justice, civil rights, and community-based nonprofit leaders at the Investment

¹⁵⁶ *Id.*

¹⁵⁷ See CAL. HEALTH & SAFETY CODE § 39712 (2014). SB 535 funds may be directed at sectors including energy efficiency; renewable energy; public transportation; goods and freight; water; land and natural resources; sustainable land use; waste and recycling; research and development; and GHG-reducing investments implemented by local and regional agencies, local and regional collaboratives, and nonprofits coordinating with local governments. *Id.* These sectors, however, are not exhaustive and the funding may be directed at other GHG-reducing programs. *Id.*

¹⁵⁸ The DOF serves as the Governor’s chief fiscal policy advisor. It drafts the State’s budget. See *Governmental Role of the Department of Finance*, CAL. DEP’T OF FIN., http://www.dof.ca.gov/about_finance/governmental_role/ (last visited Mar. 17, 2014), archived at <http://perma.cc/S8GJ-JC6E>.

¹⁵⁹ CAL. HEALTH & SAFETY CODE §§ 39720, 39721 (2014).

¹⁶⁰ *Id.* § 39721.

¹⁶¹ See Guillermo Mayer, *Climate Justice Bill Puts Public Health Front-and-Center*, PUBLIC ADVOCATES (Aug. 20, 2013), <http://www.publicadvocates.org/2013-08-20/sb-535-coalition-pushes-climate-justice-bill-forward>, archived at <http://perma.cc/S7UX-END5> (discussing formation of Coalition).

Plan hearings so that they could weigh in on the issues.¹⁶² The Coalition also encouraged leaders to submit letters to shape the plan.¹⁶³ Ultimately, the letters helped create an Investment Plan that reflects the needs of under-resourced communities.¹⁶⁴ A significant portion of the letters focused on the need to clean up the transportation sector, invest in renewable energy and energy efficiency, and fund natural resource conservation and community greening.¹⁶⁵

The three-year Investment Plan is designed to be the State's guide for investing cap-and-trade revenues; however, the Plan does not guarantee funding for the programs it prioritizes. The monies are to be appropriated through the State budget, which is developed by the Governor, enacted by the Legislature, and administered by the State's agencies each year.¹⁶⁶ AB 1532 states that "moneys in the funds shall be appropriated through the annual Budget Act consistent with the investment plan developed."¹⁶⁷ It is possible, however, that the term "consistent" will be broadly interpreted. For example, the Investment Plan laid out general sectors — transportation, renewable energy, and natural resources. It is unclear how much of the cap-and-trade revenues must be invested in each pot. The Investment Plan merely provides an illustrative Venn diagram without any exact numbers.¹⁶⁸ Therefore, the Governor retains a significant amount of discretion in allocating the cap-and-trade revenues despite the Plan.

2. *Allocating Funds to Disadvantaged Communities.*

SB 535 requires that the cap-and-trade revenues be allocated so that 25% of funds benefit disadvantaged communities and 10% are invested inside the geographic boundaries of disadvantaged communities.¹⁶⁹ The law directs CalEPA to identify the State's most disadvantaged communities for investment opportunities by looking at their geographic, socioeconomic,

¹⁶² Letter from SB 535 (de León) Coalition to Mary Nichols, Chair, Cal. Air Res. Bd. (Apr. 24, 2013), available at <http://www.arb.ca.gov/lists/com-attach/289-ghgreductfund13-ViVcOAAQwWDgCMVMM.pdf>, archived at <http://perma.cc/74C4-NWP5>.

¹⁶³ Cal. Air Res. Bd., *Board Meeting Comments Log*, CA.GOV, <http://www.arb.ca.gov/lispub/comm/bccommlog.php?listname=ghgreductfund13> (last visited Apr. 2, 2014), archived at <http://perma.cc/7FT6-H2N9>.

¹⁶⁴ STATE OF CAL., CAP-AND-TRADE AUCTION PROCEEDS INVESTMENT PLAN: FISCAL YEARS 2013–14 THROUGH 2015–16 iii (2013), available at http://www.arb.ca.gov/cc/capandtrade/auctionproceeds/final_investment_plan.pdf, archived at <http://perma.cc/YM8J-RT5K>.

¹⁶⁵ *Id.*

¹⁶⁶ *California's Budget Process*, CAL. DEP'T OF FIN. (Sept. 2012), <http://www.dof.ca.gov/fisa/bag/process.htm>, archived at <http://perma.cc/MWE4-PHXX>.

¹⁶⁷ Assemb. 1532, 2011–2012 Reg. Sess. (Cal. 2012), available at http://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201120120AB1532, archived at <http://perma.cc/LYF6-HYZP>.

¹⁶⁸ STATE OF CAL., *supra* note 164, at 25.

¹⁶⁹ S. 535, 2011–2012 Reg. Sess. (Cal. 2012), available at http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201120120SB535&search_keywords, archived at <http://perma.cc/3AWR-J98F>.

public health, and environmental-hazard problems.¹⁷⁰ The statute gives CalEPA some criteria for identifying disadvantaged communities — such communities may be (1) areas disproportionately affected by pollution and other hazards that can lead to negative public health effects, exposure, or environmental degradation; or (2) areas with a concentration of people who are of low income and suffer from high unemployment rates, low levels of homeownership, high rent burden, or low levels of educational attainment.¹⁷¹

CalEPA's Office of Environmental Health Hazards Assessment ("OEHHA") created a screening methodology to help identify the areas disproportionately harmed by environmental and socioeconomic burdens.¹⁷² This unprecedented tool allows the State to scientifically identify the disproportionate environmental harms, which "contributes to a better understanding of the relationship between race/ethnicity and the pollution burdens facing communities in California."¹⁷³

Under the direction of CalEPA, OEHHA conducted a series of regional public workshops to get input on a draft cumulative impacts screening tool.¹⁷⁴ The screening tool, named "CalEnviroScreen," was released in 2012.¹⁷⁵ The tool maps the environmental, health, demographic, and socioeconomic data of various areas (currently by zip code, but future versions will use census tracts) to create a screening score for communities across the state.¹⁷⁶ These maps show which areas of the state have the highest pollution burdens and vulnerabilities.¹⁷⁷ CalEnviroScreen guides investments under SB 535 but also helps the State and other stakeholders identify areas that have the most need for assistance.¹⁷⁸

¹⁷⁰ CAL. HEALTH & SAFETY CODE § 39711 (2014).

