Trading Rights for Greenhouse Gases: The Dilemma of Cap-and-Trade and Environmental Justice

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Introduction

On August 29, 2005, Hurricane Katrina ravaged the Gulf Coast and quickly proceeded towards the city of New Orleans where the storm would prove to be beyond devastating for many residents. Though the impact of the devastation in New Orleans can be partly attributed to a lack of disaster preparedness and absence of political transparency, environmental effects were also a factor, especially for the low-income and minority populations of the city.[1] In addition to the storm surge and wind damage to homes, raw sewage and industrial waste from heavily polluted industrial sites spilled directly into the poorer New Orleans neighborhoods, contaminating groundwater and resulting in clean up complications. Residents not only lost their possessions and their livelihood, but also had to worry about the threat of pollutants and chemicals from industrial waste that could create large-scale health effects over time.

The destruction of the poorest areas of New Orleans in the aftermath of Hurricane Katrina demonstrated that climate change and its effects on low-income and minority populations are an impending environmental and civil rights issue. Low-income and minority populations are "often the ones to bear the brunt of environmental hazards, the most likely to develop health complications from these exposures, and yet the least likely to gain access to beneficial health

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[1] *See* Robert D. Bullard & Beverly Wright, *Introduction* to Race, Place, and Environmental Justice After Hurricane Katrina: Struggles to Reclaim, Rebuild, and Revitalize New Orleans and the Gulf Coast 1, 1-4 (2009).

services that would detect and treat these problems."[2] Minority populations are least likely to have access to the resources available to cope with, resist, and recover from the impacts of extreme weather events and other climate change effects.[3]

Industrial waste facilities producing hazardous waste and high amounts of pollution, like those facilities that caused groundwater contamination in New Orleans, are often located in areas with low property values because of the economic advantages of locating there.[4] This desirable location strategy results in health and environmental effects among low-income populations living in those areas.[5] A 1994 report found that "people of color were 47 percent more likely than whites to live near a commercial hazardous waste facility."[6] Another study found that "three out of every five African-Americans and Latinos live in communities with uncontrolled toxic waste sites."[7] Thus, the location of municipal waste facilities and hazardous waste dumps disparately impacts minority and low-income populations over and above the climate change and health effects already present in those communities.[8]

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[2] FLORENCE MARGAI, ENVIRONMENTAL HEALTH HAZARDS AND SOCIAL JUSTICE: GEOGRAPHICAL PERSPECTIVES ON RACE AND CLASS DISPARITIES 3 (2010).

[3] RACHEL MORELLO-FROSCH ET AL., UNIVERSITY OF SOUTHERN CALIFORNIA PROGRAM FOR ENVIRONMENTAL AND REGIONAL EQUITY, THE CLIMATE GAP: INEQUALITIES IN HOW CLIMATE CHANGE HURTS AMERICANS & HOW TO CLOSE THE GAP 25 (2009), http://dornsife.usc.edu/assets/sites/242/docs/ClimateGapReport_full_report_web.pdf (citing Kim Knowlton et al., *Assessing Ozone-Related Health Impacts under a Changing Climate*, 112 ENVTL. HEALTH PERSPS. 1557 (2004)).

[4] *See* Juliana Maantay, *Zoning Law, Health, and Environmental Justice: What's the Connection?*, 30 J.L. MED. & ETHICS 572, 576 (2002).

[5] *See* John McQuaid, *Unwelcome Neighbors: How the Poor Bear the Burdens of America's Pollution*, THE TIMES-PICAYUNE (May 22, 2000), http://www.nola.com/speced/lastchance/t-p/index.ssf?/speced/unwelcome/index.ssf?/speced/unwelcome/stories/0522c.html.

[6] BENJAMIN A. GOLDMAN & LAURA FITTON, TOXIC WASES AND RACE REVISITED: AN UPDATE OF THE 1987 REPORT ON THE RACIAL AND SOCIOECONOMIC CHARACTERSITICS WITH HAZARDOUS WASTE SITES (1994), *reprinted in* BARRY E. HILL, ENVIRONMENTAL JUSTICE LEGAL THEORY AND PRACTICE 31 (2d ed. 2009).

[7] James H. Colopy, Comment, *The Road Less Traveled: Pursuing Environmental Justice Through Title VI of the Civil Rights Act of 1964*, 13 STAN. ENVTL. L.J. 125, 130 (1994) (citing COMMISSION FOR RACIAL JUSTICE, UNITED CHURCH OF CHRIST, TOXIC WASTES AND RACE IN THE UNITED STATES: A NATIONAL REPORT ON THE RACIAL AND SOCIO-ECONOMIC CHARACTERISTICS OF COMMUNITIES WITH HAZARDOUS WASTE SITES (1987)).

[8] *See* Earthea Nance, *Making the Case for Community-Based Laboratories: A New Strategy for Environmental Justice*, *in* BULLARD, *supra* note 1, at 154-55.

In 2006, Congress attempted to alleviate these disproportionate effects by amending the Civil Rights Act of 1964 to include Title VI.[9] Congress intended Title VI to protect low-income and minority populations from the disparate effects caused by federally funded programs.[10] The few successful environmental justice cases are usually brought under Title VI because of the statutory option of proving discriminatory *intent* under section 601 or disparate *impact* under section 602.[11] Early environmental justice cases established that a plaintiff must prove intent or motive to discriminate under Section 601 or possess evidence of disparate impact under Section 602.[12] Initially, environmental justice plaintiffs were able to produce strong statistical data as well as evidence of historical segregation as proof of discriminatory intent and disparate impact in low-income and minority communities.[13]

Today, the environmental justice plaintiff confronts a much different struggle. Historical influences of segregation have lost their evidentiary value and distinct minority groups are less identifiable, creating an apparent difficulty in proving discriminatory intent under Section 601.[14] Nevertheless, if an environmental justice plaintiff can prove disparate impact under Section 602, the plaintiff can succeed on

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[9] *See* Civil Rights Act of 1964 §§ 601, 602, 42 U.S.C. §§ 2000d, 2000d-1 (2006).

[10] 42 U.S.C. §§ 2000d, 2000d-1. This Comment refers only to those industrial waste facilities and hazardous waste dumps that are federally funded, as Title VI only applies to federally funded programs. Notably, "most environmental projects, including waste dumps, incinerators, and landfills, are heavily underwritten by federal funds, environmental justice plaintiffs are turning to Title VI to press for injunctive and remedial relief." Colopy, *supra* note 7, at 128.

[11] The Environmental Protection Agency defines environmental justice as "the fair treatment and meaningful involvement of all people regardless of race, color, national origin or income with respect to the development, implementation and enforcement of environmental laws, regulations and policies. [The Environmental Protection Agency has this goal] for all communities and persons across this Nation. [It will be] achieved when everyone [ ] enjoys the same degree of protection from environmental and health hazards and equal access to the decision-making process to have a healthy environment in which to live, learn, and work." OFFICE OF INSPECTOR GEN., ENVTL. PROT. AGENCY, REPORT NO. 2004-P-00007, EPA NEEDS TO CONSISTENTLY IMPLEMENT THE INTENT OF THE EXECUTIVE ORDER ON ENVIRONMENTAL JUSTICE (2004), http://www.epa.gov/oig/reports/2004/20040301-2004-P-00007.pdf. *See* Colopy, *supra* note 7, at 158; *see generally* 42 U.S.C. §§ 2000d, 2000d-1.

