State Cumulative Environmental Impact Laws: Route to Counteracting Federal Failures in Public Participation?

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Environmental Justice (EJ) communities across the United States bear a disproportionate burden of industrial facility siting, yet federal law does not equip them with meaningful opportunities to challenge these decisions. Existing permitting frameworks under primary environmental laws provide affected stakeholders only with formal notice and comment. There is no requirement for permitting authorities to incorporate this gathered information into the final decision. This Note argues that state-level cumulative impact legislation provides a path towards procedural justice that can overcome these federal failures. Drawing on a procedural justice framework, this Note contends that true community participation requires that community input actually shape permitting outcomes. Using New Jersey's landmark EJ law as a case study, this Note identifies structural gaps within these existing frameworks and proposes the integration of Community Advisory Groups (CAGs) as an enforceable mechanism for promoting procedural justice.

Part I develops the procedural justice framework and surveys the federal legal architecture governing environmental permitting. Part II examines how this federal regime leaves EJ communities with participation rights that are both procedurally fragile and substantively weak, using New Jersey's cumulative impact law to illustrate the promise and persistent limitations of existing reform efforts. Part III proposes integrating the CAG model into state cumulative impact legislation and addresses the practical and legal challenges of doing so.

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INTRODUCTION

When developers began searching for an optimal location for the Cape Wind Project—a 130-turbine offshore wind farm—the search focused on ocean geography and nearby electric transmission infrastructure.[1] Before long, the team found a satisfactory location: the Nantucket Sound, off the coast of Cape Cod.[2] Building there, however, would prove to be more difficult than expected. Residents of Cape Cod, Martha's Vineyard, and Nantucket quickly joined forces to form the Alliance to Protect Nantucket Sound and initiated an aggressive legal campaign against the project's federal permitting process.[3] The organization

1. Mark Rodgers & Craig Olmsted, *The Cape Wind Project in Context*, 8 LEADERSHIP & MGMT. ENG'G 102, 104–05 (2008).

2. *Id.* at 105.

3. Greg Watson & Fara Courtney, *Nantucket Sound Offshore Wind Stakeholder Process*, 31 B.C. ENV'T. AFFS. L. REV. 263, 268–69 (2004). *See, e.g.*, All. to Protect Nantucket Sound, Inc. v. U.S. Dep't of Army, 398 F.3d 105, 107–08 (1st Cir. 2005) (federal suit against

soon fundraised $40 million and received national support from politicians and wealthy residents in the area.[4] After over a decade of litigation, and despite both state and federal court orders upholding site permits,[5] sustained community opposition forced the developer to back out of the project.[6]

But this "success story" is the exception rather than the rule; in many communities, public opposition efforts fail to prevent the siting of facilities even more deleterious to one's health and the surrounding environment. "Cancer Alley"[7] in Louisiana is one oft-cited example of environmental racism,[8] where a history of slavery and segregation have fueled high levels of concentrated siting.[9] Formerly enslaved individuals developed communities in the region following the Emancipation Proclamation, and many current residents are their descendants.[10] A chemical plant now

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U.S. Army Corps of Engineers' decision to issue a permit authorizing construction of a data tower in connection with Cape Wind).

4. Katherine Q. Seelye, *After 16 Years, Hopes for Cape Cod Wind Farm Float Away*, N.Y. TIMES (Dec. 19, 2017), https://www.nytimes.com/2017/12/19/us/offshore-cape-wind-farm.html [https://perma.cc/WL4L-PJGW] (explaining that donors included, among others, billionaire fossil fuel businessman Bill Koch). Politicians like Robert F. Kennedy Jr. engaged in public opposition campaigns, without acknowledging the personal ties his family had in the area. *See, e.g.*, Robert F. Kennedy Jr., *An Ill Wind Off Cape Cod*, N.Y. TIMES (Dec. 16, 2005), https://www.nytimes.com/2005/12/16/opinion/an-ill-wind-off-cape-cod.html [https://perma.cc/BX3F-9HW3] (arguing that siting a wind farm in Cape Cod is akin to building a wind farm in a national park); Anna Grace Lee, *Everything You Need to Know About the Kennedy Compound in Hyannis Port, as Seen in* Love Story, VOGUE (Feb. 26, 2026), https://www.vogue.com/article/kennedy-compound-hyannis-port-explainer#:~:text=Then%2C%20in%201928%2C%20Kennedy%20Sr,of%20land%2C%20overlooking%20the%20water [https://perma.cc/PCG4-BFJE] (outlining the history of the "Kennedy Compound," a six acre plot in Cape Cod owned by the Kennedys).

