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California's Next Environmental Frontier: Climate Justice Leadership

Suma Peesapati*

The world is bearing witness to an unprecedented series of extreme climate-related events causing historic flooding and massive displacement of millions of people in the United States and South Asia. Earlier this year, the scientific community made the unsurprising finding that the earth's oceans are warming at a rate that far exceeds original models.¹ On the heels of California's deluge and accompanying alarm over the potential failure of the Central Valley's Oroville Dam, climate experts published a study finding that the earth's oceans are warming thirteen percent faster than previously thought.²

While the consequence of these recent findings holds universal relevance, the full impact of this new knowledge is not equally shared among the world's population. Images from hurricane-ravaged regions in the United States and South Asia show that apart from bearing the daily burden of industrial pollution, low-income communities and communities of color are hit first and hardest by the climate change impacts of those industries. As a particularly stark example of that phenomenon, many oil refinery and petrochemical neighbors near Houston, who were evacuated as a result of Hurricane Harvey, suffered a second blow when those industrial facilities began malfunctioning and emitting thousands of unpermitted tons

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1. Lijing Cheng, Kevin E. Trenberth, et al., *Improved estimates of ocean heat content from 1960 to 2015*, 3 SCI. ADVANCES, Mar. 10, 2017, <https://perma.cc/9ZGC-QQ4V>.

2. *Id.*

of toxic, localized pollution.³ Making matters worse, many renters came home to eviction notices declaring their rental units uninhabitable, displacing them permanently.⁴

The more recent humanitarian crisis in Puerto Rico offers another troubling example of the distributive injustice associated with the earth's changing climate. Hurricane Maria destroyed eighty percent of the island's homes and left millions of American citizens without basic services, including power or drinking water, for an indeterminate amount of time.⁵ The sorely inadequate emergency response to that crisis places a spotlight on the urgent need for stronger climate resilience measures on the back end of the arc of climate justice. While it may be difficult to weigh the relative impact of environmental racism against the political disenfranchisement caused by Puerto Rico's non-voting territory status, the tragic result is the same: profound and preventable human suffering. Sadly, the summer's string of extreme climate events appears to be nature's early warning sign about what is at stake in the debate about addressing climate change.

California's Climate Laws and Policies

Without a doubt, California is a global leader in the battle against our rapidly changing climate. Our Golden State rightfully boasts of many laudable forward and far-reaching greenhouse gas reduction and climate resilience policies. California's leadership started with Governor Arnold Schwarzenegger's passage of the California Global Warming Solutions Act of 2006 (AB 32), requiring California to reduce its greenhouse gas emissions to 1990 levels by the year 2020.⁶ Often overlooked is AB 32's companion bill, SB 1368, which prohibited California's regulated utilities from long-term

3. Troy Griggs, Andrew W. Lehren, et al., *More Than 40 Sites Released Hazardous Pollutants Because of Hurricane Harvey*, N.Y. TIMES (Sept. 8, 2017), <https://perma.cc/343E-QLQW>; Sarah Fitzpatrick, *Harvey Releases 2 Million Pounds of Pollutants From Refineries, Plants*, NBC NEWS (Aug. 30, 2017), <https://perma.cc/8UWK-ZRTV>; Erin Brodwin, *A new analysis suggests Hurricane Harvey caused 4.6 million pounds of chemicals to be released — but the risk is still unclear*, BUS. INSIDER (Sept. 12, 2017), <https://perma.cc/U83U-JRXY>; *Houston flood: More fires expected at stricken Arkema plant*, BBC NEWS (Aug. 31, 2017), <https://perma.cc/494K-8V84>.

4. Brentin Mock, *Harvey's Poorest Victims Will Never Rebuild. They're Getting Evicted.*, MOTHER JONES (Sept. 15, 2017), <https://perma.cc/K9NN-D6WE>.

5. Sarah Almkhtar, Troy Griggs, et al., *The Devastation in Puerto Rico, as Seen From Above*, N.Y. TIMES (Sept. 27, 2017), <https://perma.cc/9JRY-U6NX>; Brian Resnick, *Why Hurricane Maria is such a nightmare for Puerto Rico*, VOX (Sep. 22, 2017), <https://perma.cc/5M38-YZCV>.