[12] *See* Hawkins v. Town of Shaw, 437 F.2d 1286, 1291-92 (5th Cir. 1971); Bean v. Sw. Waste Mgmt. Corp., 482 F. Supp. 673, 677 (S.D. Tex. 1979).

[13] *See Hawkins*, 437 F.2d at 1288 (presenting evidence that "[n]early 98% of all homes that front on unpaved streets in Shaw [we]re occupied by blacks").

[14] *See* Sten-Erik Hoidal, Comment, *Returning to the Roots of Environmental Justice: Lessons from the Inequitable Distribution of Municipal Services*, 88 MINN. L. REV. 193, 205-06 (2003).

his claim.[15] But, due to a lack of evidence of intent and impact, environmental justice plaintiffs can rarely prove the necessary disparate effect either under Section 601 or Section 602. Specifically, equal justice plaintiffs today lack the same statistical data that was overwhelmingly successful in proving racial discrimination in the 1960s and 1970s.[16]

The environmental justice plaintiff also must reconcile environmental impacts with alternative solutions to the climate change problem. For example, a cap-and-trade system sets a limit (a cap) on greenhouse gas (GHG) emissions and allows polluting facilities to buy, sell, borrow or trade the credits.[17] Proponents of an emissions trading system contend that it reduces GHG emissions while raising funds from polluters to pay for the funding of research and development of clean energy.[18] However, environmental justice advocates claim an unconstrained market system will, at a minimum, fail to realize the full benefits of co-pollutant reduction and, at a maximum, worsen the current pattern of inequality.[19] In an emissions trading system, the industrial business owners and the market ultimately control where emissions reductions occur on a localized level.[20] Proponents argue "that the location of the emissions reduction is not important—reductions in GHG emissions benefit the planet no matter where they occur."[21] Nevertheless, release of co-pollutants often go along with the release of GHG emissions, so there could be varying health effects on residents living near facilities that choose to either reduce emissions or buy credits under a cap-and-trade system.[22]

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15 *See id.*

16 *See Hawkins*, 437 F.2d at 1288 (presenting evidence that "[n]early 98% of all homes that front on unpaved streets in Shaw [we]re occupied by blacks").

17 Center for Climate and Energy Solutions, *Climate Change 101: Cap and Trade*, PEW CENTER ON GLOBAL CLIMATE CHANGE 11 (Jan. 2011), http://www.c2es.org/docUploads/climate 101-captrade.pdf; American Clean Energy and Security Act of 2009, H.R. 2454, 111th Cong. § 721, 724-25 (2009).

18 Manuel Pastor et al., *Minding the Climate Gap*, UNIVERSITY OF SOUTH CAROLINA PROGRAM FOR ENVIRONMENTAL AND REGIONAL QUALITY 3 (last visited Dec. 5, 2013), http://dornsife.usc.edu/pere/documents/mindingthegap.pdf; *Glossary of Terms*, NEW YORK STATE ENERGY RESEARCH & DEVELOPMENT AUTHORITY (last updated Mar. 12, 2013), http://www.nyserda.ny.gov/BusinessAreas/Energy-and-the-Environment/EnvironmentalResearch/EMEP/Research/Glossary.aspx (defining co-pollutants as other gases or particles that may be present in the atmosphere, which is a heterogeneous mix).

19 Pastor et al., *supra* note 18, at 3.

20 *Id*.

21 *Id.*

22 *Id.*

Considering the impact of a national cap-and-trade system, this Comment argues that courts should determine that a national cap-and-trade system violates environmental justice principles when plaintiffs present concrete statistical evidence of disparate impact. Part I of this Comment gives an overview of the environmental justice movement, the primary cases influencing environmental justice court decisions, and presents the problem of proof among Title VI plaintiffs. Part I also offers evidence that a national cap-and-trade system is likely to occur in the United States by reviewing state and regional cap-and-trade systems currently in existence. Part I also examines the case of *The Association of Irritated Residents v. California Air Resources Board* and addresses the difference between the economic perspective and the environmental justice advocate's view on an emissions trading system. Part II discusses the approach courts should take in assessing the impact of GHG emissions on a minority population as a result of emissions trading. Part II then argues that courts should approach emissions trading environmental justice cases like municipal services cases based on concrete statistical evidence of disparate impact. Finally, Part II proposes a solution that would both reduce GHG emissions and preserve the rights of low-income and minority populations.

I. BACKGROUND

Until the environmental justice movement gained momentum in the 1970s, low-income and minority populations had to cope with the environmental and health hazards that disproportionately affected their neighborhoods more so than other areas. When environmental activists realized the effect the environment had on minority populations, they used some of the same tactics employed by civil rights activists, giving birth to the environmental justice movement.[23]

Section A of this Part gives a brief history of the environmental justice movement, outlines the evolution of environmental justice cases, and presents the problem of proof arising out of disparate impact cases. Section B explains how a cap-and-trade system operates and asserts that the United States is on the verge of implementing a national cap-and-trade system. Lastly, Section C introduces the case

[23] *See* R. Gregory Roberts, Comment, *Environmental Justice and Community Empowerment: Learning from the Civil Rights Movement*, 48 AM. U. L. REV. 229, 257 (1998).

of *Irritated Residents* and describes both the economic and environmental justice viewpoints regarding a cap-and-trade system.

A. *The Environmental Justice Movement*

In 1978, the Ward Transformers Company dumped over 32,000 cubic yards of polychlorinated biphenyl (PCB) next to a highway near fourteen North Carolina counties.[24] The state planned to build a landfill in the rural, poor and predominantly African American town of Afton located in Warren County.[25] State officials deposited the contaminated soil in Afton, despite the area being a scientifically inadequate place to build the landfill.[26] During this time, Warren County was one of the poorest counties in North Carolina and Afton had an eighty-four percent African American population.[27] Residents protested against the landfill in an effort to preserve the safety of their drinking water.[28] Although the Ward Company eventually dumped the contaminated soil at the proposed location, the protests in Warren County set precedent for low-income and minority populations to bring suit under environmental justice theories.[29]

The Warren County protests demonstrate that the environmental justice movement began as an interaction between the civil rights and environmental movements. During the 1970s, a racially aware America began to realize that people living in the country's most polluted environments are commonly poor people and people of color.[30] Congress enacted Title VI of the Civil Rights Act in recognition of the problem that race was a factor in the discriminatory impact of some federally funded programs.[31] Section 601 of Title VI states that "[n]o person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the bene-

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[24] ROBERT D. BULLARD, DUMPING IN DIXIE: RACE, CLASS AND ENVIRONMENTAL QUALITY 30 (2d ed. 1990).

[25] BULLARD, *supra* note 1, at 30.

[26] *Id.* at 30-31 (noting "[t]he water table of Afton, North Carolina, (site of the landfill) is only 5-10 feet below the surface").

[27] *Id*. at 30.

[28] *Id*. at 30-31.

[29] *Id*. at 32.

[30] Renee Skelton & Vernice Miller, *The Environmental Justice Movement*, NATIONAL RESOURCES DEFENSE COUNCIL 1 (last updated Oct. 12, 2006), http://www.nrdc.org/ej/history/hej.asp.