5. All. to Protect Nantucket Sound, Inc. v. Energy Facilities Siting Bd., 858 N.E.2d 294, 302 (Mass. 2006) (holding in favor of the Energy Facilities Siting Board's conditional approval for the Cape Wind project); *U.S. Dep't of Army*, 398 F.3d at 115 (upholding U.S. Army Corps permit for Cape Wind project).

6. Seelye, *supra* note 4 (developer forwent the Cape Wind project after continued financial and political setbacks).

7. The terms "Chemical Corridor" and "Cancer Alley" refer to an 85-mile stretch of land between New Orleans and Baton Rouge. *See* Merrill Singer, *Down Cancer Alley: The Lived Experience of Health and Environmental Suffering in Louisiana's Chemical Corridor*, 25 MED. ANTHROPOLOGY Q. 141, 141–42 (2011).

8. Environmental racism is defined as "a society unduly burdening people of color with the risks and harmful effects of environmental policies that otherwise benefit the rest of society." Idna G. Castellon, *Cancer Alley and the Fight Against Environmental Racism*, 32 VILL. ENV'T L.J. 15, 16 (2021).

9. Bridgett Cecilia McCoy, Note, *Critical Infrastructure, Environmental Racism, and Protest: A Case Study in Cancer Alley, Louisiana*, 53 COLUM. HUM. RTS. L. REV. 582, 599 (2022) (outlining how plantation lands that were not purchased by freed Black people following emancipation are now the site of polluting industries).

10. Castellon, *supra* note 8, at 19–20.

sits atop the land where the largest slave rebellion in U.S. history occurred,[11] and another proposed industrial complex was preliminarily sited on an unmarked slave burial ground in the area.[12] Along this 85-mile stretch between New Orleans and Baton Rouge—a corridor one can drive in just under 90 minutes[13]—over 200 fossil fuel and petrochemical plants produce about 25% of U.S. petrochemical products.[14] Louisiana residents are exposed to almost four times the national average of toxic pollutants;[15] cancer risk by air toxins exceeds the EPA's acceptable threshold by 27 times.[16] In addition, new research indicates that there are significant health risks where chemical pollutants interact with each other,[17] identified through cumulative impacts analysis.[18] The disproportionate exposure to harmful chemicals in this region led the United Nations Special Rapporteur on Human Rights and the Environment to identify Cancer Alley as an example of "the worst imaginable dereliction of a State's obligation to respect, protect and fulfill the right to a clean, healthy and sustainable

11. Oliver Laughland & Jamiles Lartey, *First Slavery, Then a Chemical Plant and Cancer Deaths: One Town's Brutal History*, THE GUARDIAN (May 6, 2019, at 06:00 EDT), https://www.theguardian.com/us-news/2019/may/06/cancertown-louisiana-reserve-history-slavery [https://perma.cc/H4CT-9LPE].

12. Castellon, *supra* note 8, at 19–20.

13. *New Orleans, Louisiana to Baton Rouge, Louisiana*, GOOGLE MAPS, https://www.google.com/maps/dir/New+Orleans,+Louisiana/Baton+Rouge,+Louisiana/ [https://perma.cc/P9RZ-9JRX] (last visited May 6, 2026).

14. HUM. RTS. WATCH, "WE'RE DYING HERE": THE FIGHT FOR LIFE IN A LOUISIANA FOSSIL FUEL SACRIFICE ZONE 4 (2024); Public Health on Call, *Louisiana's 'Cancer Alley' Is More Deadly Than Previously Imagined*, JOHNS HOPKINS BLOOMBERG SCH. OF PUB. HEALTH (Aug. 4, 2025), https://publichealth.jhu.edu/2025/the-shocking-hazards-of-louisianas-cancer-alley [https://perma.cc/UT94-9Y8G]; *See also* Ellis S. Robinson et al., *Total Cancer Risk Estimates From Measured Concentrations of Volatile Organic Compounds in Industrialized Southeastern Louisiana*, 122 PNAS 1, 1 (2025) (finding that, while this corridor only comprises 12% of Louisiana's land area, it contains 45% of listed industrial facilities on the EPA's Toxic Releases Inventory).

15. HUM. RTS. WATCH, *supra* note 14, at 29.

16. Sadie Smith et al., *Social Vulnerability and Cancer Risk from Air Toxins in Louisiana: A Spatial Analysis of Environmental Health Disparities*, FRONTIERS IN PUB. HEALTH, May 20, 2025, at 1, 4.

17. Public Health on Call, *supra* note 14 (noting that traditional research methods assume each chemical pollutant acts individually when evaluating risk to health and organ systems, while residents in this area are exposed to between 40 and 50 chemical pollutants simultaneously).