¹⁷¹ *Id.*

¹⁷² *California Communities Environmental Health Screening Tool (CalEnviroScreen 1.1)*, OFF. OF ENVTL. HEALTH HAZARD ASSESSMENT (Sept. 13, 2013, updated Mar. 7, 2014), <http://oehha.ca.gov/ej/cesll.html>, archived at <http://perma.cc/C95V-ZKFM>.

¹⁷³ *Id.*

¹⁷⁴ *Announcement of August and September 2012 Cumulative Impacts Regional Workshops*, OFF. OF ENVTL. HEALTH HAZARD ASSESSMENT (Aug. 14, 2012), <http://oehha.ca.gov/ej/cipa081412.html>, archived at <http://perma.cc/ER8N-3TBA>; *Announcement of Additional Workshops in October 2012 on the Draft California Communities Environmental Health Screening Tool*, OFF. OF ENVTL. HEALTH HAZARD ASSESSMENT (Oct. 8, 2012), <http://oehha.ca.gov/ej/cipa092112.html>, archived at <http://perma.cc/U7QC-C3KB>.

¹⁷⁵ *California Communities Environmental Health Screening Tool (CalEnviroScreen 1.0)*, OFF. OF ENVTL. HEALTH HAZARD ASSESSMENT (June 12, 2013), <http://oehha.ca.gov/ej/ces042313.html>, archived at <http://perma.cc/SK2Z-T542>.

¹⁷⁶ *Id.*

¹⁷⁷ *California Communities Environmental Health Screening Tool*, *supra* note 172.

¹⁷⁸ See MATTHEW RODRIGUEZ & GEORGE V. ALEXEEFF, CALIFORNIA COMMUNITIES ENVIRONMENTAL HEALTH SCREENING TOOL, VERSION 1.1 (CALENVIROSCREEN 1.1): GUIDANCE AND SCREENING TOOL i (2013), available at <http://oehha.ca.gov/ej/pdf/CalEnviroscreenVer11report.pdf>, archived at <http://perma.cc/63QS-JL6H>.

3. *The Governor Borrows the Funds.*

SB 535 was to be implemented beginning with the 2013–2014 budget cycle.¹⁷⁹ The funding allocations were delayed when the Governor borrowed the cap-and-trade funds,¹⁸⁰ essentially ignoring the State’s Investment Plan. The Administration’s justifications implied that the need to invest the funds was somehow not a priority or was unnecessary, and that borrowing the funds was the more “prudent” choice.¹⁸¹

The Governor’s decision angered environmental and environmental justice advocates.¹⁸² The Legislative Analyst’s Office had predicted a \$3 billion surplus for the year.¹⁸³ This indicated that the State was in a sufficiently stable position financially to invest the cap-and-trade revenues in desperately needed actions to reduce GHG emissions and create jobs. Some advocates responded that the Governor’s conduct would delay climate change action.¹⁸⁴ By borrowing these funds, the Governor signaled to communities suffering from pollution and poverty that they were being deprioritized yet again.¹⁸⁵ Advocates were also alarmed because the Governor’s actions demonstrated the political potential for these funds to be abused.¹⁸⁶ This was particularly true because the Governor reasoned that the need for these funds was not

¹⁷⁹ S. 535, 2011–2012 Reg. Sess. (Cal. 2012), available at http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201120120SB535&search_keywords, archived at <http://perma.cc/3AWR-J98F>.

¹⁸⁰ See Anne C. Mulkern, *Gov. Brown Proposes to Borrow \$500M from Cap-and-Trade Revenue*, E&E PUBLISHING, LLC. (May 15, 2013), <http://www.eenews.net/stories/1059981189>, archived at <http://perma.cc/5B86-LDPT>.

¹⁸¹ *Id.*

¹⁸² Jeremy B. White, *Cap-and-Trade Loan in State Budget Deal Irks Environmentalists*, SACRAMENTO BEE (June 11, 2013, 3:47 PM), <http://blogs.sacbee.com/capitolalert/latest/2013/06/cap-and-trade-loan-in-state-budget-deal-irks-environmentalists.html>, archived at <http://perma.cc/5P4T-UWZ6>; see also Patrick McGreevey, *Governor Brown Chided for Plan to Borrow from Cap-and-Trade Funds*, L.A. TIMES (May 14, 2013), <http://articles.latimes.com/2013/may/14/local/la-me-pc-governor-brown-cap-trade-20130514>, archived at <http://perma.cc/F8FP-5AKK>.

¹⁸³ MAC TAYLOR, LEGIS. ANALYST’S OFF., THE 2013–2014 BUDGET: OVERVIEW OF THE MAY REVISION 3 (2013), available at <http://www.lao.ca.gov/reports/2013/bud/may-revise/overview-may-revise-051713.pdf>, archived at <http://perma.cc/3ULS-U4WK>.

