

Shifting the burden of permit approval in the United States: the case for improved state action

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Overburdened communities are those where environmental burdens (EB) and socioeconomic disparities (SD) act cumulatively to create harmful living conditions. The 2021 Executive Order (EO) 14008¹ and the Justice40 Initiative² bring to the forefront the plight of these communities and the need to ameliorate their conditions. A simple way (assuming only stationary sources) to demonstrate this is to express the burden of these hazardous sources, EB_k , within a defined area k , usually a census block, as their sum:

$$EB_k = S_1 + S_2 + S_3 + \dots + S_i + \dots + S_n + S_{n+1}$$

Even if each individual source S_i is under the regulatory threshold, the sum of all sources has the potential to pose a threat to vulnerable communities. In addition, environmental justice (EJ) concerns are raised since the k^{th} community is likely to be burdened by a disproportional number of sources. The regulatory challenge emerges when a new facility, $n+1$, applies for a permit. Though no federal guidelines currently exist, the U.S. Environmental Protection Agency (EPA) is working to develop guidance regarding cumulative impact analyses.³

The time has come for state action.

Although EPA provides baseline standards of minimal environmental regulation nationwide, the agency also delegates authority to states in many ways. For example, under the Clean Air Act, every

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¹ Exec. Order No. 14008, 86 Fed. Reg. 7619 (2021).

² *Justice40: A whole-of-government initiative*, The White House (2021), <https://www.whitehouse.gov/environmentaljustice/justice40/> (last visited Sept. 13, 2022).

³ See *Cumulative Impacts: Recommendations for ORD Research*, Envir. Protection Agency Office of Research and Development, (Jan. 2022) https://www.epa.gov/system/files/documents/2022-01/ord-cumulative-impacts-white-paper_externalreviewdraft-508-tagged_0.pdf (last visited Sept. 16, 2022).

state has been directed to develop a State Implementation Plan to attain and maintain National Ambient Air Quality Standards (NAAQS).^{4,5} Plans allow states to develop New Source Review (NSR) requirements and procedures unique to state needs—provided they meet or exceed the requirements of EPA.^{6,7} Consequently, states are accustomed to tailoring policies in ways that can address and rise above EPA standards to best meet their own goals.

Moreover, recent Supreme Court decisions have stripped EPA of some of its regulatory authority, again signaling that states may be in the best position to respond and take more immediate action. In June 2022, the Supreme Court struck down the EPA's Clean Power Plan rule in its decision of *West Virginia v. EPA*. First promulgated in 2015, the rule attempted to reduce carbon pollution from power plants.⁸ The Court's decision that EPA did not have authority under the Clean Air Act to regulate emissions using the approach provided for in rule⁹ narrows the scope of EPA's work and limits agency deference in rulemaking.

Finally, because most permits are granted by state and local governments, enforcement is also in the hands of state and local actors.¹⁰ Enforcement is key in ensuring compliance with environmental restrictions. While states vary in approach—deterrence-based, compliance-incentive, or assistance-

⁴ State implementation plans for National Primary and Secondary Ambient Air Quality Standards, 42 U.S.C. § 7410.

⁵ *Tools for State Implementation Plan (SIP) Status*, Envir. Protection Agency, <https://www.epa.gov/air-quality-implementation-plans/tools-state-implementation-plan-sip-status> (last visited Sept. 13, 2022).

⁶ See State implementation plans, above n.4.

⁷ *New Source Review (NSR) Permitting*, Envir. Protection Agency, <https://www.epa.gov/nsr/learn-about-new-source-review> (last visited Sept. 13, 2022).

⁸ *Archive of Clean Power Plan*, Envir. Protection Agency, <https://archive.epa.gov/epa/sites/production/files/2015-08/documents/fs-cpp-overview.pdf> (last visited Sept. 13, 2022).

⁹ *West Virginia et al. v. Environmental Protection Agency et al.*, No. 20-1530 (U.S. Jun. 30, 2022).

¹⁰ Standards of performance for new stationary sources, 42 U.S.C. § 7411.

based¹¹—even federal policymakers acknowledge that successful environmental objectives rely on state and local cooperation.^{12,13}

The opportunity exists to reevaluate and strengthen state-level approaches to permitting based on EJ. We recommend that states take three immediate steps.