18. Cumulative impacts "encompass the effects from both environmental and social stressors that can arise through multiple, interconnected pathways. Cumulative effects from pre-existing health, environmental, social, and institutional factors can cause socioeconomically vulnerable individuals to have both higher exposure and higher susceptibility to environmental threats." Laura A. Bakkensen et al., *Cumulative Impacts in Environmental Justice: Insights from Economics and Policy*, 107 REG'L SCI. & URB. ECON., July 2024, at 1.

environment."[19] And yet, despite ongoing dissent from the community,[20] permit approvals for new facilities continue.[21]

Why is it that the residents near Nantucket Sound were able to halt the Cape Wind Project, while those in Cancer Alley continue to bear the burdens of hazardous facility siting? Part of the answer lies in disparities in political, economic, and social power. When affluent, predominantly White communities successfully oppose the siting of undesirable facilities, developers often redirect those projects to communities with fewer resources and less capacity to mount effective resistance.[22] Another reason is that White individuals have greater opportunity—when compared to Black, Latinx, Asian, Pacific Islander, and Native American individuals—to relocate if the local environment becomes health-threatening.[23] These dynamics are not isolated. The above case studies are just two examples reflecting a systemic feature of facility siting in the United States.

Despite the persistence of disproportionate facility siting across the United States,[24] federal law has failed to structure public

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19. HUM. RTS. WATCH, *supra* note 14, at 15. For the full report of U.N. Special Rapporteur Ashwini K.P. (Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance), see Human Rights Council, *Visit to the United States of America*, U.N. Doc. A/HRC/56/68/Add.1 (May 16, 2024).

20. Rise St. James v. La. Dep't of Env't Quality, 383 So.3d 956, 969 (La. Ct. App. 1. Cir. 2024) (local community NGO RISE St. James filed suit against approved air quality permits for proposed chemical manufacturing complex); *see also* Zoe Friese, *Fight of Flight: A Story of Survival and Justice in Cancer Alley*, 7 WOMEN LEADING CHANGE: CASE STUDIES IN WOMEN, GENDER, & FEMINISM 3, 12 (2023) (Rise St. James was founded in 2018 to fight continued environmental harm through community opposition and legal campaigns).

21. *Rise St. James*, 383 So.3d at 991–92 (rejecting community claims that DEQ's decision violated the public trust doctrine by failing to consider the disproportionate impact on nearby minority communities and ultimately reversing the lower court's decision to vacate the new facility's air quality permits).

22. Castellon, *supra* note 8, at 17–18; Vicki Been, *What's Fairness Got to Do with It? Environmental Justice and the Siting of Locally Undesirable Land Uses*, 78 CORN. L. REV. 1001, 1002–03 (1993) ("Because local protest can be costly, time-consuming, and politically damaging, siting decision makers often take the path of least resistance—choosing sites in neighborhoods that are least likely to protest effectively."); Richard J. Lazarus, *Pursuing "Environmental Justice": The Distributional Effects of Environmental Protection*, 87 NW. UNIV. L. REV. 787, 810 (1993) ("Lawmakers inevitably seek the path of least political resistance when allocating the burdens of environmental protection.").

23. Robert D. Bullard, *Anatomy of Environmental Racism and the Environmental Justice Movement*, in CONFRONTING ENVIRONMENTAL RACISM: VOICES FROM THE GRASSROOTS 21 (Robert D. Bullard, ed., South End Press 1993) (arguing that White individuals are more capable of "vot[ing] with their feet," where individuals of color face racial barriers through housing discrimination, redlining, and other market forces).

24. Robert D. Bullard, *Introduction: Environmental Justice—Once a Footnote, Now a Headline*, 45 HARV. ENV'T L. REV. 243, 244–45 (2021) (reviewing decades of studies

participation procedures to meaningfully constrain siting decisions. Existing permitting frameworks provide communities with formal opportunities for notice and comment that are too far removed from the decision-making process to shape the actual outcome.[25] As a result, public participation[26] often functions as a procedural formality, rather than a mechanism of influence. This Note argues that this disconnect reflects a larger failure of procedural justice, where decision-makers disregard communities and strip them of the power to influence decisions affecting their health and homes.

Focusing narrowly on facility siting decisions, this Note contends that true procedural justice[27] requires reworking the agency decision-making process itself so that community input is not a cursory attempt—gathered and dismissed during the course of a rulemaking—but instead, substantively integrated into permitting decisions and outcomes. It further argues that emerging state-level cumulative impact legislation offers an avenue for transforming public participation processes along these lines. By strengthening these procedural participation requirements, state statutes can address the inequitable division of harmful facilities, thus advancing distributive justice.[28]

This Note proceeds in three parts. Part I develops the procedural justice framework for evaluating public participation in facility siting and describes the federal legal architecture that governs participation in environmental permitting, including statutory provisions, agency regulations, and judicial review. Part II then examines how this federal regime leaves Environmental Justice (EJ) communities with participation rights that are both procedurally fragile and substantively weak. Because federal EJ

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documenting the disproportionate siting of environmental hazards in minority communities).