¹⁸⁴ Scott Detrow, *Enviro Groups Slam Budget’s Cap and Trade Funds Diversion*, KQED NEWS (June 12, 2013), <http://blogs.kqed.org/newsfix/2013/06/11/california-budget-will-borrow-cap-and-trade-auction-money/>, archived at <http://perma.cc/T7HE-WXAW> (quoting Bill Magavern at the Coalition for Clean Air: “It’s a disappointing and shortsighted decision. It’s bad for the health and economies of our most disadvantaged communities.”).

¹⁸⁵ See Lori Abbott, *Possible Detour for Cap & Trade Auction Revenues*, PUB. NEWS SERVICE (May 29, 2013) (quoting Vien Truong’s argument that the resulting delay in climate change action is unjust).

¹⁸⁶ See, e.g., Preeti Vissa, *Battle Brewing in California over Climate Change Funds*, GREENLINING INST. (Apr. 29, 2013), <http://greenlining.org/blog/2013/battle-brewing-in-california-over-climate-change-funds/>, archived at <http://perma.cc/T3Y4-8UE5>; Ngoc Nguyen, *In May Revise, Gov. Raids Funds to Tackle Climate Change*, NEW AM. MEDIA (May 15, 2013), <http://newamericamedia.org/2013/05/in-may-revise-gov-brown-raids-fund-to-tackle-climate-change.php>, archived at <http://perma.cc/SD56-RCPW>.

urgent,¹⁸⁷ implying that the needs of disadvantaged communities could be ignored in favor of more politically pressing programs. Borrowing these funds also inflamed community members and led many to question whether and how these funds would be used.¹⁸⁸

Furthermore, many advocates believed it was important to use these funds conservatively because the opponents of AB 32 (Western States Petroleum Association, California Manufacturers & Technology Association, California Chamber of Commerce) continued to seek ways to invalidate the law¹⁸⁹ and the cap-and-trade program.¹⁹⁰ The more that the funds were used beyond the intended GHG-emission-reduction goals, the more easily they could be interpreted to be a “slush fund” for the Governor. In this fiscal year (FY 2014–2015), advocates and legislators are continuing to push the Governor to return the funds borrowed last year, to refrain from borrowing any additional funds, and to spend all the revenues generated.¹⁹¹

C. Benefits of SB 535

Cap-and-trade auction revenues offer California the opportunity to further the State’s climate, air-quality, public-health, and economic goals. If used as intended, strategic investments may not only accelerate the State’s transformation in GHG-emissions-reducing sectors, but also revitalize areas that have been historically underserved.

¹⁸⁷ Nguyen, *supra* note 186.

¹⁸⁸ See *id.*; see also Vissa, *supra* note 186.

¹⁸⁹ See, e.g., HASTINGS COLL. OF THE LAW, UNIV. OF CAL., VOTER INFORMATION GUIDE FOR 2010, GENERAL ELECTION 38–45 (2010), available at http://repository.uchastings.edu/cgi/viewcontent.cgi?article=2304&context=ca_ballot_props, archived at <http://perma.cc/MN63-XXL8> (exploring arguments in favor of Proposition 23, which would suspend implementation of AB 32).

¹⁹⁰ See *Morning Star Packing Co. v. Cal. Air Res. Bd.*, No. 34-2013-80001464 (Super. Ct. Cal., Aug. 28, 2013) (tentative decision and order demanding appearances). In *Morning Star*, the Superior Court Judge tentatively concluded that AB 32 gave the ARB wide discretion to design a system of emissions reductions that meets the statutory goals, including authority to employ an auction as a reasonable means to allocate allowances. *Id.* at 7. The court tentatively held that both “[t]he text and structure of AB 32 demonstrate that the Legislature intended ARB to have discretion . . . to ‘design’ the method for distributing allowances.” *Id.* This holding was not surprising given the very broad discretion the Legislature gave ARB to design a program to meet AB 32’s goals. Every case that has challenged ARB’s statutory authority under AB 32 has come up short. See, e.g., *Citizens Climate Lobby v. Cal. Air Res. Bd.*, No. CGC-12-519554 (Super. Ct. Cal. Jan. 25, 2013), available at <http://cdn.law.ucla.edu/SiteCollectionDocuments/Centers%20and%20Programs/Emmett%20Center%20on%20Climate%20Change%20and%20the%20Environment/CCL%20v%20ARB.pdf>, archived at <http://perma.cc/7VCB-DT7E>.

¹⁹¹ See Letter from Celia V. Andrade, A3PCON Environmental Justice Task Force, et al., to Governor Edmund “Jerry” Brown (Oct. 31, 2014), available at <http://calclimateag.org/wp-content/uploads/2013/11/Letter-to-Governor-on-auction-proceeds-10-31-13-copy.pdf>, archived at <http://perma.cc/F2WC-Y8YA>; see also Letter from California Senators to Governor Jerry Brown (Dec. 19, 2013) (on file with Harvard Law School library); Letter from California Assembly Members to Governor Jerry Brown (Dec. 16, 2013) (on file with Harvard Law School library).