[31] *Title VI Legal Manual*, UNITED STATES DEPARTMENT OF JUSTICE CIVIL RIGHTS DIVISION 10 (Jan. 11, 2001), http://www.justice.gov/crt/about/cor/coord/vimanual.php.

fits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."[32] Section 602 of Title VI authorizes and directs federal agencies to enact "rules, regulations, or orders of general applicability" to achieve Section 601's objectives.[33] Regulations promulgated under Section 602 forbid recipients of federal funds from:

> utiliz[ing] criteria or methods of administration which have the effect of subjecting individuals to discrimination because of their race, color, or national origin, or have the effect of defeating or substantially impairing accomplishment of the objectives of the program as respects individuals of a particular race, color, or national origin.[34]

1. The Evolving Environmental Justice Case

In 1979, *Bean v. Southwestern Waste Management* was the first lawsuit to challenge the proposed location of a waste facility under civil rights law.[35] In *Bean*, African American homeowners in Houston, Texas fought to keep a solid waste landfill out of their neighborhood by claiming that Southwestern Waste Management's decision to locate in a minority community was motivated by racial discrimination.[36] In its decision, the court stated that "plaintiffs must show not just that the decision to grant the permit is objectionable or even wrong, but that it is attributable to an intent to discriminate on the basis of race."[37] However, the court did acknowledge that "[s]tatistical proof can rise to the level that it, alone, proves discriminatory intent," but the plaintiffs could not show a likelihood of success on the merits.[38] The court noted that it would have denied the waste facility permit "based upon the evidence adduced," but because it was a motion for preliminary injunction it did not have the power to do so.[39] Although the court in *Bean* ruled that the plaintiffs could not

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32 Civil Rights Act of 1964 § 601, 42 U.S.C. § 2000d (2006).

33 Civil Rights Act of 1964 § 602, 42 U.S.C. § 2000d-1 (2006).

34 28 C.F.R. § 42.104(b)(2) (2003).

35 *See* Bean v. Sw. Waste Mgmt. Corp., 482 F. Supp. 673 (S.D. Tex. 1979).

36 *Id*. at 675.

37 *Id*. at 677.

38 *Id.*; Winter v. Natural Res. Def. Council, Inc., 555 U.S. 7, 20 (2008) (stating that "[a] plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest.").

39 *See Bean*, 482 F. Supp. at 681.

prove Southwestern Waste Management based its location decision on purposeful discrimination, the case demonstrated that environmental justice litigation could be won with adequate statistical proof of discrimination.[40]

To prove disparate impact under the Title VI, "a plaintiff must first demonstrate by a preponderance of the evidence that a facially neutral practice has a disproportionate adverse effect on a group protected by Title VI."[41] The difficulty for environmental justice plaintiffs lies in the preponderance of the evidence element of proof. Often, plaintiffs can present proof of discrimination but are unable to prove *intentional* discrimination based on the same evidence.[42] Plaintiffs also have difficulty proving disparate impact because they do not have the resources to conduct new surveys, already existing data may be insufficient, and polluting facilities can point to statistically insignificant areas of the plaintiffs' data.[43]

The primary reason for the continued existence of environmental racism is the burden to prove either a facially discriminatory intent or an actionable discriminatory effect.[44] As a result of this difficulty in proof, environmental justice plaintiffs have encountered more defeat than success in their efforts for fair treatment. For example, in *South Camden Citizens v. New Jersey Department of Environmental Protection*, the court ruled that the congressional intent to create a private right of action under Section 1983 did not exist under Section 602.[45] In *South Camden*, neighborhood residents claimed that the location of a cement plant designed to emit particulate matter was racially discriminatory.[46] Notably, the neighborhood was sixty-three percent African American and twenty-eight percent Hispanic, with a median household income of $15,082.[47] The *South Camden* case leaves *private* environmental justice plaintiffs with the only remaining federal recourse—petition for Environmental Protection Agency (EPA)

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[40] *Id.* at 677.

[41] Elston v. Talladega Cnty. Bd. of Educ., 997 F.2d 1394, 1407 (11th Cir. 1993).

[42] *See Bean*, 482 F. Supp. at 677.

[43] Colopy, *supra* note 7, at 137-38.

[44] Michael T. Kirkpatrick & Margaret B. Kwoka, *Title VI Disparate Impact Claims Would not Harm National Security — A Response to Paul Taylor*, 46 HARV. J. ON LEGIS. 503, 533 (2009).

[45] S. Camden Citizens in Action v. N.J. Dep't of Envtl. Prot., 145 F. Supp. 2d 446 (D.N.J. 2001), *rev'd*, 274 F.3d 771 (3d Cir. 2001), *cert. denied*, 536 U.S. 939 (2002).

[46] *S. Camden Citizens*, 145 F. Supp. 2d at 450.

[47] *Id*. at 459.

administrative enforcement of anti-discrimination regulations promulgated under Title VI.[48]

Although no private right of action exists for environmental justice plaintiffs under Title VI, other avenues do exist for environmental justice plaintiffs to enforce their rights, such as common law property claims.[49] However, common law property claims often fail to provide the plaintiff with a remedy due to either the plaintiff's inability to meet standing requirements or the plaintiff's permanent property damage cannot be fixed.[50] Additionally, many environmental justice suits are settled out of court.[51] For example, in 1997, citizens living in Convent, Louisiana, the town surrounding the proposed location of an industrial plant, mobilized and protested the plant and filed multiple complaints under Title VI.[52] Before any of the cases were brought to trial, the corporation decided not to build its plant in Convent.[53] As in the case of the Convent residents, the polluting facility often discovers a new location and the environmental justice case is not brought to trial—a success for the environmental justice plaintiff, but a loss for establishing precedential case law.

2. Municipal Services and the Problem of Proof

Despite the lack of success for environmental justice plaintiffs, minority communities have seen success in challenging inequitable distribution of municipal services under similar theories. In municipal services cases, plaintiffs prove discriminatory intent by providing the court with statistical proof coupled with a historical showing of broad-based racial discrimination.[54] In *Hawkins v. Town of Shaw*, a group of African American citizens claimed the city provided municipal services in a racially discriminatory manner in violation of the Equal Pro-

48 *See also* Alexander v. Sandoval, 532 U.S. 275, 293 (2001) (ruling that no private right of action exists for environmental justice plaintiffs claiming disparate impact under Section 602 in federal court).

49 Hoidal, *supra* note 14, at 203.

50 *See id*. at 203-204.

51 *See* Robert E. Holden & Tad Bartlett, *Leaving Communities Behind: The Evolving World of Environmental Justice*, 51 LA. B.J. 94, 94-95 (2003).

52 *See id*. at 95.

53 *Id*.

54 *See* Ammons v. Dade City, 783 F.2d 982, 985-86 (11th Cir. 1986); *see also* Hawkins v. Town of Shaw, 437 F.2d 1286, 1288-92 (5th Cir. 1971), *aff'd per curiam*, 461 F.2d 1171, 1172 (5th Cir. 1972); *see also* Johnson v. City of Arcadia, 450 F. Supp. 1363, 1369-77 (M.D. Fla. 1978).

tection Clause.[55] The plaintiffs presented evidence of historical segregation as well as statistical evidence that black residents occupied approximately ninety-eight percent of the homes that faced unpaved streets and ninety-seven percent of the homes not served by sanitary sewers.[56]

Similarly, the plaintiffs in *Johnson v. City of Arcadia* claimed that the quality and quantity of street paving services and water supply systems differed from those provided to white citizens.[57] The plaintiffs in *Johnson* proved intent to discriminate under Section 601 of Title VI by providing the court with statistical proof that black residents of Arcadia were more than two times as likely as white residents to live on an unpaved street.[58] Further, "[t]he ratio of households fronting unpaved streets, black to white, was 6.0 to 1."[59] In light of the evidentiary presentations, in both *Hawkins* and *Johnson* the court ruled that the towns distributed their municipal services in a discriminatory manner and granted plaintiffs injunctive relief.[60]

Additionally, plaintiffs in *Ammons v. Dade City*, claimed unequal services regarding street paving and storm water drainage facilities in violation of their rights under Section 601 of Title VI.[61] Plaintiffs presented evidence that out of the total street footage resurfaced, "9.7[%] of the resurfacing was done in the black residential community as compared to 90.3[%] done in the white residential community."[62] The court in *Ammons* ruled that because of the "(1) size of the disparity, and (2) nature of the practices at issue in this case," disparate impact alone gives rise to "an inference of discriminatory intent."[63] The proof presented in *Ammons* is not unlike the proof required under Section 602 of Title VI.[64] The rulings in these municipal services cases show that plaintiffs can prove disparate impact and discriminatory intent through strong statistical, documentary, and testimonial evidence.