25. *See* Jonathan Skinner-Thompson, *Procedural Environmental Justice*, 97 WASH. L. REV. 399, 413–14, 432–33 (2022) (describing how decision-makers narrow public input opportunities to highly technical analyses that prevent communities without specialized knowledge from adequately participating).

26. This Note uses public participation to refer to the community input required in administrative permitting procedures. *See infra* Part I.C (describing baseline federal public participation requirements).

27. *See infra* note 30 for a discussion of procedural justice.

28. *See* Nicola Ulibarri et al., *Barriers and Opportunities to Incorporating Environmental Justice in the National Environmental Policy Act*, 97 ENV'T IMPACT ASSESSMENT REV., 2022, at 2 (explaining that procedural justice, while an end in itself, also functions as a tool for addressing distributive injustices by incorporating affected communities into decision-making).

protections have largely depended on executive action, agency guidance, and regulatory discretion rather than durable statutory mandates, they remain vulnerable to shifting presidential administrations. Even when participation opportunities exist, they often operate through inaccessible, late-stage, and highly technical procedures that do little to redistribute decision-making power. Lastly, Part III turns to state-level cumulative impact legislation, arguing that these regimes provide a pathway toward reconnecting public participation and substantive decision-making.

I. BACKGROUND

A. PROCEDURAL JUSTICE FRAMEWORK FOR PUBLIC PARTICIPATION

The EJ movement,[29] arising out of the disproportionate impacts of environmental racism,[30] is traditionally viewed through the lens of four forms of justice: distributional, procedural, corrective, and social.[31] This taxonomy, developed by Professor Robert Kuehn,

29. For varying definitions of environmental justice compare *Learn About Environmental Justice*, U.S. ENV'T PROT. AGENCY, epa.gov [https://perma.cc/V8R5-ZYAB] (last modified Nov. 22, 2024) (on file with the *Columbia Journal of Law & Social Problems*) ("Environmental justice means the just treatment and meaningful involvement of all people, regardless of income, race, color, national origin, Tribal affiliation, or disability, in agency decision-making and other Federal activities that affect human health and the environment so that people are fully protected from disproportionate and adverse human health and environmental effects (including risks) and hazards . . . and have equitable access to a healthy, sustainable and resilient environment . . . ."), *with* Robert D. Bullard, *Environmental Justice: It's More Than Waste Facility Siting*, 77 SOCIAL SCIS. Q. 493, 493 (1996) ("Environmental justice embraces the principle that all people and communities are entitled to equal protection of environmental and public health laws and regulations.").

30. Following the largest polychlorinated biphenyls ("PCB") chemical spill in the United States, state government officials chose to move the hazardous waste to a site in Afton, North Carolina, home to the highest percentage of Black residents in the state. *See* Dollie Burwell & Luke W. Cole, *Environmental Justice Comes Full Circle: Warren County Before and After*, 1 GOLDEN GATE UNIV. ENV'T L.J. 9, 11–14 (2007). Residents, seeing this choice as a continuation of the racism the community had long experienced, fought back. *Id.* at 15. On the day the waste trucks were set to arrive, protesters marched to the dump site and were met by police in riot gear. *Id.* at 21. The protests continued for weeks, garnering national attention and public support, as the community continued to fight against the disposal of hazardous waste in their landfill. *Id.* at 24–25. While the protests did not prevent the subsequent dumping of PCBs in the community, these protests are seen as the impetus for the environmental justice movement, leading to "consciousness of environmental racism across the U.S." *Id.* at 36.

31. *See* Robert R. Kuehn, *A Taxonomy of Environmental Justice*, 30 ENV'T L. REP. 10681, 10684–99 (explaining that where distributional justice asks about the "equitable

provides a framework for analyzing and identifying problems within an EJ perspective.[32] Most EJ scholars, communities, and government officials studying the health and environmental consequences of facility siting focus on distributional justice,[33] which addresses the disproportionate degree of environmental harm experienced by EJ communities.[34] This frame of reference focuses on the outcome—namely, the proportion of facilities and combined pollution in a given area—rather than the cause of harm.[35] While this approach rightly questions the inequitable distribution of facility siting and identifies the problem, it has proven insufficient on its own to effectively redistribute community power.[36]

Procedural justice, by contrast, shifts the focus from outcomes to the decision-making processes that produce them, and thus offers an avenue for implementing harm reduction before it

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distribution of the burdens resulting from environmentally threatening activities or of the environmental benefits of government and private-sector programs," procedural justice questions the fairness of the procedures that led to such an outcome, corrective justice asks what should be done to punish those who inflicted damage on the individuals and communities affected, and social justice concerns the "search for social structures and agents that are causing the environmental problems").