AB 32 itself requires that actions taken to comply with the law not disproportionately impact low-income communities.¹⁹² AB 32 also provides the basis for directing investments “toward the most disadvantaged communities in California” — giving “small businesses, schools, affordable housing associations, and other community institutions” the opportunity to “participate in and benefit from statewide efforts to reduce greenhouse gas emissions.”¹⁹³ As explained earlier, SB 535 was intended to fulfill this promise, offering disadvantaged communities some resources to address existing environmental problems and ensuring that the benefits of a rapidly transforming clean-energy economy would be enjoyed by all.¹⁹⁴

SB 535 provides explicit goals to invest in programs that create cobenefits, the additional benefits that result from climate-change-mitigation efforts.¹⁹⁵ These cobenefits include:

- (1) [m]aximiz[ing] economic, environmental, and public health benefits to the state[;]
- (2) [f]oster[ing] job creation by promoting in-state greenhouse gas emissions reduction projects carried out by California workers and businesses[;]
- (3) [c]omplement[ing] efforts to improve air quality[;]
- (4) [d]irect[ing] investments toward the most disadvantaged communities and households in the state[;]
- (5) [p]rovid[ing] opportunities for businesses, public agencies, nonprofits, and other community institutions to participate in and benefit from statewide efforts to reduce greenhouse gas emissions[; and]
- (6) [l]essen[ing] the impacts and effects of climate change on the state’s communities, economy, and environment.¹⁹⁶

Thanks to cap-and-trade revenues, California, for the first time, has significant funding to directly aid disadvantaged communities. The Governor’s proposed budget for 2014–2015 estimates that cap-and-trade revenues will be \$850 million — \$225 million of which would be directed to programs that benefit disadvantaged communities.¹⁹⁷ And this is only the first year of allocations. While future revenue is unpredictable, cap-and-trade revenues are likely to be high. In fact, some have deemed these revenues “California’s new gold.”¹⁹⁸

SB 535, through its goals of investing in programs that provide cobenefits, helps California move toward an equitable green future. Creat-

¹⁹² See CAL. HEALTH & SAFETY CODE § 38562 (2014).

¹⁹³ *Id.* § 38565.

¹⁹⁴ *Id.* § 39715.

¹⁹⁵ *Id.* § 38501(h).

¹⁹⁶ *Id.* § 39712(b).

¹⁹⁷ CAL. DEP’T OF FIN., *supra* note 14, at 104–05.

¹⁹⁸ See BURTRAW ET AL., *supra* note 82.

ing a green economy is beyond a political or legislative challenge; it is a moral challenge. The challenge is whether the State will create greener, more sustainable communities for the wealthy few, or make such improvements a reality for those who need them most. There are areas in California that have suffered disproportionate levels of pollution, poverty, and unemployment; in allocating the funds captured by cap-and-trade, we can and should make sure that those areas are prioritized.

D. *Limits of SB 535*

While SB 535 is an important law, it is only the start of what California needs to do to address the deep environmental racism of the past and create viable, sustainable communities in the future. We must still address several important issues.

First, SB 535 provides only a floor for investments in disadvantaged communities. The State must invest much more than this minimum — 10% of revenue generated by cap-and-trade auctions — to counter the decades of pollution in low-income communities and communities of color. Recently, the Census found that nearly 25% of California's thirty-eight billion residents live in poverty when accounting for the cost of living and the lack of a social safety net.¹⁹⁹ This suggests that the state should invest at least 25% of the funds *in* disadvantaged communities. SB 535 originally called for 30% of the revenue generated to be spent in the most disadvantaged communities.²⁰⁰ The State should invest closer to that original amount.

Second, policymakers must better define the requirement that 25% of investments “benefit” disadvantaged communities. Under the current law, “benefit” can be interpreted broadly. For example, wetland restoration miles away from a disadvantaged community might “benefit” disadvantaged communities, but it would not have a direct benefit. Until “benefit” can be properly defined and estimated, the Administration should consider allocating 25% of funds within the boundaries of disadvantaged communities to compensate for past burdens. The Administration should evaluate the funded programs periodically, making adjustments as necessary in consultation with the legislature and the advocates who supported and passed SB 535.

¹⁹⁹ U.S. CENSUS BUREAU, *supra* note 2. California's official poverty rate is 16.5%. While this rate is higher than the national rate of 15.1%, many other states' rates surpass California's. The official rate is based on half-century-old criteria that have been criticized as obsolete. The official rate assumes, in essence, that the cost of living is the same nationwide. The Census Bureau has developed an alternative method that uses broader indicia, including the local cost of living. See Dan Walters, *California Still Has Highest Poverty Rate Under New Method*, SACRAMENTO BEE (Nov. 6, 2013), <http://blogs.sacbee.com/capitolalert/latest/2013/11/california-still-has-highest-poverty-rate-under-new-method.html>, archived at <http://perma.cc/VY6U-4DTV>.

²⁰⁰ *Bill Analysis: Hearing on Assemb. B. 1405 Before the S. Energy, Utils. & Commc'n Comm.*, 2009–2010 Reg. Sess. (Cal. 2009).

At the time of this writing, CalEPA, the SB 535 Coalition, and other stakeholders are developing a more tangible definition of “benefits” for purposes of investing auction revenues. While working on a precise definition, our coalition has offered some explicit principles for how we believe the funds should be allocated,²⁰¹ such as:

- (1) Making the process inclusive, transparent, and accountable. ARB and DOF should ensure transparency, accountability, and the robust participation of disadvantaged communities in the process of developing and implementing an investment plan.
- (2) Investing in high-priority needs. The benefits of SB 535 investments should specifically address high-priority needs of disadvantaged communities. ARB should develop metrics to quantify and track the cobenefits to disadvantaged communities (e.g. improvements in housing, transit, job, and public-health outcomes).
- (3) Ensuring that the benefits of the investments outweigh the burdens. The benefits of SB 535 investments in disadvantaged communities must significantly outweigh the burdens that the projects may impose on those communities.

As stakeholders are simultaneously working on a definition of “benefits” and allocating the revenue, these investment principles provide a guidepost to help direct funds as SB 535 intended.