6. CAL. HEALTH & SAFETY CODE §§ 38500-38510 (West 2017).

investment in coal-fired power plants.⁷ SB 1368, and California's resulting divestment from coal, led to the retirement of some of our nation's most outdated coal-fired facilities in the Southwest, permanently eliminating large sources of uncontrolled, localized, and environmentally unjust pollution on or near tribal lands in the process.⁸

California's commitment to neutralizing climate change has since become even more aggressive. The most recent example is last year's passage of SB 32, setting California's greenhouse reduction target to forty percent below 1990 levels by the year 2030.⁹ SB 32 transformed Governor Brown's April 2015 Executive Order, B-30-15, from an aspirational goal into a legal mandate.¹⁰ Also last year, our legislature pushed California's energy sector into similarly uncharted territory with SB 350, which requires California to procure at least fifty percent of its electricity from renewable sources of generation by 2030—a significant step forward from SB 2, a 2011 law that required California to achieve a thirty-three percent renewable generation portfolio by 2020.¹¹

The task of operationalizing those legislative mandates falls on a number of key government agencies. AB 32 designated the California Air Resources Board (Air Board) as the statewide planning agency responsible for setting California's roadmap for emissions reductions through a sweeping, multi-sector "Scoping Plan" that the Air Board is now updating to reflect SB 32's more aggressive pollution reduction targets.¹² The California Public Utilities Commission, California Energy Commission, and California Independent Systems Operator also loom large in the climate change regulatory sphere by overseeing the orderly integration of renewable energy into California's complex energy grid and by licensing and approving ratepayer compensation for new sources of generation and energy efficiency programs.

Apart from modernizing California's energy grid, the Air Board's Scoping Plan contemplates a number of other important climate change control strategies targeting various sectors, including transportation. For

7. CAL. PUB. UTIL. CODE §§ 8340-8341 (West 2017).

8. Suma Peesapati, *Clearing the Air in the Southwest with State, Federal Rules*, EARTHJUSTICE BLOG (Dec. 31, 2013), <https://perma.cc/RA7N-NKCE>.

9. CAL. HEALTH & SAFETY CODE § 38566 (West 2017).

10. *Id.*; OFFICE OF GOVERNOR EDMUND G. BROWN JR.: GOVERNOR BROWN ESTABLISHES MOST AMBITIOUS GREENHOUSE GAS REDUCTION TARGET IN NORTH AMERICA, Apr. 29, 2015, <https://perma.cc/CR5L-KYQY>.

11. CAL. AIR RES. BOARD, THE 2017 CLIMATE CHANGE SCOPING PLAN UPDATE, 98, Jan. 20, 2017, <https://perma.cc/H8R5-KX95>.

12. CAL. HEALTH & SAFETY CODE § 38561(a) (West 2017); AB 32 *Scoping Plan*, CAL. AIR RES. BOARD, July 14, 2017, <https://perma.cc/9UJM-3F9G>.

instance, California's coastal ports are some of the world's largest import-export hubs and key drivers of the global goods movement economy. As described in the proposed Scoping Plan Update, "[t]he California's freight system . . . is the most extensive, complex, and interconnected system in the country, with approximately 1.5 billion tons of freight valued at \$2.8 trillion shipped in 2015 to, through, and within California."¹³ Electrifying California's ports, increasing the efficiency of California's freight system, and reducing emission from vehicles are all key pieces of the planned evolution of the statewide goods movement infrastructure. Passenger vehicles, as a category, are also significant contributors to the State's overall greenhouse gas inventory. The Scoping Plan describes the State's ongoing efforts on this front as follows:

There are already more than one-quarter million electric vehicles in California—almost half the national total and clean transportation is fast becoming a significant part of the State's clean energy economy. In 2015, clean transportation was the hottest sector for venture capital investment in California, bringing in \$3.4 billion in that year, 90.5 percent of all clean transportation vehicle capital investment in the nation. In the coming months and years, more and more zero-emission and hybrid trucks and buses will be on the State's streets and highways, including many destined for disadvantaged communities.¹⁴

