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Environmental Law and Justice Clinic

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November 26, 2008

Air and Radiation Docket
Environmental Protection Agency
Mailcode: 2822T
1200 Pennsylvania Ave., NW.
Washington, DC 20460
a-and-r-docket@epa.gov
Attention: Docket ID No. EPA-HQ-OAR-2008-0318

**RE: Comments on the EPA's Advance Notice of Proposed Rulemaking,
Regulating Greenhouse Gas Emissions Under the Clean Air Act, 73 Fed. Reg.
44354 (July 30, 2008)**

To the Environmental Protection Agency:

On behalf of Communities for a Better Environment and Bayview Hunters Point Community Advocates the Environmental Law and Justice Clinic at Golden Gate University submits these comments in response to EPA's Federal Register publication of its Advance Notice of Proposed Rulemaking for Regulating Greenhouse Gas Emissions Under the Clean Air Act, which solicits public comment on how to respond to the U.S. Supreme Court's decision in *Massachusetts v. EPA* and how to regulate greenhouse gases under the Clean Air Act. 73 Fed. Reg. 44354 (July 30, 2008).

INTRODUCTION

In the Advanced Notice of Proposed Rulemaking (ANPR), EPA initially acknowledged that the evidence of global warming is "unequivocal" and that "[o]verall risk to human health, society and the environment increases with increases in both the rate and magnitude of climate change." 73 Fed. Reg. at 44396. While evaluating ways to tackle this far-reaching issue, EPA recognized that environmental justice analyses could be informative to global warming policies:

Distributional analyses, environmental justice analyses, and other analyses can be informative. For example, to the extent that climate change affects the distribution of wealth or the distribution of environmental damages, then climate change mitigation policies may have significant distributional impacts, which may in some cases be more important than overall efficiency or net benefits. EPA seeks comment on how to adequately inform economic choices, as well as broader policy choices, associated with GHG mitigation policies.

Id. at 44417. This qualified reference to environmental justice is the only direct reference to this important issue in the lengthy ANPR. However, an environmental

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justice analysis is more than just potentially relevant information. A thorough evaluation and analysis of environmental justice issues is critical to avoid the foreseeable disproportionate and potentially devastating impacts that global warming will have on these populations.

DISCUSSION

Evidence shows that climate change will disproportionately impact low income and minority communities that already bear a significant environmental burden. To protect these susceptible populations, the Agency should regulate greenhouse gas emissions under the Clean Air Act, while taking into account the cumulative impact likely to be experienced in these already overburdened communities.

1. EPA Should Regulate Greenhouse Gas Emissions To Ensure Emissions Are Reduced In A Manner That Protects Low-Income And Minority Communities.

EPA is required to consider the most vulnerable populations when promulgating regulations. Specifically, Executive Order 12898 states that to the extent practicable and permitted by law, each federal agency “shall make achieving environmental justice part of its mission by identifying and addressing, as appropriate, the disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minority populations and low-income populations in the United States.” In 1994, the EPA Administrator issued guidance pursuant to this executive order requiring that environmental justice issues are considered early in the rule-making process. In addition, EPA has stated that it will form workgroups for high priority rules to ensure that data are collected and input is sought relevant to environmental justice issues.

Despite these specific Agency commitments to the environmental justice issue, we are concerned that EPA will devote little attention to evaluate environmental justice issues related to the impacts of climate change on low-income and minority communities. In 2005, the United States Government Accountability Office (GAO) found that EPA had “generally devoted little attention to environmental justice” when it drafted recent clean air rules. *See* U.S. Gov’t Accountability Office, *EPA Should Devote More Attention to Environmental Justice When Developing Clean Air Rules*, GAO-05-289 at 1 (2005) (2005 GAO Report). The 2005 GAO Report highlighted the fact that, although prior rules stated that environmental justice issues would be considered during the promulgation of the final rules, the rules “did not provide decision makers with environmental justice analyses,” and EPA failed to identify the “types of data necessary to analyze such impacts.” *Id.* at 1.

The ANPR is a high-priority rule which demands that EPA examine environmental justice issues, respond to environmental justice comments, and prepare an economic review assessing the implications of the rule on environmental justice. *See id.* at 9-10 (GAO report discussing EPA’s environmental justice requirements when promulgating rules). In addition, our review of the ANPR indicates that environmental justice is not being considered early in the process as EPA guidance requires. *See id.* at 10 (“EPA guidance calls for environmental justice to be considered early in the

rulemaking process”). Therefore, we request that EPA provide and evaluate data and other relevant information related to environmental justice early in the rulemaking process.