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55 *Hawkins*, 437 F.2d at 1288.

56 *Id*. at 1288-91.

57 *Johnson*, 450 F. Supp. at 1368.

58 *Id*. at 1370.

59 *Id*.

60 *See Hawkins*, 437 F.2d at 1292-93; *see also Johnson*, 450 F. Supp. at 1378-80.

61 Ammons v. Dade City, 783 F.2d 982, 983 n.2 (11th Cir. 1986).

62 *Ammons*, 783 F.2d at 985 n.8.

63 *Id*. at 988 (citing Ammons v. Dade City, 594 F. Supp. 1274, 1301 (M.D. Fla. 1984)).

64 *See id*.

B. *The World of Emissions Trading*

In today's society, courts ruling on Title VI issues, like those in *Ammons*, have to consider the impact of solutions to current environmental problems, such as climate change. One of the most prominent solutions is the emissions trading system. Cap-and-trade—also known as emissions trading—is a free market based approach to pollution reduction.[65] The "cap" is the limit on the total quantity of emissions from a set of regulated sources.[66] By creating a limit on the total emissions that can be released, an emissions trading system ensures that the regulated sources meet predetermined emissions goals.[67] The trade element of a cap-and-trade system generates an incentive for regulated sources to pursue cost-effective reductions, while also urging quick emissions reduction.[68] Regulated entities receive "allowances" with each allowance signifying the ability to emit one ton of GHG emissions.[69] Regulated sources must give up an allowance for each ton of GHG emissions the facility releases.[70] If a specific source does not want to use all of the allowances it has been given in a certain period, it can retain the allowances to be used at a later time or sell them to another registered source.[71] This ability to sell allowances to other regulated sources creates a market price for reduction of GHGs and an incentive for businesses to reach the maximum possible reductions at the lowest cost.[72]

1. The Imminence of a National Cap-and-Trade System

Many scholars believe a cap-and-trade system is forthcoming and the presence of such a system is only a matter of time and political agenda.[73] Proof of this belief can be found in a variety of forms and

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[65] Amicus Curiae Brief of Environmental Defense Fund in Support of Defednant and Respondent California Air Respources Board at 14, Ass'n of Irritated Residents v. Cal. Air Res. Bd., 143 Cal. Rptr. 3d 65 (Cal. Ct. App. 2012) (No. A132165), 2012 WL 698729, at *15.

[66] *Id*.

[67] *Id*.

[68] *Id*.

[69] *Id*.

[70] *Id*.

[71] Amicus Curiae Brief of Environmental Defense Fund in Support of Defendant and Respondent California Air Respources Board at 14, Ass'n of Irritated Residents v. Cal. Air Res. Bd., 143 Cal. Rptr. 3d 65 (Cal. Ct. App. 2012) (No. A132165), 2012 WL 698729, at *15.

[72] *Id*.

[73] SCOTT D. DEATHERAGE, CARBON TRADING LAW AND PRACTICE 64 (2011).

theories. First, the concept of a cap-and-trade system was developed in the United States with the implementation of the sulfur dioxide emissions trading system that developed under Title IV of the 1990 Clean Air Act Amendments.[74] This system allows affected sources to buy, sell, or trade allowances.[75] Second, environmental markets are an evolving aspect of modern economies, and the use of emissions markets to address air pollution is a preferred industry approach because of its cost effectiveness and flexibility.[76] Third, the United States has seen dramatic growth in the demand for consumer service companies to reduce GHG emissions.[77] The creation of voluntary carbon credit markets among these consumer service companies demonstrates that the public has become more aware of the effects of climate change and its causes.[78]

Finally, then President-Elect Barack Obama addressed domestic climate change in his message to the Global Climate Summit stating that the United States would "start with a federal cap-and-trade system" to reduce emissions when he took office.[79] Following up with this promise, President Obama put cap-and-trade in his first budget.[80] Subsequently, a cap-and-trade bill—the American Clean Energy and Security Act of 2009—passed the House, but stalled in the Senate.[81] In 2010, when Republicans won a majority in the House and gained seats in the Senate; the American Clean Energy Act consequently failed to pass through the Senate.[82] However, political experts noted that President Obama's use of executive authority and the EPA's interpretation of existing laws might lay the groundwork for renewed

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74 *Id.* at 20 (citing 42 U.S.C. §§ 7651-7651o).

75 *Overview - The Clean Air Act Amendments of 1990*, ENVIRONMENTAL PROTECTION AGENCY (last visited Aug. 15, 2013), http://epa.gov/air/ caa/caaa_overview.html.

76 DEATHERAGE, *supra* note 73, at 64.

77 *Id*.

78 *Id*. at 65.

79 Barack Obama, *A New Chapter on Climate Change* (Nov. 17, 2008), http://www.youtube .com/watch?gl*&hl= it&v=hvG2XptIEJk.*

80 Jackie Calmes, *Obama Planning to Slash Deficit, Despite Stimulus Spending*, N.Y. TIMES (Feb. 25, 2009), http://www.nytimes.com/2009/02/22/us/politics/22budget.html.

81 *See* American Clean Energy and Security Act of 2009, H.R. 2454, 111th Cong. § 111 (2009); John M. Broder, *'Cap and Trade' Loses Its Standing as Energy Policy of Choice*, N.Y. TIMES (Mar. 25, 2010), http://www.nytimes.com/2010/03/26/science/earth/26climate.html.

82 Carl Hurse & David Herszenhorn, *Democrats Call Off Climate Bill Effort*, N.Y. TIMES (July 22, 2010), http://www.nytimes.com/2010/07/23/us/politics/23cong.html?_r=0.

cap-and-trade efforts.[83] Furthermore, as recently as July 2013, President Obama's Climate Action Plan shows the administration's continued persistence in solving the climate change problem.[84]

2. Regional and State Systems

Another strong indicator that the United States will implement a national emissions trading system soon is the existence of several state and regional emissions markets. California has the most extensive state climate change program and Florida and New Mexico also have basic GHG emissions systems.[85] Created in 2005, the Regional Greenhouse Gas Initiative was the first of the multi-state systems to develop a GHG regulatory system which encompasses ten northeastern states.[86] The Regional Greenhouse Gas Initiative involves a cap-and-trade system where the states adopt a model rule, then each state implements and enforces the GHG regulatory program in their jurisdiction.[87] Because the Regional Greenhouse Gas Initiative was the first of the regional systems to be implemented, the monitoring of that system is well documented. In 2010, emissions remained twenty-seven percent below the Regional Greenhouse Gas Initiative cap making the initiative a successful program.[88]

The Western Climate Initiative, which began in 2007, is a multi-state and multi-national program that consists of western states comprising twenty percent of United States GDP, certain Canadian provinces and Mexican states.[89] The former Governor of California, Arnold Schwarzenegger, stated that the Western Climate Initiative "sets the stage for a regional cap and trade program, which will provide a powerful framework for developing a national cap and trade

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83 Zack Colman, *Obama, EPA actions make cap-and-trade more likely*, THE HILL (Sept. 5, 2012), http://thehill.com/blogs/e2-wire/e2-wire/247697-obama-epa-actions-make-cap-and-trade-more-likely.