Third, policymakers must use a consistent metric to allocate the cap-and-trade funds via the budget process every year.²⁰² Reallocation each year creates uncertainty about which programs will be funded and for how many years. Funds are then also subject to some additional unpredictability because they are distributed through agencies before going to the community.²⁰³ These agencies may have varying definitions of “benefits” for purposes of SB 535. They might also use different metrics to track and assess the impacts of these revenues in disadvantaged communities. Worse, they might not track the investments at all. Accountability, uniformity, and transparency in data tracking are important to making sure that these funds are spent well and that they are directed to programs that truly serve disadvantaged communities. The accessibility and presentation of this data will also be important in garnering public support for AB 32 and the cap-and-

²⁰¹ THE SB 535 COAL., PRINCIPLES FOR IMPLEMENTING SB 535 (DE LEÓN) TO BENEFIT DISADVANTAGED COMMUNITIES (Mar. 8, 2013), *available at* http://www.publicadvocates.org/sites/default/files/library/sb_535_principles_01_07_13.pdf, *archived at* <http://perma.cc/H5UP-W4CS>. The SB 535 Coalition is led by some, but not all, of the SB 535 cosponsors. The SB 535 Coalition is currently focusing on the implementation of SB 535. This group includes the Asian Pacific Environmental Network, Coalition for Clean Air, the Greenlining Institute, and Public Advocates. *Id.*

²⁰² CAL. HEALTH & SAFETY CODE § 39716(a) (2014).

²⁰³ *Id.* § 39718(b).

trade program. For these reasons, SB 535 implementation needs a consistent metric to determine the success of investments.

Fourth, SB 535 implementation should include an explicit role for community members and other stakeholders to guide and shape the allocation of revenue. Those who work or live in the community know best what the community needs. It is important that community members have a role in guiding the investments and shaping their own communities, and a community review panel would allow members to influence allocation in ways that best serve their communities.²⁰⁴

Senator (then Assemblymember) de León previously introduced legislation to create an advisory committee to guide the spending of cap-and-trade revenues.²⁰⁵ The attempt was repeated in AB 1405 and later in SB 535 — both of which initially included language calling for a review panel that would guide the investments of auction revenues.²⁰⁶ All legislative attempts to create an advisory or review panel to guide the spending of revenue allocations were amended out of the bills. Senator de León explained some of the reasons why they were amended out:

There was and perhaps still is a belief that climate change policy is the purview of [the] upper-middle class and only certain individuals of government. Frankly, there was a belief that our communities weren't necessary for the conversation or discussion. In part, that's a byproduct of a history of tension [behind] environmental justice policy. However, I do believe that school of thought is changing.²⁰⁷

As Senator de León notes, SB 535 is not perfect. Laws are rarely, if ever, perfect. Policy development involves negotiations and compromises. State policy must allow for flexibility to handle unexpected issues that may arise and allow room for implementing agencies to meet the intent of the law by applying their own rules and processes. Policymaking is an iterative process — when needed, future tweaks are made either in subsequent legislation or in the implementation process. That said, SB 535 remains an important policy that helps mitigate poverty and pollution by directing significant funds to historically under-resourced communities.

E. SB 535 Implications

Senate Bill 535 creates a durable mandate that cap-and-trade revenue be directed to the neediest communities in perpetuity. These funds will significantly change the communities that receive this money. This law will

²⁰⁴ Assemb. 1405, 2009–2010 Reg. Sess. (Cal. 2009).

²⁰⁵ Assemb. 2869, 2007–2008 Reg. Sess. (Cal. 2007).

²⁰⁶ Cal. Assemb. 1405.

²⁰⁷ Interview with Senator de León, *supra* note 139.

also have important implications for jurisdictions seeking to implement a carbon trading policy and for future political support of environmental policies.

1. *The Effect of SB 535 on Multijurisdictional Efforts to Combat Climate Change.*

California is the ninth-largest economy in the world.²⁰⁸ As a result, California's emission-reduction programs will likely be viewed as models for other jurisdictions and bodies considering the creation or adoption of cap-and-trade programs.²⁰⁹ California is already working closely with British Columbia, Ontario, Quebec, and Manitoba through the Western Climate Initiative ("WCI"), a collaboration among jurisdictions seeking to work together on emissions trading programs and policies,²¹⁰ to develop harmonized cap-and-trade programs that will deliver cost-effective emission reductions. The WCI jurisdictions have formed a nonprofit corporation, WCI, Inc., to provide coordinated and cost-effective administrative and technical support for its participating jurisdictions' emissions-trading programs. Just as with other voluntary agreements that ARB establishes with local air districts, states, the federal government, and contractors, ARB's agreement with WCI, Inc. does not confer any decisionmaking authority on the organization; decisions concerning ARB's cap-and-trade regulations are only made by ARB at the direction of the Board.²¹¹ Rather, WCI, Inc. will help jurisdictions successfully implement cap-and-trade programs. WCI will develop a compliance-tracking system for allowances and offset certificates; administer allowance auctions; and conduct market monitoring of both allowance auctions and allowance/offset certificate trading. As WCI scales up, SB 535

²⁰⁸ MAC TAYLOR, CAL. LEGISLATIVE ANALYST'S OFFICE, CAL FACTS 2013, at 1 (2013), available at http://www.lao.ca.gov/reports/2013/calfacts/calfacts_010213.pdf, archived at <http://perma.cc/B8R2-5UY5>.