Furthermore, as discussed below, due to the fact that a cap and trade program does not protect minority and low-income communities against hot spots or provide interested stakeholders with an opportunity to public participation, we request that the Agency regulate GHG emissions directly under the Clean Air Act to adequately protect these susceptible populations. These regulatory options should be proposed and considered as part of a proposed rulemaking to allow the environmental justice community to evaluate the impact of the proposed regulation on the minority and low-income communities in the United States.

2. EPA Should Consider Global Warming’s Disproportionate Impact On Low Income And Minority Communities.

In the ANPR, EPA notes that global climate change will impact climatic conditions in the U.S. in several ways: (i) heat waves are projected to intensify in magnitude, frequency, and duration, (ii) air quality will decline with increases in regional ozone levels and the possibility of increases in particulate matter concentrations, (iii) extreme weather events will increase and hurricanes will intensify, and (iv) the range of vector-borne diseases will change. *See* 73 Fed. Reg. at 44426. According to EPA, these changes in environmental conditions are likely to produce disproportionate health effects upon economically disadvantaged or sensitive subpopulations. *See id.*

For example, EPA says that increases in heat waves will increase mortality and morbidity especially in elderly, young, and frail individuals. *Id.* EPA also opines that increased ozone and particulate pollution will produce more respiratory infections, aggravate asthma, and increase premature death among susceptible groups. *Id.*¹

While we agree with these statements, EPA’s partial impact assessment fails to thoroughly consider how climate change will impact poor and minority communities. The Agency should consider more comprehensive information since the health, society and environmental impacts of climate change will disproportionately impact poor and minority communities and a policy that does not consider these conditions could exacerbate the problem.

Existing research and literature already document the disproportionate impacts which EPA should consider. Minority and low-income communities are less likely to be able to adapt to the serious effects of climate change. A community’s ability to adapt is dependent on its wealth, infrastructure, technology and institutions. *See* World Health Organization, *Climate Change & Human Health*, available at <http://www.who.int/globalchange/climate/summary> (summarizing the determinants for

¹ EPA also notes in the ANPR that climate change will exacerbate environmental and social problems for indigenous tribes in Alaska. 73 Fed. Reg. at 44427.

a community's adaptive capacity). "Adaptive capacity is also a function of current population health status and pre-existing disease burdens." *Id.* In other words, the populations that are least likely to adapt to the far-reaching effects of climate change are those that have less economic resources and that are already experiencing health effects from pollution.

Numerous studies have shown that low income and minority communities bear more of the cumulative burden of pollution in California and around the nation. *See, e.g.,* Rechtschaffen, C., *The Evidence of Environmental Injustice*, Environmental Law News, Vol. 12, No. 3 (Fall 2003); Toxic Wastes and Race at Twenty, *available at* <http://www.ucc.org/justice/environmental-justice/pdfs/toxic-wastes-and-race-at-twenty-1987-2007.pdf>. Specifically, minority and low income communities disproportionately bear the environmental and health impacts from fossil fuel exploration, extraction, production, consumption and disposal. *Id.*; *see also* The California Environmental Justice Movement's Declaration Against the Use of Carbon Trading Schemes to Address Climate Change, *available at* http://www.ejcc.org/assets/declaration_carbon_trading.pdf.

Partly for that reason, poor and minority communities will be disproportionately affected by the increased pollution related to climate change. For example, in 2004, the Congressional Black Caucus Foundation reported that African-Americans are twice as likely to die than the general population as a result of a heat wave and nearly three times more likely to die of asthma than Whites. *See African Americans and Climate Change: An Unequal Burden*, July 21, 2004, *available at* www.rprogress.org/publications/2004/CBCF_REPORT_F.pdf. Increases in ozone and particulate matter concentrations, both of which can exacerbate asthma, will thus have a disproportionate impact upon African-Americans. In addition, as this Agency has admitted, global warming can exacerbate the harmful effects of air pollution: "[e]xposure to air pollutants has been shown to aggravate respiratory and cardiovascular diseases and cause premature deaths. The net effect on human health from simultaneous exposure to stressful weather and air pollution may be greater than the separate effects added together." EPA, *Climate Change and Public Health*, EPA 236-F-97-005 (October 1997).