84 *See* EXEC. OFFICE OF THE PRESIDENT, THE PRESIDENT'S CLIMATE ACTION PLAN (2013), http://www.whitehouse.gov/sites/default/files/image/president27sclimateactionplan.pdf.

85 DEATHERAGE, *supra* note 73, at 74, 84.

86 *Id*. at 85.

87 *Id*.

88 *RGGI Emissions Trends*, ENVIRONMENT NORTHEAST, 1 (May 2011), http://www.envne.org/public/resources/pdf/ENE_RGGI_Emissions_Report_110502_FINAL.pdf.

89 *Clean Energy: Creating Jobs, Protecting the Environment*, WESTERN CLIMATE INITIATIVE 3 (May 24, 2010), http://www.westernclimateinitiative.org/document-archives/general/WCI-Brochure-(May-2010)/.

program."[90] The most recent regional program is the Midwestern Greenhouse Gas Reduction Accord, which would establish a multi-sector cap-and-trade program in several Midwestern states.[91] The Midwestern Greenhouse Gas Reduction Accord is structured much like the Western Climate Initiative and the Regional Greenhouse Gas Initiative in its regulations of GHG emissions. Notably, the Regional Greenhouse Gas Initiative, the Western Climate Initiative, and the Midwestern Greenhouse Gas Reduction Accord initiated a cooperative activities doctrine to develop some degree of consistency across the programs.[92] This doctrine reflects the structure of what a national cap-and-trade system would look like because so many U.S. states are already involved.

C. *A New Era Combination: Emissions Trading and Environmental Justice*

What happens when a polluting facility locates in an area surrounded by low-income and minority neighborhoods and buys allowances under a cap-and-trade system to pollute above the limit under that system? The case of *Associated Residents* presents the answer to this question and the consequences of an emissions trading system when such a situation occurs.

1. *The Association of Irritated Residents v. California Air Resources Board*

California is often the leader among the states in developing environmental solutions and initiatives that become federal law.[93] Following this tradition, in May 2011, the Association of Irritated Residents (AIR) brought suit under Title VI against the California Air Resources Board (CARB) claiming the Global Warming Solutions Act (AB 32) would result in a substantial adverse effect on minority populations throughout California because the facilities regulated

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[90] Press Release, Western Climate Initiative, Five Western Governors Announce Regional Greenhouse Gas Reduction Agreement (Feb. 26, 2007), http://www.westernclimateinitiative.org/component/ remository/general/WCI-National-Press-Release/.

[91] DEATHERAGE, *supra* note 73, at 95-96.

[92] *Id*. at 96.

[93] Daniel Stone, *California Tackles Climate Change, But Will Others Follow?*, NAT'L GEOGRAPHIC (Nov. 16, 2012), http://news.nationalgeographic.com/news/energy/2012/11/121116-california-cap-and-trade/.

under cap-and-trade are primarily located in communities of color.[94] The cap-and-trade program is the centerpiece of AB 32, which mandates a reduction in GHG emissions to 1990 levels by 2020.[95]

The plaintiffs in *Irritated Residents* presented statistical evidence that low-income and minority populations are more likely to live within six miles of a cap-and-trade facility regulated under AB 32.[96] The plaintiffs claimed that these minority populations would not see the benefits of reduction and could very possibly see an increase in health and environmental effects.[97] AIR also noted that AB 32 actually acknowledges that regions of the state are more affected by climate change, but the bill does not address the issue further.[98] The court ruled that CARB failed to conduct an adequate analysis of alternatives to cap-and-trade, such as a carbon tax which is a tax on each ton of carbon dioxide emitted.[99] In August 2011, CARB supplemented the court's inadequate alternative ruling by approving a revised analysis of alternatives to the cap-and-trade program.[100] The plaintiffs subsequently filed a civil rights complaint with the EPA, which is currently pending.[101] Importantly, the case of *Irritated Residents* proves that (1) environmental justice plaintiffs can now present concrete evidence of disparate impact unlike previous environmental justice plaintiffs; and (2) the implementation of a cap-and-trade system would trigger environmental justice litigation.

2. The Economic Argument

The creators of emissions trading system, such as the CARB board, are often economists. For economists, the most appealing

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94 Complaint at 2, Coal. for a Safe Env't v. California Air Res. Bd., Unassigned Number (Envtl. Prot. Agency June 8, 2012), http://www.acoel.org/file.axd?file=2012%2F6%2FCSE.pdf.

95 *Facts About Assembly Bill 32*, CALIFORNIA ENVIRONMENTAL PROTECTION AGENCY (Dec. 7, 2009), http://www.arb.ca.gov/cc/factsheets/ab32factsheet.pdf.

96 Complaint at 2, *Coal. for a Safe Env't*, http://www.acoel.org/file.axd?file=2012%2F6%2FCSE.pdf.

97 *Id*.

98 *Id*.

99 Ass'n of Irritated Residents v. California Air Res. Bd., 206 Cal. App. 4th 1487, 1493-94, 1505 (2012); *see generally* Mac Taylor, *Evaluating the Policy Trade-Offs in ARB's Cap-and-Trade Program*, LEGISLATIVE ANALYST'S OFFICE 5 (Feb. 9, 2012), http://www.lao.ca.gov/reports/2012/rsrc/cap-and-trade/cap-and-trade-020912.pdf (discussing CARB's emission plan).

100 *Ass'n of Irritated Residents*, 206 Cal. App. 4th at 1494.

101 Complaint at 4, Coal. for a Safe Env't v. California Air Res. Bd., Unassigned Number (Envtl. Prot. Agency June 8, 2012), http://www.acoel.org/file.axd?file=2012%2F6%2FCSE.pdf.

aspect of cap-and-trade is the achievement of industrial efficiency.[102] The flexible compliance element of cap-and-trade reduces the costs of achieving a set emissions target in comparison to a carbon tax alternative or other established regulatory mechanisms."[103] The notion behind cap-and-trade is to allow market forces to produce the cheapest emissions reductions instead of having agency regulators decide which reductions will occur. Proponents often assert that cap-and-trade encourages technological innovation and early reductions.[104] Advocates also contend that a cap-and-trade system provides environmental certainty that a specific emission level is achieved and provides compliance flexibility and lower transaction costs.[105]

Defendants in environmental justice suits hold that market forces, not discrimination, drive the disparities.[106] These market forces—namely low property values, low employment rates, and employment in industrial occupations—encompass characteristics common to minority communities.[107] Thus, discriminatory forces often shape these market forces, which is the problem environmental justice litigation seeks to redress.[108]

3. The Environmental Justice Advocate's Concerns

Environmental justice analysis does not view efficiency as a goal. Instead, environmental justice places a high premium on relieving low-income and minority communities of environmental burdens regardless of the resulting higher costs to certain market participants or to society as a whole.[109] Environmental justice advocates point out that the climate change problem is often viewed at the macro level rather than focusing on the impact on minority populations at a local

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102 Lily N. Chinn, Comment, *Can the Market Be Fair and Efficient? An Environmental Justice Critique of Emissions Trading*, 26 ECOLOGY L.Q. 80, 83 (1999).

