

I have a few thoughts on environmental justice and the [new court decision halting implementation](#) of the AB 32 scoping plan, inspired by my colleague [Ann Carlson's post](#), and the comments on that post. Reflecting on the environmental justice community's successful (at least temporarily) attack on greenhouse gas emissions trading in California - and on the EJ advocates' loathing of market-based solutions generally - I don't believe their positions are internally inconsistent, naive, or cynical at all. Rather, their opposition to AB 32 - and to emissions trading generally - is based on a set of values and principles that flow from their mission and goals, and I believe it's quite rational. (Disclosure: I have represented Communities for a Better Environment through my law clinic on various matters. This doesn't affect my view of this issue, however.)

The EJ movement's primary goal is to lessen the proportionate burdens on low-income and minority communities from human-created environmental risks. At the same time, the EJ community has an abiding commitment to process-oriented goals, too. These goals include integrating public participation and community-based knowledge and values into decisionmaking at the level of individual decisions about how best to regulate activities, projects, plants, and environmental and land use decisions that might affect local community health. The movement regards community participation in regulatory decisions as among its most cherished values. It is a core belief of EJ advocates that a process lacking in community engagement at the project or plant level cannot lead to a sustainable long-term set of solutions to the environmental inequities they are trying to eradicate - even if some decisions good for the environment or even for EJ stakeholders might sometimes result from a process without community engagement.

In light of this set of values and commitments by EJ advocates, it is both unsurprising, and entirely consistent with these advocates' goals, for them to be against emissions trading programs, including GHG emissions trading programs.

First, by their nature, trading programs leave little to no opportunity for community input. This may be the EJ community's most fundamental objection to trading programs. Command-and-control regulation typically provides opportunities for community input on a case-by-case basis. Local communities can influence the regulatory process by participating in permitting proceedings and variance proceedings, by commenting on proposed rules, and by undertaking or intervening in direct administrative or court enforcement actions or urging regulators to pursue these actions. By contrast, once a trading program is in place, the regulated parties, entities that control and regulate the pool of available offsets, and investors and traders will form the system that dictates the regulatory outcome on a local level by controlling available carbon emission allowances. If one believes - as EJ advocates believe - both that the lineup of players in the process affects the outcome, and that the

engagement of local interests is a crucially important feature of a regulatory program in its own right, regardless of the outcome, it's not surprising that one would oppose emissions trading systems.

Second, the EJ advocates' role in the political and legal process is to protect the substantive interests of disproportionately impacted communities, and they believe that fighting cap-and-trade will further this goal. Our air quality laws are enforced intermittently, and with serious exceptions (for example, variances issued by local air quality regulators). A trading plan that works perfectly – by resulting in the maximally efficient allocation of GHG emissions – will likely result in continued concentration of industrial production in certain geographic areas, since that will be the most economically efficient outcome. And so we will be pushing the limits of our already-inadequate air quality permitting and enforcement resources even more, with the possible result that there will be disproportionate pollution impacts from co-pollutants in those areas. Moreover, as research by Stanford scientist Mark Jacobson has shown, it is likely that carbon dioxide emissions have localized impacts. So the trading program may well result in direct health impacts as well. It's reasonable to expect EJ advocates to point that out, and to advocate for a different solution that they believe would be less likely to result in disproportionate impacts. The fact that we have other laws to deal with these issues doesn't mean that those laws are adequately enforced, and EJ advocates have – above all, and understandably – concluded that concentration of industrial sources in certain places inevitably leads to more pollution on those areas, regardless of the availability of laws designed to reduce emissions. Bottom line: they believe that AB 32 has the potential to exacerbate current siting and emissions disparities.

One understandable retort to this argument is that the communities that EJ advocates are trying to protect will also be the most vulnerable to the climate change impacts that AB 32 is trying to prevent. Thus, the argument goes, EJ advocates are shortsighted because they are delaying necessary climate change solutions. Another response is Ann's: that the costs of less efficient regulation will themselves be borne disproportionately by the poor. These are powerful arguments, but they don't actually support a trading system, unless it's clear that the trading system is truly both more efficient and more effective than alternatives. It's also understandable that the tangible, daily pollution from oil refineries and other major sources is the focus of their concern, especially since California's reductions in GHG emissions, by themselves, won't directly result in a measurable decrease in climate impacts. And more fundamentally, EJ advocates believe it's not clear that cap-and-trade will result in real, verifiable reductions in GHG emissions anyway. (See my third point below.)

If they truly don't believe that AB 32's trading system will result in GHG reductions, it's even more understandable why they would object.

And while Ann's observation that AB 32's primary purpose is to reduce greenhouse gas emissions is clearly correct, that law also clearly and specifically requires maximization of co-benefits and minimization of adverse impacts on communities already disproportionately impacted by pollution. The EJ community advocated for these features, and believe that this aspect of the law isn't being implemented robustly. (It's also worth pointing out that the legislature, based on EJ advocacy efforts, didn't require an emissions-trading program, but that Governor Schwarzenegger decreed early on, through executive order and other public statements, and before public review of alternatives, that the core of the State's plan would be a market-based program. The EJ community couldn't have been happy about this, and it also speaks to the allegations that concerned the court in this case: lack of serious consideration of alternatives.)

Finally, EJ advocates are deeply skeptical that the trading program can or will work effectively to reduce GHGs. They point to the European Union's trading system, in which the market has not worked effectively to reduce GHG emissions, because – among other reasons – the cap wasn't correctly set, and the allowances were over-allocated in the first place. And they are skeptical that offset protocols will be effective in ensuring real, permanent, verifiable, additional GHG reductions. There's certainly some research (for example, from Michael Wara of Stanford) to support the idea that offsets used in those international systems often don't lead to additional GHG reductions beyond business as usual. While this is more properly framed as an objection to the likely implementation of a cap-and-trade program, rather than to a trading program in principle, EJ advocates believe deeply that the allowance market and the offset market will be gamed.

I do share Ann's confusion as to why an EJ advocate might believe that carbon fee/tax might be preferable. Certainly, reliance on taxes or fees alone – even in an ideal form – will not provide the process benefits that the EJ community wants. But actually, I read the EJ community as not wanting a carbon fee/tax. While the court decision focused on CARB's failure to consider adequately such an alternative, the EJ advocates clearly would either prefer command-and-control regulation or some type of cap in conjunction with a fee. And I agree with Ann that it's odd, and potentially misleading, to compare an ideal alternative – whether carbon tax or command-and-control regulatory system – with a real-life cap-and-trade proposal.

Personally, I think cap-and-trade is an imperfect solution, with some risk that it will be ineffective. And it will have some adverse trade-offs if it is effective. On the other hand, I believe that putting a price on carbon emissions somehow – forcing fossil-fuel-intensive industries to internalize the societal costs of their GHG emissions – is crucial, and cap-and-trade might be the most politically feasible means of doing so. (Or ***seemed*** to be; one of

the ironies of the State's position today is that the legislature and the Governor believed cap-and-trade to be the most politically palatable way to price GHG emissions, but now, that support may have eroded in the business community.) I don't share all the EJ community's core concerns and positions, especially the elevation of the participatory process above virtually all other values. But their position seems neither naïve nor cynical to me; they're just advocating for their values.