Low income urban populations are also more susceptible to illness and death during heatwaves. Heatwaves are known to cause higher day and night time temperatures in cities than in rural areas. *See* Pew Center on Global Climate Change, *Heatwaves and Global Climate Change*, (December 2007) *available at* www.pewclimate.org/docUploads/Regional-Impacts-Midwest.pdf. In these urban centers, low income communities are less likely to have air conditioning in their homes to prevent heat strokes and death in heat waves. This Agency has previously recognized this link stating that "[p]eople living in inadequate housing with no air conditioning in urban areas where heat is retained by buildings and pavement are particularly vulnerable [to climate change]." EPA, *Climate Change and Public Health*, EPA 236-F-97-005 (October 1997). Given that major urban centers in the United States tend to have greater percentages of people of color and immigrant communities, environmental inequities are likely to be experienced not only by African-Americans,

but also by Latinos, Asian-Americans, and other ethnic groupings including immigrant communities.

People who work outdoors, such as laborers, are also likely to have a greater health risk due to heatwaves and the related increases in air pollution. See Pew Center on Global Climate Change, *Heatwaves and Global Climate Change*. EPA should analyze whether this subpopulation is disproportionately people of color or of lower socio-economic status and include these data in its environmental justice evaluation.

In addition, low income and minority communities are often more vulnerable to rising sea levels. For example, in the San Francisco area, the flatlands closest to the Bay such as the Bayview-Hunters Point neighborhood have larger minority communities than the hills. Moreover, “[t]he six states with the highest African American population are all in the Atlantic hurricane zone, and are expected to experience more intense storms resembling Katrina and Rita in the future.” Env’tl. Justice & Change Initiative, *A Climate of Change, African Americans, Global Warming, and a Just Climate Policy for the U.S.* (June 2008), available at http://www.ejcc.org/issues/us_policy. Further, low-income individuals have less access to health care, which means they will have less ability to cope with the predicted introduction of tropical diseases to the United States, such as dengue fever and West Nile Virus.

Thus, adverse heat-related impacts from climate change will likely be greater among the poor and communities of color who tend to be both more exposed and more vulnerable due to risk factors such as residence in urban centers, inadequate health care, greater social isolation, and lack of transportation. See California Climate Change Center, *Public Health Related Impacts of Climate Change in California*, March 2006, available at www.energy.ca.gov/2005publications/CEC-500-2005-197/CEC-500-2005-197-SF.pdf.

The limited capability of low income and minority communities to adapt to climate change was also recently recognized by California’s Attorney General:

The impacts of global warming experienced by [communities of color] and poor communities will be exacerbated because these groups are often the least able to adapt. They typically have less access to health care and medical, home, and renter’s insurance; less money to purchase air conditioning or to move away from droughts, floods and fires caused by global warming; and spend a higher percentage of their income on necessities such as gasoline, water, and electricity, which will become scarcer and more expensive with climate change.

Office of California Attorney General, *Global Warming’s Unequal Impacts*, available at <http://aq.ca.gov/globalwarming/unequal.php>.

In sum, both low-income people and people of color are likely to be disproportionately impacted by the far-reaching climate change impacts in the United

States. EPA should consider these impacts on these populations when addressing the EPA's role in a climate change regulatory regime.

3. A Cap and Trade System Is Not An Effective Way To Regulate Greenhouse Gases.

A cap and trade system is not an effective way to regulate greenhouse gases. As illustrated by other cap and trade systems such as the RECLAIM program in Los Angeles and the European Union's cap and trade programs, cap and trade systems have had significant problems with monitoring and enforcement. *See* McAllister, L., Beyond Playing "Banker:" the Role of the Regulatory Agency in Emissions Trading, 59 Admin. L. Rev. 269, 272, 287 (2007) (stating that RECLAIM, a cap-and-trade program for SO₂ and NO_x emission in Southern California, which began in 1994, had considerable enforcement and compliance difficulties). In addition, a cap-and-trade program can exacerbate harm and increased risk to low-income communities and communities of color from climate change because it is difficult or nearly impossible to ensure reliable and accurate reporting. *See* Letter from Williams, L. & Zabel, A. to Congress, *re: Climate Change Legislation* (May 4, 2008) (two individuals with decades of environmental enforcement experience citing difficulties with under-reporting in Europe). Further, enforcing a complex cap and trade system will be both time intensive and difficult when companies have a motivation to underreport their emissions. *See id.*

Indeed, even the Wall Street Journal has written about the shortcomings of a cap and trade system: "The emerging alliance of business and environmental special interests may well prove powerful enough to give us cap-and-trade in CO₂ . . . [I]t would make money for some very large corporations. But don't believe for a minute that this charade would do much about global warming." Wall Street Journal, "Cap and Charade: The political and business self-interest behind carbon limits," March 3, 2007.