32. *Id.* at 10682.

33. *Id.* at 10684–85 (distributive justice focuses on the "geographic equity" of communities' proximity to unwanted land uses); Clare E. B. Cannon, *Critical Environmental Injustice: A Case Study Approach to Understanding Disproportionate Exposure to Toxic Emissions*, 12 TOXICS 295, 297 (2024) ("Much EJ scholarship has focused on [distributive] injustice, including the disproportionate distribution of environmental hazards such as landfills, hazardous industrial facilities, and poor air quality."). *See, e.g.*, Alice Kaswan, *Distributive Justice and the Environment*, 81 N.C. L. REV. 1031, 1037 (2003) (addressing distributive justice through an "equal division" model). The Commission for Racial Justice of the United Church of Christ published the first public review on the distribution of hazardous facilities in 1987, focusing on commercial hazardous waste facilities and uncontrolled toxic waste sites. The study concluded that race was the most significant factor—including when compared to household income—in determining the location of hazardous waste facilities, where three in five Black and Hispanic people lived in communities subject to uncontrolled toxic waste sites. In addition, the study found that three communities where over 78 percent of residents were Black and Hispanic accounted for 40 percent of the U.S. landfill capacity. COMM'N FOR RACIAL JUST.: UNITED CHURCH OF CHRIST, TOXIC WASTES AND RACE IN THE UNITED STATES 13, 16 (1987).

34. The author is using the term "EJ communities" to refer generally to those communities that have been subject to a disproportionate number of environmental harms compared to environmental benefits.

35. Cannon, *supra* note 33, at 297 ("Communities' ability to participate in meaningful solutions is essential for preventing their disproportionate exposure to toxics in the environment and to redressing such exposure after it has occurred.").

36. Ulibarri et al., *supra* note 28, at 2 (explaining that meaningful participation provides affected communities with agency and the decision-control necessary to challenge existing environmental inequities).

occurs.[37] In the context of facility siting, this requires meaningful engagement at decision-making stages that precede a facility's approval and operation.[38] Practically, this takes place during the public participation phase of permit approvals.[39] Although the Environmental Protection Agency (EPA) broadly defines public participation as "any process that directly engages the public in decision-making and gives full consideration to public input in making that decision,"[40] existing statutes and agency regulations have dramatically cabined its reach and effect. Instead, rules governing public participation specify, among other things, the exact time period when a community is permitted to provide input on a facility or its permits.[41] These opportunities for community participation often arise too late in the process to mount substantive opposition to a particular siting decision. Citizens are

37. There is still a gap in current procedural justice scholarship because scholars' predominant concerns are either advocating for decisionmakers to consider EJ concerns from a distributional lens in permit applications or increasing communities' technical expertise, rather than shifting who has the decision-making power. Skinner-Thompson, *supra* note 25, at 426 ("To date, despite its immense importance to the lives of many marginalized communities and its relative size within the regulatory landscape, scholars have largely overlooked citizen advocacy in the context of air quality permitting decisions and standard setting.").

38. *Id.* at 429 ("[I]t is equally important to provide communities with the capability to advocate for better pollution controls or stricter emission limits before permits are issued. That way, overburdened communities can ensure their voices are heard at the critical stages before it becomes necessary to verify compliance (and not assume regulatory officials will take their interests into consideration).").

39. *Id.* at 406–17 (noting that public participation, as it stands, is problematic, but focusing solely on how to improve the public participation process to improve EJ in permitting); Darya Minovi, *EPA Needs to Listen to the Public. Will New Public Participation Guidance Help?*, UNION OF CONCERNED SCIENTISTS: THE EQUATION (Oct. 7, 2024, 3:37 PM), https://blog.ucs.org/dminovi/epa-needs-to-listen-to-the-public-will-new-public-participation-guidance-help/ [https://perma.cc/VUV8-UEE5] ("[W]e can't create effective solutions to problems unless the people actually affected by those problems have a say in the process. And without effective tools for public participation, these decisions will be disproportionately informed by the actors with more power, resources, and access—namely, the polluting industries themselves.").

40. *Public Participation Guide: Introduction to Public Participation*, U.S. ENV'T PROT. AGENCY (Feb. 6, 2025), https://www.epa.gov/international-cooperation/public-participation-guide-introduction-public-participation#:~:text=Public%20participation%20can%20be%20any,process%2C%20not%20a%20single%20event [https://perma.cc/2LRJ-A8SP].