²⁰⁹ Stephen Brown, Tesoro's lobbyist, said: "We see the grand experiment going on in California as informing the rest of the country. The concern is that elements of this will start popping up in different states." Coral Davenport, *California's New Cap-and-Trade Law: A Model for the Country?*, NATIONAL J. (Dec. 13 2012), <http://www.nationaljournal.com/magazine/california-s-new-cap-and-trade-law-a-model-for-the-country-20121213>, archived at <http://perma.cc/4MRQ-R37X>. In 2010, Tesoro funded Proposition 23 to stop AB 32 from being implemented. Lee Fang, *PowerPoint Reveals Tesoro Recruiting Other Oil Companies, Including BP, to Repeal CA Clean Energy*, THINKPROGRESS (Aug. 5, 2010, 3:25 PM), <http://thinkprogress.org/climate/2010/08/05/174758/tesoro-powerpoint/>, archived at <http://perma.cc/C3P C-YDE3>.

²¹⁰ *Organization*, W. CLIMATE INITIATIVE, <http://www.westernclimateinitiative.org/organization> (last visited Mar. 17, 2014), archived at <http://perma.cc/K92S-CCEE>.

²¹¹ More details on the organization and operation of WCI, Inc. can be found at <http://www.wci-inc.org/>, archived at <http://perma.cc/WMK2-VP6S>. In November 2011, WCI formed WCI, Inc., a nonprofit corporation, to provide administrative and technical services to support the implementation of state and provincial GHG-emission-trading programs. See *Multi-State Climate Initiatives*, CTR. FOR CLIMATE & ENERGY SOLUTIONS, <http://www.c2es.org/us-states-regions/regional-climate-initiatives#WCI> (last visited Mar. 2, 2014), archived at <http://perma.cc/GD8-UPEE>.

will be a model for developing a more inclusive carbon-trading program. Senator de León has stated that “SB 535 will impact WCI and other efforts without a doubt. We are proving what can be done in California. It is my hope that other states will follow our examples.”²¹² Whether one favors or opposes carbon trading, if the trading is to happen, these programs should safeguard disadvantaged or under-resourced communities from bearing the disproportionate burdens of climate change. These programs are designed to ensure that disadvantaged or underserved communities have resources that begin to address the burdens and historic problems in their environments.

As WCI and the United States keep their eyes on California, the State must implement SB 535 well and preserve it as a strong model for how cap-and-trade revenues should be allocated. ARB has noted that “the pressure to get it right is coming from many levels. We know the world is watching. The country is watching. California voters, who supported this program, are watching. The best way to handle pressure like that is to succeed.”²¹³ As other jurisdictions begin looking to California as a model, the State should define success in terms of policies that reflect the needs of all Californians.

2. *Implications for Greening Up Low-Income Communities.*

It is imperative for the government to create programs that bring environmental resources and improvements to low-income communities. Working families spend a disproportionate amount of their incomes on the costs of goods and utilities. These costs can grow as a result of climate change²¹⁴ and may increase in coming years.²¹⁵ Therefore, programs and policies that help reduce those costs — for example, free or low-cost financing programs for working families for energy-efficient or renewable-energy products — will provide economic relief for families, provide market demand for green products and services, and create jobs. SB 535 is an example of an environmental solution that begins to more effectively reduce pollution. But, as noted above, the policy is not perfect and is not the silver bullet to solve decades of dumping and pollution in our communities.

²¹² Interview with Senator de León, *supra* note 139.

²¹³ Davenport, *supra* note 209.

²¹⁴ JAYANTE SATHEY ET AL., ESTIMATING RISK TO CALIFORNIA ENERGY INFRASTRUCTURE FROM PROJECTED CLIMATE CHANGE 65 (2011), available at <http://www.osti.gov/scitech/servlets/purl/1026811>, archived at <http://perma.cc/ZX8E-BK83>.

²¹⁵ According to a March 2009 report to ARB from the California Climate Change Center: “Four climate change impacts [alone] — hurricane damage, energy costs, real estate losses, and water costs — [] are projected to cost 1.8 percent of the GDP of the United States, or, just under \$1.9 trillion in 2008 U.S. dollars by the year 2100. . . . These price increases will disproportionately impact groups that spend the highest proportion of their income on these necessities. There is nearly a three-fold difference in the proportion of the sum of expenses allocated to water between the lowest- and the highest-income brackets. Households in the lowest income bracket use more than twice the proportion of their total expenditures on electricity than do those households in the highest income bracket.” MORELLO-FROSCH ET AL., *supra* note 19, at 14–16.

3. *Political Implications for California's Environmental Movement.*

Californians believe in the importance of investing in low-income and disadvantaged communities.²¹⁶ Communities of color, for example, overwhelmingly opposed the attempts to undercut AB 32.²¹⁷ In 2013, the Public Policy Institute of California found that 52% of Californians agreed that it was very important to spend cap-and-trade revenues in low-income or disadvantaged communities (31% agreed that it was somewhat important to spend this money in low-income communities).²¹⁸ SB 535 is a popular policy, but it must be implemented to fulfill its intent and requirements if it is to continue garnering support from disadvantaged communities. If there is not evidence of a growing green economy in disadvantaged communities, these communities will see the hope of a green economy as mere hype.