1. *Adopt a revised definition of EJ that includes the environment*

When President Biden signed EO 14008, he established that EJ needs to be secured for “disadvantaged communities that have been historically marginalized and overburdened by *pollution*. . .”¹⁴ Yet, a 2022 study found that 30 states failed to adopt any formal definition of EJ as recorded in open government data.¹⁵ Among those with a definition, many provided no quantifiable measures to determine a community’s EJ status and even when included, measures often focused on minority composition and household income only, not environmental impacts.¹⁶ For a solid foundation, each state must adopt a definition of EJ that includes some measure of the environment.

2. *Create new permit requirements that build upon the definition of EJ*

In the absence of federal guidance, several states require cumulative impact assessments, but approaches lack consistency and, at times, follow through. For example, Minnesota law requires analysis and consideration of “cumulative levels and effects of past and current pollution” for permits in some communities.¹⁷ Yet, there is no mention of authority to deny a permit or require additional reductions

¹¹ David L. Markell, The Role of Deterrence-based Enforcement in a “Reinvented” State/Federal Relationship: The Divide between Theory and Reality, 24 Harv. Envtl. L. Rev. 1, 9 (2000).

¹² *The Federal-State Relationship: A Look Into EPA Regulatory Reinvention Efforts: Hearing Before the Subcomm. on Oversight and Investigations of the House Comm. on Commerce*, 105th Cong. 24-25 (1997).

¹³ Robert R. Kuehn, Essay, The Limits of Devolving Enforcement of Federal Environmental Laws, 70 TUL. L. REV. 2373, 2384 (1996).

¹⁴ See Exec. Order No. 14008, above n. 1.

¹⁵ Federica Fusi, Fengxui Zhang, & Jiaqi Liang, *Unveiling environmental justice through open government data: Work in progress for most US states*, Public Administration 9-11 (2022).

¹⁶ *Ibid.* At 11.

¹⁷ Powers and duties, Minn. Stat. Ann. § 116.07.

in emissions based on that analysis. A New Jersey Law provides authority to deny a permit if it would cause or contribute to adverse environmental/public health stressors in an overburdened community “that are higher than those borne by other communities.”¹⁸ But, this approach is tied to a comparison between communities and not based on evaluation of potential risks to human health.

States have the authority and ability to do better. We recommend one amelioration measure analogous to the framework enacted for the protection of nonattainment areas.¹⁹ Nonattainment areas are classified based on thresholds, which are derived from the pollutant concentration.²⁰ The classification scale implies control requirements for each nonattainment category.²¹ A similar approach is proposed for overburdened communities. With the two-dimensional methodology proposed by Becerra et al.,²² communities can be classified based on the severity of the combined EB and SD levels. As in nonattainment areas, a permit for a stationary source, S_{n+1} emitting, for example, particulate matter (PM-10) in a serious overburdened area, EB_k , can be required to adhere to reduced PM-10 level emissions from the regulatory limit (e.g., 70 tons per year for a PM-10 nonattainment area) and comply to emission levels a fraction of this amount (e.g., 50%). The EJ reduction factor could then be applied for the list of criteria pollutants.²³

By utilizing the two-dimensional EJ identification methodology referenced above,²⁴ this proposal better addresses the issue of cumulative impacts by placing requirements on hazardous sources based

¹⁸ Requirements for permit applicants, N.J. Stat. § 13:1D-160.

¹⁹ Pub. L. 101-549, 104 Stat. 2399 (sec. 181-193)(1990).

²⁰ Air quality control regions, 42 U.S.C. § 7407.

²¹ National Primary and Secondary Ambient Air Quality Standards, 40 C.F.R. 50 et seq. (2021).

²² Marisol Becerra et al., Putting the Environment back in “Environmental Justice”: A Two-Dimensional Approach for Area Identification (Aug. 12, 2022) (under review) (on file with authors).

²³ See National Primary and Secondary Ambient Air Quality Standards, above n. 21.

²⁴ See Marisol Becerra et al., above n. 22.

on the severity of the SD and EB characteristics of the community and not the risk characteristics of the source.

3. *Comment on EPA's rulemaking to ensure it reflects principles of EJ*

During the Trump Administration, countless aspects of permitting regulations were rolled back to create a system more lenient for emitters.²⁵ As the Biden Administration works to strengthen requirements through rulemaking, it is essential that evidence-based comments be provided for all proposed rules that adequately reflect EJ.

States have always been the backbone of policy experimentation and advancement. While federal environmental regulations set an important floor of achievement, it is time for states to aim higher to protect their already overburdened communities.

²⁵ *EPA Takes further Actions to Improve the NSR Permitting Program*, Envir. Protection Agency, <https://www.epa.gov/newsreleases/epa-takes-further-actions-improve-nsr-permitting-program> (Dec. 3, 2019) (last visited Sept. 13, 2022).