103 Brief for Environmental Defense Fund as Amici Curiae Supporting Respondents, Ass'n of Irritated Residents v. Cal. Air Res. Bd., 206 Cal. App. 4th 1487 (2012) (No. A132165), 2012 WL 698729, at *16.

104 Pastor et al., *supra* note 18, at 3.

105 Brief for Environmental Defense Fund as Amici Curiae Supporting Respondents, *Ass'n of Irritated Residents*, at *16.

106 Lorna Jaynes, Comment, *Emissions Trading: Pollution Panacea or Environmental Injustice*, 39 SANTA CLARA L. REV. 207, 214 (1998).

107 *Id.* at 215.

108 *Id*.

109 Chinn, *supra* note 102, at 84.

level.[110] In the case of *Irritated Residents*, environmental justice advocates were concerned that AB 32 did not take into consideration the co-pollutant effects of the carbon trading system and did not consider a carbon tax alternative.[111] The carbon tax alternative "amounts to a tax on each ton of carbon dioxide emitted, thereby placing a new cost on emitting GHGs."[112] Unlike a cap-and-trade system, a carbon tax does not directly limit the number of emissions that an individual source can release.[113] Rather, the government establishes the tax rate on emissions, so the resulting amount of GHG emissions does not exceed the emissions goals.[114] The concerns over co-pollutant effects and lack of consideration of feasible alternatives are often the same concerns that environmental justice plaintiffs struggle with in their efforts to prevent disparate impact. Likewise, environmental justice plaintiffs contend that, in general, an emissions trading system does not significantly reduce GHG emissions.[115] They also argue that there is no regulatory oversight so enforcement of such a market system is not feasible, comparable to the subprime mortgage crisis.[116]

II. ANALYSIS

Environmental justice litigation under a cap-and-trade system would result in inequality in benefits and substantial burdens because of the location of waste facilities and polluting factories in low-income and minority communities. Section A of this Part will discuss how Title VI Sections 601 and 602 apply to the implementation of a national emissions trading system in environmental justice cases. Section B will present some of the most prominent obstacles faced by environmental justice plaintiffs. Finally, Section C will examine solutions to the problem presented by a national emissions trading system and present the best alternative solution to the climate change problem.

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110 Pastor et al., *supra* note 18, at 3.

111 Ass'n of Irritated Residents v. Cal. Air Res. Bd., 206 Cal. App. 4th 1487, 1493 (2012).

112 Taylor, *supra* note 99.

113 *Id*.

114 *Id*.

115 Pastor et al., *supra* note 18, at 3.

116 *Id*.

A. *Equal Protection, Not Equal Pollution: The Legal Impacts of Cap-and-Trade*

Based on past Title VI municipal services cases and previous environmental justice litigation, courts should rule that a national cap-and-trade system violates environmental justice principles when plaintiffs present concrete statistical evidence of disparate impact. Congress can address this concern before it reaches the judicial system by establishing safeguards to prevent disparate impact among low-income and minority populations.

The goal of cap-and-trade is to reduce GHG emissions at the lowest cost.[117] Initially upon implementing an emissions trading system, polluters will likely buy more allowances to either create green technology or invent other methods to remain under the cap allowed by the system.[118] But, after just one cycle of trade allowances, groundwater will already be polluted because GHG emissions will create adverse health effects by emitting co-pollutants not regulated under the system. "Assuming the degree of toxicity is positively related to the cost of pollution [reduction] . . . stationary sources with high[er] marginal costs will buy credits from sources with low marginal costs, [and] emissions will be effectively relocated to minority communities" surrounding those sources.[119] Therefore, the most likely result in a Title VI disparate impact case in an emissions trading system is a ruling based on evidence of concrete statistical data showing inequality in benefits and substantial burdens.

The municipal services cases, *Hawkins*, *Ammons*, and *Johnson*, provide a framework with which to analyze the amount and type of proof necessary in Title VI environmental justice cases. To prove that market choice will inevitably lead to disparate impacts on minority or low-income communities, one must demonstrate that the cost of pollution correlates with income or race of the community surrounding the stationary source.[120] An environmental justice case under a cap-and-trade system can be distinguished from failed environmental jus-

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117 A. Denny Ellerman et al., *Emissions Trading in the U.S.: Experience, Lessons, and Considerations for Greenhouse Gases*, PEW CENTER ON CLIMATE CHANGE, iii (May 2003), http://www.c2es.org/docUploads/emissions_trading.pdf.

118 *See* Chinn, *supra* note 102, at 114.

119 *Id*. at 113-14.

120 *Id.* at 114.

tice cases because plaintiffs can satisfy the evidentiary burden required under Section 602.

In *Hawkins*, the plaintiffs presented statistical evidence that black residents occupied almost one hundred percent of the homes that faced unpaved streets and homes not served by sanitary sewers.[121] The plaintiffs also pointed to the historical segregation contributing to municipal discrimination.[122] Although the plaintiffs in *Hawkins* brought their case under the Equal Protection Clause, proof under Section 602 of Title VI involves parallel requirements of unequal distribution or impact.[123] Under an emissions trading system, a low-income, minority community would be affected in a similar manner as the plaintiffs in *Hawkins* because of concentrated high levels of pollution and a potential lack of benefits in addition to other burdens. Under Section 602, plaintiffs could show the specific increase in tons of GHG emissions that a polluting facility bought or traded as compared to communities in other areas. That evidence would show that the plaintiffs' community is disparately impacted by emissions trading.

Under Section 602 of Title VI, a plaintiff must show an actionable discriminatory impact.[124] The court in *Ammons* focused on the size of the disparity as well as the nature of the practices at issue to infer intent from disparate impact.[125] As demonstrated in *Ammons*, the size of the disparity under Section 602 provides the best avenue to bring a complaint for an environmental justice plaintiff.[126] Although not all plaintiffs may be able to demonstrate a disparity as drastic as that in *Ammons*, an emission trading system would provide similar disparities. Because polluting facilities are more likely to be located in low-income and minority communities, environmental justice plaintiffs would be able to compare both the lack of benefits and the increased burden in their community to that of a similarly situated white, affluent neighborhood.[127] Additionally, plaintiffs would have the statistically significant level of data necessary to win their case,

121 Hawkins v. Town of Shaw, 437 F.2d 1286, 1288-91 (5th Cir. 1971).

122 *Id.*

123 *Id*. at 1288.

124 Ammons v. Dade City, 783 F.2d 982, 984 (11th Cir. 1986).

125 *Id*. at 985.

126 *Id*.

127 Pastor et al., *supra* note 18, at 3.

meaning plaintiffs would fall into the category of cases described in *Bean* that prove disparate impact based on statistical data.[128]

As shown in the previous cases, environmental justice plaintiffs do not *need* to prove discriminatory intent. Under Title VI, a plaintiff can prove disparate impact under Section 602 as an alternative to the burden of showing intentional discrimination under Section 601.[129] Under Section 601 of Title VI, a plaintiff must prove facially discriminatory intent.[130] The plaintiffs in *Johnson* demonstrated intent to discriminate under Section 601 by providing the court with statistical proof that black residents were more likely to face unpaved streets coupled with historical showing of broad-based racial discrimination.[131] As a result, if environmental justice plaintiffs could satisfy the higher burden of proving intentional discrimination under Section 601, proof of disparate impact under Section 602 should be inferred. By showing a pattern of racially discriminatory location decisions throughout an area, a plaintiff could show disparate impact through discriminatory intent comparable to the proof provided in *Johnson*. Although discriminatory intent would be harder to prove than discriminatory impact, an emissions trading system could incentivize a pattern of discriminatory location decisions in order to reduce costs.