41. OFF. OF SOLID WASTE & EMERGENCY RESPONSE, U.S. ENV'T PROT. AGENCY, PUBLIC INVOLVEMENT IN ENVIRONMENTAL PERMITS: A REFERENCE GUIDE 20 (2000) ("[P]ublic participation requirements are triggered when a permitting authority issues a draft permit, holds a public hearing, renews or reopens a permit, or makes a significant modification to a permit. Before the permitting authority issues the permit, a public notice and comment period is provided, usually 30 days, to allow comments regarding the proposed permit . . . ."). *See, e.g.*, 40 C.F.R. § 70.7(h) (outlining that the permitting authority must provide at least 30 days for public comment).

left to fight against permit approvals after the site has already been chosen in their neighborhood,[42] or at worst, fight simply to heighten the standards used for permits that decision-makers will inevitably approve.[43] As a result, participation often functions as a mechanism for registering dissent rather than influencing outcomes. Procedural justice seeks to move beyond bare opportunities for input and, instead, transform these processes into substantive mechanisms through which a community can actually impact the decisions made.[44] If communities are able to utilize participatory processes to alter facility siting decisions—thus achieving procedural justice—substantive, distributional justice will follow.[45] In the context of EJ communities already bearing disproportionate environmental burdens, procedural justice demands more than a fair process; it requires that community opposition carry the weight necessary to prevent additional harm. Where a community has demonstrated that a proposed facility will compound existing cumulative stressors, a truly just process must empower that community to block the siting altogether, not merely register dissent against an outcome that has already been determined.

B. FACILITY SITING PROCESS AND IMPORTANCE

In the land use context, facility siting refers to the geographic location for the specific project, which will, in turn, determine what permit approvals are required for facility operation.[46] The siting

42. *See, e.g.*, Rise St. James v. La. Dep't of Env't Quality, 383 So.3d 956, 969 (La. Ct. App. 1. Cir. 2024) (local community filed suit against approved air quality permits for proposed chemical manufacturing complex).

43. Cheryl Simrell King et al., *The Question of Participation: Toward Authentic Public Participation in Public Administration*, 58 PUB. ADMIN. REV. 317, 320 (1998).

44. *Id.* at 317. The call for concrete benefits in citizen participation processes described here aligns with the popularized "Ladder of Citizen Participation" developed by Sherry Arnstein. Arnstein argues that, for "the empty ritual of participation" to become "real power needed to affect the outcome of the process," there must be a redistribution of citizen power, where those who are excluded from decision-making processes are an intentional part of future decision-making such that they can share in the benefits of society. Sherry Arnstein, *A Ladder of Citizen Participation*, 35 J. AM. INST. PLANNERS 216, 216 (1969).

45. Kuehn, *supra* note 31, at 10688 (suggesting that many communities base concerns of distributive justice on "the perceived fairness of the procedures leading to the outcome").

46. Sabine Blumenthal, *The Ins and Outs of Siting and Permitting in the Northwest*, CLEAN ENERGY TRANSITION INST. (Oct. 27, 2025), https://www.cleanenergytransition.org/post/the-ins-and-outs-of-siting-and-permitting-in-the-northwest [https://perma.cc/T3KH-ZL6B]; OFF. OF SOLID WASTE & EMERGENCY RESPONSE, *supra* note 41, at 16 (identifying four major milestones in the permitting process: (i) the permitting authority receives and

process is both complex and highly structured,[47] involving various levels of government, along with private parties, and relies "almost exclusively upon government regulation."[48] There are a number of interested parties that participate in the process: the applicant, who initiates the siting process and intends to build a facility; regulatory bodies whose roles are defined by statute; those directly impacted by the proposed facility; and public interest groups concerned about health, safety, and property values.[49] Beyond these procedural steps and stakeholders, there are also substantial practical hurdles. The gold-standard industry guidance on siting, for instance, notes that while the "ideal" location for a new facility would be one where there are no nearby communities, these locations often lack the infrastructure needed to operate a given facility.[50] So, while site choice may differ depending on the type of land use at issue, real estate costs, physical features of the property, proximity and access to transportation, access to raw materials, and costs of infrastructure and site development often drive site choice.[51]

The combination of these structural features make facility siting a central mechanism for distributing environmental burdens. But while regulation of active facilities can provide some

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reviews the permit application, (ii) a draft permit or notice of intent to deny the permit is issued by the permitting authority, (iii) the applicant and/or the permitting authority provide a public comment period of at least 30 days for the public to comment on the draft permit, and (iv) the permitting authority makes a final determination on the permit application).