Oil companies are courting low-income communities, saying that environmental policies are hurting us because they will increase the costs of goods and services.²¹⁹ These companies have argued that environmental policies that shift our energy load to renewable sources cost taxpayers more.²²⁰ Oil companies are also arguing that new regulations would increase business costs, which would then be passed on to consumers.²²¹ The same arguments were used in political advertisements against AB 32 in the Proposition 23 fight.²²² These arguments are exaggerations at best. Sticking with the same oil-price example, we know that oil prices are largely driven by the international market, not state laws.²²³ While it is possible that costs of basic necessities like fuel could increase, the industry scare tactics in this case are exaggerations. Studies have found that the potential increases will be nominal.²²⁴ Polling has found that 65% of Californians support the State taking action immediately to meet its climate goals, even in difficult economic

²¹⁶ See generally MARK BALDASSARE ET AL., PUBLIC POLICY INSTITUTE OF CALIFORNIA STATEWIDE SURVEY: CALIFORNIANS AND THE ENVIRONMENT (2013), available at http://www.ppic.org/content/pubs/survey/S_713MBS.pdf, archived at <http://perma.cc/Z2CP-36KU>.

²¹⁷ See CATHERINE LERZA, A PERFECT STORM: LESSONS FROM THE DEFEAT OF PROPOSITION 23, at 10, 13, available at http://www.edgefunders.org/wp-content/uploads/2012/01/Prop23CaseStudy_000.pdf, archived at <http://perma.cc/C8BK-9VUE>.

²¹⁸ BALDASSARE ET AL., *supra* note 216, at 4.

²¹⁹ "AB 32 will cost your family almost \$4,000 a year in increased costs and taxes." SUSPEND AB 32!, <http://suspendab32.org/> (last visited Mar. 2, 2014), archived at <http://perma.cc/GL39-89MJ>.

²²⁰ *Id.*

²²¹ *Id.*

²²² See "Yes On 23" Ad Misleads About California's Investment in Clean Energy, POLITICAL CORRECTION (Oct. 1, 2010, 10:27 AM), <http://politicalcorrection.org/adcheck/201010010001>, archived at <http://perma.cc/7LAZ-PQYJ> (showing advertisements of consumers upset when seeing the rising costs of utilities as a result of environmental policies).

²²³ See Faculty Research: Professor Lutz Kilian, *Recent Oil Price Fluctuations Linked to World Economy*, <https://www.lsa.umich.edu/UMICH/econ/Home/Research/Economics%20Research%20in%20the%20Department/Kilian%20Oil%20Price%20Fluctuations.pdf> (last visited Jan. 24, 2014), archived at <http://perma.cc/9VQT-HQPE>.

²²⁴ See UNION OF CONCERNED SCIENTISTS, ELECTRICITY RATE INCREASES AND RENEWABLE ENERGY BACKGROUNDER (2013).

times.²²⁵ Eighty-two percent of Californians believe it is very or somewhat important for the State to pass regulations and spend money now to prepare for the future effects of climate change.²²⁶ Recent surveys have found that nearly half of Californians support the transition to renewable energy even if it results in an increase to their electricity bill.²²⁷ And if these programs are designed with environmental equity in mind, they will likely get even higher levels of public support, especially from low-income residents.

If there is not a real investment in disadvantaged communities, the environmental movement might lose political support from the very communities needed to continue the advancement of environmental policies. At this time, the future of California's environmental policy landscape and, by extension, the future of regulations that benefit disadvantaged communities, are uncertain. Oil companies spend millions on lobbying and advertisements to push back against environmental policies every year.²²⁸ In 2013, the Western States Petroleum Association ("WSPA") spent \$4.67 million and Chevron spent \$3.95 million in lobbying — the highest and the third-highest expenditures by any lobbying interest in the state.²²⁹ From 2009 to 2013, the oil industry lobby spent \$45.5 million in California — \$20 million of which was spent by WSPA.²³⁰ Advocates must counter this spending with organ-

²²⁵ BALDASSARE ET AL., *supra* note 216, at 6.

²²⁶ *Id.* at 29.

²²⁷ *Id.* at 16. In 2011, California passed a law requiring that a third of the state's electricity come from renewable energy sources by 2020. A statewide survey found that 79% of Californians favor this law. Forty-four percent favor it even if it means an increase in their electricity bills and 35% favor it but not if it costs more. Seventeen percent oppose this law. Levels of support were similar in July 2011 (46% favor even with increased electricity bills, 31% do not favor if it increases electricity bills) and July 2012 (44% favor even with increased electricity bills, 33% do not favor if it increases electricity bills). Across income groups, the percentage who are in favor even if it means higher electricity bills is somewhat lower among those with incomes under \$40,000 (40% under \$40,000, 48% \$40,000 to \$80,000, 51% \$80,000 or more). *Id.* It should also be noted that renewable-energy standards have minimal impact on electricity rates. In California, solar power is cheaper than building new natural gas power plants. See Richard W. Caperton, *Renewable Energy Standards Deliver Affordable, Clean Power*, CTR. FOR AM. PROGRESS (Apr. 11, 2012), <http://www.americanprogress.org/issues/green/report/2012/04/11/11397/renewable-energy-standards-deliver-affordable-clean-power/>, archived at <http://perma.cc/C6HR-5ZSN>. The cost of electricity will continue to rise because of inflation and increasing scarcity of fossil fuels. These costs should also be considered when determining price impacts of renewable energy. UNION OF CONCERNED SCIENTISTS, *supra* note 224.

²²⁸ John Howard, *Top 10 Lobbying Firms Billed More Than \$40 Million*, CAPITOL WEEKLY (Feb. 3, 2014), <http://capitolweekly.net/top-10-lobbying-firms-billed-40-million/>, archived at <http://perma.cc/5X5M-HMZU>; *Lobbyists Spend Big Bucks in California in 2013*, ABC NEWS 10, <http://www.news10.net/videos/news/politics/2014/02/03/5195633/> (last visited Mar. 17, 2014), archived at <http://perma.cc/Z8D3-NTZ6>; Laurell Rosenhall, *Capitol Lobbying Firms Made More Money in 2013*, SACRAMENTO BEE (Feb. 3, 2014, 3:07 PM), <http://blogs.sacbee.com/capitolalertlatest/2014/02/california-lobbying-firms-made-more-money-in-2013.html>, archived at <http://perma.cc/75W-MZZS>.