Furthermore, it is not clear that the two potential benefits of cap and trade systems that advocates highlight - reduction in emissions and compliance costs - have actually been achieved. In particular, analyses of the cap and trade program under Title IV suggest that the majority sulfur dioxide emission reductions is due to factors such as lower coal prices for western coal rather than the cap and trade program. *See, e.g.,* Ellerman, A. Denny, The Declining Trend in Sulfur Dioxide Emissions: Implications for Allowances Prices, 36 J. of Env't Economics 26, 27 (1998) (concluding that "SO₂ emissions have declined mostly for reasons unrelated to Title IV"). Economists have also suggested that other types of regulatory programs may reduce compliance costs more than a cap and trade program. *See, e.g.,* Resources for the Future, Sulfur Dioxide Control by Electric Utilities: What Are the Gains from Trade?, J. of Political Economy, Vol. 108, No. 6, 1292-1326 (predicting that the "cost savings [for electric utilities] would be twice as great if the alternative to trading were forced scrubbing" rather than a cap and trade scheme).

Due to all these problems with cap and trade programs, direct regulation is the best way to ensure immediate reduction. This is particularly critical to prevent further warming and irreversible destabilization of the climate system. *See, e.g.,* 2007 Bali Climate Declaration By Scientists, *available at* <http://www.climate.unsw.edu.au/bali>.

4. Cap and Trade Regimes Do Not Protect the Most Susceptible Communities.

Importantly, cap and trade schemes are not protective of the most susceptible populations. Cap and trade regulatory regimes can create hot spots in areas already experiencing high levels of pollution, which in turn leads to a greater cumulative health risk and impact in these communities. Greenhouse gas levels are directly related to the environmental burden these communities currently face partly because sources of greenhouse gases also simultaneously emit harmful co-pollutants, including potentially other greenhouse gases and pollutants that cause serious health effects. In particular, stationary and mobile sources that burn fossil fuels also emit a host of other harmful air pollutants at the same time including particulate matter, nitrogen oxides, sulfur dioxide, and mercury. Therefore, a concentration of greenhouse gases in an area is likely to also contain higher amounts of harmful co-pollutants. A cap and trade program does not protect against high concentrations of these co-pollutants, *i.e.*, hot spots.

For example, RECLAIM, a trading system based in Los Angeles, California, demonstrated that emissions trading programs can “exchange small reductions in widespread pollution for increased exposure to concentrated, and often more toxic, pollution in the neighborhoods surrounding large industrial facilities.” Drury, Richard, et. al., *Pollution Trading and Environmental Injustice: Los Angeles’ Failed Experiment in Air Quality Policy*, 9 Duke Env’t. Law & Pol’y Forum 231, 272 (1999); *see also* Rose, C., *Hot Spots in the Legislative Climate Change Proposals*, 102 Nw. U. L. Rev. 189, 190 (2008) (discussing how cap and trade systems create hot spots); Kaswan, A., *Environmental Justice & Domestic Climate Change Policy*, 38 Env’t. L. Rep. 10287, 10299 (2008); Martinac, I., *Considering Environmental Justice in the Decision to Unbundle Renewable Energy Certificates*, 35 Golden Gate U. L. Rev. 491, 523 (2005) (explaining how RECLAIM created hot spots).

In addition, pollution in inner-city communities is unlikely to decrease due to carbon trading as much as it would under direct regulation command and control program:

Environmental justice concerns will arise both domestically and globally under global pollution trading. Carbon dioxide sources release hazardous co-pollutants, e.g., fine particles and toxic products of incomplete combustion. As U.S. firms buy bogus credits or cheap reduction credits from developing countries, where energy inefficiencies are high, air pollution in urban U.S. communities will be maintained or at least not reduced as fast as it otherwise would have been had domestic reduction in greenhouse gases been mandated.

Drury, R., *supra* at 287.

Another problem with cap and trade programs is that they do not allow for communities to have input in decisions that significantly impact their lives. Rather, under a carbon trading scheme, industry, market designers and commodity traders

determine whether and where to reduce greenhouse gases and co-pollutant emissions. Since trading programs create incentives for companies to underreport numbers, the lack of public accountability means that there is no meaningful public opportunity to evaluate the emissions reports. Plus, public input is needed to ensure that reductions which are made benefit the local community.

CONCLUSION

We request that EPA directly regulate greenhouse gas emissions since a cap-and-trade program will not protect low-income and minority communities, which already bear a disproportionate environmental burden. We also specifically request that EPA consider the cumulative impact which is likely to occur in low income and minority communities from climate change. In this review, we request that EPA meaningfully involve the relevant environmental justice stakeholders and ensure that all of the benchmarks set forth in EPA guidance related to environmental justice are met.

Sincerely,

/s/ Deborah Behles

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