47. Requirements depend on the location and type of facility being proposed. For example, a state may require pre-application public involvement and scoping to determine potential environmental and health impacts, permits for specific kinds of air and water discharge, and approval from a state permitting agency. The local government might have further zoning compliance requirements. In addition, the facility may need to submit federal permits for air, water, and hazardous waste, along with an environmental impact assessment if the project is federally owned or funded. *See, e.g.*, DEP'T OF PUB. SERVICE, NEW YORK STATE, *Siting Board FAQs*, https://dps.ny.gov/siting-board-faqs [https://perma.cc/ZK35-UA7R] (last visited Apr. 1, 2026).

48. Joshua Glasgow, *Not in Anybody's Backyard? The Non-Distributive Problem with Environmental Justice*, 13 BUFF. ENV'T L.J. 69, 78 (2005).

49. Paul R. Kleindorfer & Howard C. Kunreuther, *Siting of Hazardous Facilities*, *in* 6 HANDBOOKS IN OR & MS 403, 405–06 (S.M. Pollock et al., eds., 1994).

50. CTR. FOR CHEM. PROCESS SAFETY OF THE AM. INST. OF CHEM. ENG'RS, GUIDELINES FOR SITING AND LAYOUT OF FACILITIES 53 (American Institute of Chemical Engineers eds., 2d ed. 2018). The guidelines also provide a long paragraph on stakeholder outreach, outlining that while it is "not the direct responsibility of the location selection team," the company should recognize stakeholder issues and establish relationships within the community. *Id.* at 64–65.

51. Kaswan, *supra* note 33, at 1093 (outlining a number of "objective" factors that influence the land use siting process for industry actors).

post hoc protection against environmental harm,[52] it is a comparatively blunt tool. The most effective way to prevent continued community exposure to toxins is to prevent industrial siting in and around these communities, in the first place.[53] Once a facility begins operation, exposure to hazardous toxins is often inevitable. Existing facilities frequently violate the pollution emission standards they are subject to, exposing individuals who live nearby to excessive air and water pollution where they live, work, and play.[54] Lack of regulatory enforcement exacerbates these inequalities, allowing these same facilities to violate environmental standards again and again, without consequences and without real protection for community members.[55] Where states do enforce federal environmental laws, there is unequal enforcement.[56] Companies who violate air, water, and waste

52. Environmental permits set standards for how much and how often a facility can emit certain pollutants. For example, EPA emissions reductions requirements under the Clean Air Act, including capping emissions of sulfur dioxide and nitrogen oxides in the industrial power sector, significantly reduced the occurrence of acid rain and improved air quality. NAT'L SCI. & TECH. COUNCIL, NATIONAL ACID PRECIPITATION ASSESSMENT PROGRAM REPORT TO CONGRESS 1–2 (2005).

53. Skinner-Thompson, *supra* note 25, at 429 (emphasizing the importance of overburdened communities' voices being heard *before* permits are issued and industries are then regulated through their compliance).

54. *Id.* at 420 (finding that low-income and communities of color are often where "pollution hotspots" form that contain high levels of pollutants, far above federal standards); *see also* Rodger C. Field, *Siting, Justice, and the Environmental Laws*, 16 N. ILL. U. L. REV. 639, 641 (1996) (finding that studies show poor and minority communities are subject to a significantly higher amount of poor air quality, with African-Americans 40% more likely and Latino populations almost 90% more likely to live in an area exceeding EPA air quality standards when compared to white populations).

55. *See, e.g.*, Formosa Plastics Louisiana Detailed Facility Report, EPA (last visited Mar. 25, 2026) (despite EPA's finding that the facility had a "high priority violation" under the Clean Air Act for 12 quarters in a row and was a "significant noncomplier" under the Resource Conservation and Recovery Act, the EPA had not issued a single monetary penalty against the facility in the last five years); Richard L. Revesz, *Air Pollution and Environmental Justice*, 49 ECOLOGY L. Q. 187, 187 (2022) (arguing that the EPA's unwillingness to impose sanctions for failing to meet statutory obligations has led to a "state of permanent nonattainment of the National Ambient Air Quality Standards."). In addition to a lack of penalties, monitoring itself appears to be insufficient. *See* Public Health on Call, *supra* note 14 (identifying that Cancer Alley only has two monitors in an area with around 200 industrial facilities and much of the chemical pollution found there is not measured at all by the state government). *See also* Scott Kuhn, *Expanding Public Participation is Essential to Environmental Justice and the Democratic Decisionmaking Process*, 25 ECOLOGY L. Q. 647, 653 (1999) (demonstrating that lax federal regulation of clean air quality had allowed for pollution trading markets, where "CEOs and shareholders of companies decide, without community involvement, whether to comply with emissions reductions or offset reductions through the use of pollution credits. Profit, not public health, is the deciding factor.").