The State seeks to introduce 4.3 million zero-emission and plug-in hybrid passenger vehicles by 2030.¹⁵ California has been leading the charge on fuel economy standards by availing itself of a federal waiver from historically weaker federal fuel economy standards. The U.S. Environmental Protection Agency (EPA), under Administrator Pruitt, recently reopened its review of Obama's fuel economy standards. While the fate of those federal standards remains uncertain, the federal government has not yet signaled a parallel intent to revoke California's waiver under section 177 of the Clean Air Act.¹⁶

California's land use planning instruments form another developing area of climate change regulatory focus. SB 375, enacted in 2008, requires local governments to fashion regional transportation plans and climate action plans that chart a sustainable course for population growth and

13. CAL. AIR RES. BOARD, THE 2017 CLIMATE CHANGE SCOPING PLAN UPDATE, 98, Jan. 20, 2017, <https://perma.cc/H8R5-KX95>.

14. *Id.* at ES6.

15. *Id.* at 105.

16. 42 U.S.C. § 7507 (2017).

accompanying residential development.¹⁷ The Environmental Health Coalition's successful environmental justice advocacy in National City (southern San Diego County) prompted the City to adopt an environmental justice element to its most recent General Plan.¹⁸ That environmental justice element imposed affordable housing allocations, zoning restrictions for polluting facilities, and transit requirements in low-income communities and communities of color. That exemplar, in turn, catalyzed last year's passage of SB 1000, which requires all municipalities to incorporate an environmental justice element into their General Plans.¹⁹

The Long Road Ahead

The global community is coalescing around enactment of the 1.5 degree Celsius guardrail against irreversible climate change by 2100.²⁰ That goal contemplates global greenhouse gas emissions falling to eighty percent below 1990 levels by the year 2050.²¹ However impressive California's efforts have been to date, the State is nowhere near the 2050 reduction trajectory, which will require even deeper transformative action. Given the scale of the challenge, equivocation and incrementalism are no longer options on California's path to decarbonization.

Against this backdrop, our legislature recently took the controversial step of passing AB 398, which extended California's greenhouse gas cap-and-trade program—the state's primary strategy for reducing carbon emissions from oil refineries and power plants, both of which are also primary culprits in the fight for environmental justice. Over the years, environmental justice advocates have voiced philosophical objections to pollution trading for commodifying a social ill that should be eradicated.²² Yet, the environmental justice community's strongest objections point to

17. S.B. 375, (Cal. 2008), <https://perma.cc/2C3C-EVZH>

18. Rachel Dovey, *New Toolkit Connects City Planning and Environmental Justice*, NEXT CITY, Oct. 3, 2017, <https://perma.cc/TJW5-GWPN>.

19. S.B. 1000, (Cal. 2016), <https://perma.cc/33H7-V9SV>.

20. THE 2017 CLIMATE CHANGE SCOPING PLAN UPDATE, at 28 n. 35 ("In the year preceding the Paris negotiations, the Governor's Office recruited subnational jurisdictions to sign onto the Memorandum of Understanding on Subnational Global Climate Leadership (Under 2 MOU), which brings together states and regions willing to commit to reducing their GHG emissions by 80 to 95 percent, or to limit emissions to 2 metric tons CO₂-equivalent per capita, by 2050.").

21. *Id.*

22. Suma Peesapati, *AB 32's Pollution Markets: A Technology-Driven Solution or A Step Backward for Climate Change?*, 24, ENVTL. L. NEWS 2 (2015).

California's multiple, fatally-flawed attempts to faithfully implement a functioning program.²³ Unfortunately, California's experiment in the greenhouse gas trade has fared no better.