²²⁹ Howard, *supra* note 228.

²³⁰ Dan Bacher, *Western States Petroleum Association Top Spender in 2013*, CAL. PROGRESS REPORT (Feb. 10, 2014), <http://www.californiaprogressreport.com/site/western-states-petroleum-association-top-spender-2013>, archived at <http://perma.cc/3J7H-KAD5>.

ized efforts to educate disadvantaged communities and the legislators who represent them.

There are also ongoing attempts to co-opt the environmental movement. As I write, there is a group called the Economic Justice Action Network — a deceptively named group — that supports fracking.²³¹ Another group called CARE — Californians for Affordable and Reliable Energy — is backed by WSPA and Chevron. It has been working to scare Californians with threats of energy shortages and price spikes in an attempt to create public backlash against AB 32.²³² As noted above, our environmental health and safety depend on the engagement and support of disadvantaged communities. These communities cannot and will not put blind faith into supporting policies or politicians that continue breaking their promises. Policymakers must be diligent to ensure that the State achieves the goals of SB 535.

CONCLUSION

Environmental laws can be used as a tool to create solutions for multi-layered problems, by using the need to address environmental challenges as leverage to rebuild and repair economic and infrastructural needs in vulnerable communities. The language in AB 32 touches on the importance of investing in disadvantaged communities and reducing their disproportionate share of social and environmental harm. When the State implemented that law, however, it ignored demands by environmental justice advocates to study potential market mechanisms to ensure that there would not be disproportionate harm to disadvantaged communities. Environmental justice advocates — and even some more mainstream environmental organizations — duly criticized and continue to oppose the development of the cap-and-trade program for its giveaways to industries, offsets programs, and inadequate regulations to mandate that industries clean up low-income and highly polluted areas.

SB 535 begins to bridge the gaps in AB 32, mandating that the State move long-term investments into disadvantaged communities to fund environmental programs that have cobenefits, such as economic and employment benefits. For instance, investing in solar power and energy efficiency programs for low-income residents will positively impact the environment, reduce residents' utility bills, and create jobs.

²³¹ *News: The 1 Million Latino Job March in the Central Valley*, ECON. JUSTICE ACTION NETWORK (July 13, 2013), <http://economicjusticeaction.org/?p=114>, archived at <http://perma.cc/898F-CGQZ>.

²³² *Big Oil's Latest Attack on Clean Energy*, STOP FOOLING CA, <http://www.stopfoolingca.org/scare/> (last visited Mar. 2, 2014), archived at <http://perma.cc/X8E8-A7EX>; *Clean Air Groups to Oil Industry: "Stop SCARE-ing California,"* STOP FOOLING CA (Aug. 19, 2013), http://www.stopfoolingca.org/press_releases/clean-air-groups-to-oil-industry-stop-scare-ing-california/, archived at <http://perma.cc/JF22-27Z9>.

California's future depends on the ability of all of its residents to contribute. Our people are our most valuable asset. We need an engaged citizenry that can help move the state toward a sustainable future. Indeed, the resounding conclusion is that countries with lower income inequality have more sustained economic growth. Research by economists at the International Monetary Fund revealed that "every 10 percent increase in equality increased the length of a country's growth period by 50 percent."²³³ Other researchers have concurred that greater economic and racial equality corresponded with more robust growth.²³⁴

As the country grows more diverse and the wealth gap widens, bills like SB 535 show that we have tools for reversing racial wealth and health gaps. Efforts like these suggest reason for some optimism that California is beginning to entertain policy initiatives that attempt to rectify past inequities in the environmental movement. SB 535 aimed directly at the reduction of pollution and economic inequities in low-income communities. However, even a cursory glimpse at health and economic data reveals that SB 535 is woefully insufficient to make up for decades of policies that have harmed the highest-need communities. We must persuade all environmental policymakers and advocates, including those who have historically not represented the interests of low-income communities and communities of color, to understand that shifting their targets to the most vulnerable benefits the long-term security and prosperity interests of the state. Despite its many flaws, SB 535 stands as a shining example of a way forward for those committed to policies that create a more sustainable social and economic infrastructure.

As Senator de León said: "We don't need to wait for Washington D.C. The White House and the [U.S. Environmental Protection Agency] know what's happening and what needs to be done. But . . . you have individuals who are large blocks in D.C. — they're like Nero, playing the violin while Rome burns."²³⁵ This nation cannot afford to wait for the music to stop in Washington as our cue to act. Instead, as de León rightly suggests, it is the responsibility of each state to act locally if we are ever to achieve the promise of a sustainable, pluralistic, and multiracial democracy.

²³³ POLICYLINK, *supra* note 2, at 2 (citing Andrew G. Berg & Jonathan D. Ostry, *Inequality and Unsustainable Growth: Two Sides of the Same Coin?* (IMF Staff Discussion Note, Apr. 8, 2011)).

²³⁴ *Id.* (citing Randall Eberts, George Erickcek & Jack Kleinhenz, *Dashboard Indicators for the Northeast Ohio Economy* (Fed. Res. Working Paper No. 06-05, Apr. 2006); and Manual Pastor, *Cohesion and Competitiveness: Business Leadership for Regional Growth and Social Equity* (OECD Territorial Review, 2006)).

²³⁵ Interview with Senator de León, *supra* note 139.