In comparison to environmental justice plaintiffs, the plaintiffs in municipal services cases were successful because they "drew inferences of intent to discriminate from statistical disparities, residential segregation patterns, and historical evidence of discrimination."[132] Notably, many early municipal services cases were brought under the Equal Protection Clause—a protective doctrine that requires proof of intent to discriminate.[133] Comparably, failed environmental justice cases were brought under Sections 601 and 602 of Title VI, a statute that requires disparate impact or discriminatory intent.[134] Environmental justice cases failed in comparison to municipal services cases because (1) environmental and health effects are harder to prove, (2)

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128 *See* Bean v. Sw. Waste Mgmt. Corp., 482 F. Supp. 673, 677 (S.D. Tex. 1979).

129 *See* Civil Rights Act of 1964 § 602, 42 U.S.C. § 2000d-1 (2006); Johnson v. City of Arcadia, 450 F. Supp. 1363, 1378-79 (M.D. Fla. 1978).

130 *Johnson*, 450 F. Supp. at 1378-79.

131 *Id*. at 1370.

132 Hoidal, *supra* note 14, at 210.

133 *See, e.g.*, Hawkins v. Town of Shaw, 437 F.2d 1286, 1288 (5th Cir. 1971).

134 *See* Civil Rights Act of 1964 §§ 601, 602, 42 U.S.C. §§ 2000d, 2000d-1 (2006).

pollutants are expensive and difficult to measure, and (3) fewer identifiable minority groups exist.[135]

Unlike the municipal services cases, many environmental justice plaintiffs seek an injunction against a polluting facility to prevent the facility from locating in a minority neighborhood.[136] As demonstrated in *Bean*, early environmental justice plaintiffs, although able to present a stronger case than plaintiffs today, still found it difficult to provide the necessary data to prove all elements of a preliminary injunction standard. The court in *Bean* stated that it would have denied the waste facility permit, but the court could not rule on that issue.[137] Therefore, the court in *Bean*, established that an environmental justice case could be won with adequate statistical proof of disparate impact.[138]

Under an emissions trading system, environmental justice plaintiffs will be able to present similar evidence as presented in *South Camden* based on the disparity in income and race in the neighborhoods directly affected by increases in GHG emissions. The plaintiffs in *South Camden* presented statistical data that the court did not rule on because the plaintiffs' standing in the case was foremost the issue.[139] Because the court did not determine whether or not the data proved disparate impact, *South Camden* cannot be used as a conclusive authority for emission trading cases.[140] However, *South Camden* is one of the most recent environmental justice cases, so the evidence presented is likely similar to that of an environmental justice plaintiff today.

The case of *Irritated Residents* presents the type of situation that would arise under a cap- and-trade system. The plaintiffs in *Irritated Residents* presented statistical data that low-income and minority populations are more likely to live within six miles of a cap-and-trade facility regulated under AB 32.[141] However, this evidence was not enough to satisfy the court and likely would not rise to the level of

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135 *See* Richard J. Lazarus, *Pursuing "Environmental Justice": The Distributional Effects of Environmental Protection*, 87 Nw. U. L. REV. 787, 790-91 (1993).

136 *See, e.g*., Bean v. Sw. Waste Mgmt. Corp., 482 F. Supp. 673, 674 (S.D. Tex. 1979).

137 *Id*. at 681.

138 *Id*. at 677.

139 *See* S. Camden Citizens in Action v. N.J. Dep't of Envtl. Prot., 145 F. Supp. 2d 446, 493 (D.N.J. 2001).

140 *Id*.

141 Complaint at 2, *Coal. for a Safe Env't*, http://www.acoel.org/file.axd?file=2012%2F6%2FCSE.pdf.

proof presented in the municipal services cases. As a result, *Irritated Residents* gives future plaintiffs an idea of what sort of evidence a court will find persuasive and determinative.

To succeed on the pending EPA claim, the plaintiffs in *Irritated Residents* need to show that the low-income and minority populations living near polluting facilities, especially facilities that pollute in large amounts, will be disproportionately affected because of the definite amount of GHGs a factory will emit. The plaintiffs also need to show that the communities they represent each have a substantial amount of minority and low-income residents to fall within the protected groups under Title VI. Further, the environmental justice groups need to present evidence of the specific disparities in each area rather than simply arguing that *in general* cap-and-trade would disparately affect minority groups. What is more, they should anticipate that the polluting facility will have research attempting to prove the unreliability and statistical insignificance of the environmental justice plaintiffs' evidence.[142] Ultimately, a cap-and-trade system without safeguards would fail to realize the full benefits of co-pollutant reduction and, at a maximum, worsen the current pattern of inequality.[143] Therefore, the plaintiffs in *Irritated Residents* and cases like it must prove this pattern of inequality by presenting evidence comparable to that offered in municipal services cases.

B. *Obstacles on the Path to "Justice"*

One of the biggest obstacles for environmental justice plaintiffs is the defendant's justification for disparately impacting low-income and minority populations in the surrounding area. Title VI only prohibits federally funded programs that produce unjustified disparate impacts.[144] Therefore, regulated entities under cap-and-trade argue that location decisions are based on business necessity rather than race or income.[145] If a defendant proves that a location decision qualified as a business necessity, the burden rests on the plaintiff to prove a definite and measurable impact because Title VI seeks to protect dis-

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142 *Id*.

143 Pastor et al., *supra* note 18, at 3.

144 Julia B. Latham Worsham, *Disparate Impact Lawsuits Under Title VI, Section 602: Can a Legal Tool Build Environmental Justice?*, 27 B.C. ENVTL. AFF. L. REV. 631, 685 (2000).

145 *Id.* at 686-87 (citing Colopy, *supra* note 7, at 161-62).

crimination based only on race or income.[146] Plaintiffs can then prove that the location decision constitutes a pretext for discriminatory intent or that the defendant could use other selection procedures.[147] The standard of discriminatory intent would be difficult to prove under a cap-and-trade system unless plaintiffs demonstrated the polluting facility based their location decision on race rather than property values. However, plaintiffs can prove unjustifiable disparate impact under Section 602 rather than discriminatory intent under Section 601 alleviating this difficulty.

Courts decide Title VI cases on an individual basis. Consequently, often plaintiffs use the kitchen sink approach of alleging disparity by presenting all available facts and circumstances rather than a narrow set of determinative facts.[148] This approach is common because the evidence necessary to prove disparate impact in each case is different.[149] However, this creates a problem for future plaintiffs because courts do not distinguish between evidence necessary to prove disparate impact and evidence that is simply influential in that decision. It would be prohibitively expensive if courts forced specific types of evidence on plaintiffs.[150] Without the assistance of environmental organizations, the low-income populations affected by polluting facilities do not individually have the resources to file suit against the facility.[151] Under an emissions trading system, plaintiffs could prove a targeted selection of facts—the amount of GHG emissions. For this reason, courts will have to decide what constitutes a disparate impact under cap-and-trade; for example, what number of GHG emissions amounts to a disparate impact on the low-income and minority populations surrounding the area.

Another major obstacle that environmental justice plaintiffs today must reconcile is the diminishing ability to identify minority groups.[152] In a case based on disparate impact under a cap-and-trade system, a regulated entity could assert that even if its actions disparately impact the residents in the surrounding community, the

146 *Id*. at 687 (citing Colopy, *supra* note 7, at 161-62).

147 *Id*.

148 *See id*. at 692.

149 *See id.* at 692-93.