In striking similarity to Los Angeles's early missteps in its regional RECLAIM trading program for other pollutants, AB 32's over allocated and underpriced greenhouse credits quickly flooded the market, disincentivizing some of our state's largest polluters from making actual pollution reductions. In fact, just last year, a key study made disturbing findings about cap-and-trade's abysmal performance.²⁴ Chief among those findings was that average GHG emissions increased among several industry sectors since the inception of the cap-and-trade program. As the study further explained, "[o]ne particular driver of the pattern is the electrical sector in which GHG reductions were largely due to reductions in imported electricity and in the GHG-intensity of those imports while in-state GHG emissions actually rose."²⁵ ²⁶ "An equally troubling finding was that "many high-emitting companies have used out-of-state 'offset' projects to meet compliance obligations. California's largest GHG emitters were more likely to use offset projects to meet their emissions obligations under cap-and-trade."²⁷ On the topic of environmental justice, the study found that, "of the top-emitting facilities in terms of both PM10 and GHGs, sixty-one percent reported increases in localized GHG emissions in 2013–14 relative to 2011–12, versus fifty-one percent of facilities overall. The neighborhoods near the top-emitting facilities that increased emissions were poorer and had a higher share of people of color than neighborhoods near top-emitting facilities that decreased their emissions."²⁸

In short, California's cap-and-trade program is not only responsible for allowing some of the state's largest polluters to use dubious offsets, but is motivating some of the worst environmental justice offenders to *increase* pollution in already-overburdened communities. In a nod to early concerns about equity, a portion of revenue generated from the program was earmarked to support environmental justice work. Yet, even that feeble attempt to redistribute the program's economic benefits proved illusory when cap-and-trade ceased generating revenue to the State some years ago.

23. *Id.*

24. See LARA J. CUSHING ET AL., A PRELIMINARY ENVIRONMENTAL EQUITY ASSESSMENT OF CALIFORNIA'S CAP-AND-TRADE PROGRAM, Sept. 2016, <https://perma.cc/XG33-8FQA>.

25. *Id.* at 1.

26. *Id.* at 1.

27. *Id.*

28. *Id.*

Apparently unsatisfied with the original cap-and-trade giveaways, the oil industry extracted even deeper concessions from the legislature and mainstream environmental groups in the latest round of negotiations to extend the program. In particular, AB 398 included a preemption clause preventing local jurisdictions from imposing separate greenhouse gas reductions on the oil industry—a direct attack on the growing grassroots efforts to secure local cap on refinery emissions in the San Francisco Bay Area. The bill further carried a price ceiling on the cost of a carbon credit to protect the economic interests of California’s biggest polluters, but lacked any commensurate mechanism to stem the continued flood of unduly cheap credits that allow industry to freely increase pollution and thwart California’s path to achieving its 2030 pollution reduction target. Though a companion bill, SB 617, creates new pollution monitoring requirements and localized pollution reduction goals, the environmental justice community has criticized the latter bill as lacking the requisite specificity and stringency to guarantee meaningful local benefits.²⁹

California’s extension of its manipulated carbon market is emblematic of Big Oil’s steel grip on American environmental policy. Not long ago, polluters were some of the strongest advocates of pollution trading, touting the quintessentially American “free market” as a more innovation-inducing and nimble regulatory replacement for “outdated” and “heavy-handed” command-and-control policy instruments. Yet, if anything, California’s artificially depressed prices for so many pollutants, including carbon, merely highlight the power of agency capture, not free market forces.

Having won a pollution market with a heavy regulatory bias favoring polluters over the public, Big Oil has shifted the goalpost even further. Emboldened by the defeat of the Waxman-Markey cap-and-trade climate bill in 2007, polluters, and their sympathetic legislators, initially refused to extend California’s cap-and-trade program as unduly burdensome government overreach. Instead of defaulting to traditional command-and-control instruments, the legislature weakened AB 398, marking a regrettable regression in California’s climate policy, particularly when viewed through a climate justice lens. Meanwhile, as the death toll rises in Puerto Rico, in wildfire ravaged communities here in California, and in climate refugee communities throughout the world, we can no longer deny a hard truth in the battle against climate change—time is quickly running out.

29. *Id.*