150 *See* Radoslaw Stech et al., *Cost Barriers to Environmental Justice*, THE ENVIRONMENTAL LAW FOUNDATION 15-18 (2009), http://www.endsreport.com/docs/20100126.pdf.

151 *See* Radoslaw, *supra* note 150, at 13.

152 *See* Hoidal, *supra* note 14.

impacted community includes a mixture of incomes and races such that it does not fall under Title VI definition of "low-income and minority population."[153] Plaintiffs can overcome this burden by including other persuasive evidence and precisely defining the groups covered under the lawsuit. Additionally, a facility would argue that it can only correct its impact by reducing its emissions to a level that would not cause large scale impact over time, placing an unfair burden on industrial defendants. However, Congress could address this issue by preemptively formulating safeguards such as a surcharge on emissions with revenue contributing to a community fund.

C. *Solution: Making the Market Fair and Efficient*

To create a system that takes low-income and minority populations into consideration, while also being cost effective for industrial polluters, Congress should create a bipartisan plan that both political parties consider adequate. Emissions trading is the most environmentally and economically sensible approach to controlling GHG emissions. The cap-and-trade system successfully controlled acid rain and sulfur dioxide and can now substantially reduce the United States' GHG emissions. However, to address environmental justice concerns, additional safeguards must be put in place.

A cap-and-trade system offers many benefits to the achievement of environmental justice goals. Although a cap-and-trade system cannot guarantee air quality improvement in every community, neither can other alternative approaches to reducing GHG emissions.[154] For example, a carbon tax creates the same environmental justice concerns as a cap-and-trade system—large pollution emitters could simply pay more for emitting more pollutants resulting in higher emissions in those areas. But, political opposition to a carbon tax is much stronger than with cap-and-trade due to the appeal of the free market approach of cap-and-trade.[155]

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153 *See* Civil Rights Act of 1964 §§ 601-602, 42 U.S.C. §§ 2000d-2000d-1 (2006).

154 Todd Schatzki & Robert N. Stavins, *Addressing Environmental Justice Concerns in the Design of California's Climate Policy*, ANALYSIS GROUP page i (2009), http://www.analysisgroup.com/uploadedFiles/Publishing/Articles/Environmental_Justice.pdf.

155 *See* Seth Borenstein, *Global Warming Talk Heats Up as Carbon Tax Revisited*, USA TODAY (Nov. 14, 2012), http://www.usatoday.com/story/weather/2012/11/14/global-warming-climate-change-carbon-tax/1704787/ (stating that a carbon tax "was considered so radical that in 2009, when President Barack Obama tried to pass a bill on global warming, that he instead opted

Cap-and-trade is the best alternative to the climate change problem, not only because it is the most effective mechanism to combat climate change, but also because it is a more bipartisan alternative. Conservative members of Congress are more likely to pass climate change legislation that is based on a free market approach rather than legislation that places a pure tax on carbon emissions.[156] Moreover, safeguards are more easily built into a cap-and-trade system as it is a market-based approach rather than a regulatory scheme. Ultimately, cap-and-trade could lead to an increase in local co-pollutant emission, even if there is a net reduction statewide. Thus, a cap-and-trade law needs to recognize the hazards of co-pollutants.[157]

A national emissions trading system needs to provide incentives to lower emissions or give incentives to locate a facility in an area that does not disparately impact low-income and minority populations. To accomplish this goal, the cap-and-trade system must build in safeguards to protect low-income and minority communities by allowing surcharges on allowances or fees in highly impacted areas, while returning funds for improvements in those same areas.[158] Under this theory, the facilities that are not the worst offenders but are still responsible for the highest impacts because of their location would be forced to contribute as well.[159] Increasing the price of GHG emissions above what it would be in the absence of the surcharge would provide an incentive for greater emissions reductions in these locations.[160] The

for the more moderate approach of capping power plant emissions and trading credits that allowed utilities to pollute more").

156 *See* Evan Lehmann & Saqib Rahim, *Sen. Snowe is Working Quietly to Find 'Consensus' on Capping Utility Emissions*, N.Y. TIMES (June 30, 2010), http://www.nytimes.com/cwire/2010/06/30/30climatewire-sen-snowe-is-working-quietly-to-find-consens-81179.html?pagewanted=all (stating that Republican Senator Snowe "believes the focused cap-and-trade program would protect businesses and electricity customers from stricter greenhouse gas limits"); *see also* Hal Bernton, *In Oregon, McCain touts his cap-and-trade system to fight global warming*, SEATTLE TIMES (May 13, 2008), http://seattletimes.com/html/politics/2004409844_mccain13m.html (stating that "Sen. John McCain . . . said he would combat global warming with a cap-and-trade system to cut carbon emissions and increase use of nuclear power and alternative energy").

157 *See* Pastor et al., *supra* note 18, at 22-23.

158 *Id*. at 24.

159 *Id*.

160 Memorandum from James K. Boyce to the Economic and Allocation Advisory Committee, California Air Resources Board (October 5, 2009), http://www.climatechange.ca.gov/eaac/documents/member_materials/Boyce_memo_on_investment_in_disadvantaged_communities.pdf.

revenue from the surcharge would then be allocated to a community benefit fund in the same locations.[161]

Additionally, a national emissions trading system must directly target co-pollutants by identifying those facilities that either emit co-pollutants at an accelerated rate or substantially contribute to the pattern of environmental inequality in the area.[162] These regulated sources, which should be few in number, would not receive as many allowance allotments, would be restricted in purchases of allowances from other regulated sources, and would be limited in use of offsets needed to locally reduce GHG emissions in order to meet their contribution to meeting the statewide carbon cap.[163] Although this system could constrain the market for GHG emissions, it would be a minor burden on the entire system and would be aimed at only a handful of businesses.[164]

Perhaps most importantly, when creating an emissions trading system, Congress must incorporate the public's interest by holding public forums and informational sessions.[165] In these forums, low-income and minority communities could express their concerns and creators of the system could explain the benefits of such a system, specifically describing how to take advantage of a community benefits fund. This fund should be based on a communities' share of fees collected from polluting facilities and should target emissions improvements in neighborhoods that are overburdened, regardless of whether they are in the same location as the sources.[166] Such neighborhoods could be identified through examining factors such as the proximity to hazards, exposure to various sorts of air pollution, and community-based social vulnerability.[167] Ultimately, the efficiency, fairness, and environmental objectives of a national emissions trading system can be achieved by simply adding safeguards to protect low-income and minority populations within the market.

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161 *Id*.

162 Pastor et al., *supra* note 18, at 23.

163 *Id*.

164 *Id*.

165 *See* Schatzki & Stavins, *supra* note 154, at 5.

166 Pastor et al., *supra* note 18, at 24.

167 *Id*.

CONCLUSION

Courts should treat the evidentiary burden in environmental justice emissions trading cases like the evidentiary burden in Title VI municipal services cases. In concluding that both types of cases carry similar burdens of proof, courts should decide that an environmental justice plaintiff bringing a case under the premise of a national emissions trading system could be successful if the plaintiff presents statistical proof that the emissions trading system disparately impacts low-income and minority neighborhoods. Environmental justice plaintiffs are able to present such evidence under a national cap-and-trade program by correlating the amount of GHG emissions and co-pollutant emissions to the impacts seen specifically in low-income and minority communities.

As a solution to this dilemma, Congress should adopt an emissions trading system that reduces GHG emissions, but does not disparately impact minority communities. A national cap-and-trade program needs to safeguard those populations disproportionately affected by implementing a plan that will benefit the nation in reducing GHG emissions, but will not leave any one population behind.