56. Castellon, *supra* note 8, at 31.

permits receive higher penalties when the violations occur in White neighborhoods compared to communities of color.[57] Imposing new, more stringent environmental regulations on existing facilities poses even greater challenges.[58] Federal regulations make it near impossible to shut down existing facilities, under the guise of "grandfathering" in these facilities,[59] and thus communities must rely on common law remedies after the harm has already occurred.[60]

For these reasons, the siting stage represents the most consequential point of intervention. At that stage, permitting authorities and industry actors determine not only where environmental burdens will be concentrated, but also whether those burdens can be meaningfully addressed at all. Preemptively preventing industries from polluting areas already experiencing disproportionate impacts requires attention to the front-end of the regulatory process—most notably, the permit approval stage—where communities might still influence whether and where a facility is built.

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57. *Id.* *Compare* ENV'T PROT. AGENCY, FORMOSA PLASTICS LOUISIANA DETAILED FACILITY REPORT (last visited Mar. 25, 2025) (imposing no monetary penalties for a high priority violation and a finding of significant noncompliance for a facility located in Louisiana's Cancer Alley), *with* ENV'T PROT. AGENCY, SHELL CHEMICAL APPALACHIA LLC DETAILED FACILITY REPORT (last visited Mar. 25, 2026) (imposing a monetary penalty of almost $5 million for a high priority violation in Monaca, Penn., whose population is majority White).

58. *See* Michael B. Gerrard, *The Role of Existing Environmental Laws in the Environmental Justice Movement*, 9 ST. JOHN'S J. LEGAL COMMENT. 555, 560–62 (1994) (explaining that, due to grandfathering within the environmental regulatory system, existing facilities can keep permits they already have).

59. Under the Clean Air Act, 42 U.S.C.A. § 7411 (New Source Performance Standards), new stationary sources of air pollution are subject to stringent emissions requirements, while already existing facilities are subject to more limited requirements unless undergoing modification that would increase the amount of emitted air pollution. For more information on grandfathering provisions and the ways in which the Clean Air Act exacerbates the issues of grandfathering, see Brian Potts, *Trading Grandfathered Air—A New, Simpler Approach*, 31 HARV. ENV'T L. REV. (2007); Jonathan R. Nash & Richard L. Revesz, *Grandfathering and Environmental Regulation: The Law and Economics of New Source Review*, 101 NW. UNIV. L. REV. 1677, 1708 (2007) (by allowing older plants to operate under more lax environmental standards, existing plants may operate for longer than would otherwise be economically efficient, as meeting the standards for new and modified plants is more costly).

60. Gerrard, *supra* note 58, at 560–61 (arguing that grandfathering provisions are a primary reason why environmental laws do not protect communities from harm).

C. BASELINE FEDERAL PUBLIC PARTICIPATION REQUIREMENTS

The EPA sets federal public participation requirements that private industry actors must comply with when engaging in industrial siting, primarily through regulations under the Resource Conservation and Recovery Act (RCRA),[61] Clean Water Act (CWA),[62] and Clean Air Act (CAA).[63] Congress enacted these statutes as part of a 1970s movement to displace local authority with federal environmental law, intending to respond to lowered environmental standards caused by interstate competition by providing a guaranteed minimum standard for environmental quality.[64] Where a facility's proposed operations involve hazardous waste, water pollution, or air pollution, the applicant must apply for a permit seeking approval from the relevant permitting agencies prior to commencing operations.[65] As part of that process, applicants and permitting authorities must comply with baseline public participation requirements.[66]

Across these statutes, however, participation is defined primarily in terms of notice and opportunity to be heard, without obligating decision-makers to incorporate public input into their decisions. The CWA requires only an opportunity for a public hearing in the National Pollutant Discharge Elimination System

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61. 42 U.S.C.A. § 6974.

62. 33 U.S.C.A. § 1251.

63. 42 U.S.C. § 7410.

64. See Kirsten H. Engel, *State Environmental Standard-Setting: Is There a "Race" and Is It "to the Bottom"?*, 48 HASTINGS L.J. 271, 284 (1997). There is some debate on whether the "race-to-the-bottom" theory, where interstate competition leads to relaxed environmental standards to attract industrial firms, exists. However, this debate primarily revolves around whether relaxing standards lowers social welfare, with general a consensus that relaxing environmental standards does occur due to interstate competition. *Id.* at 283.

65. Note that federal and state permitting agencies often work together and may have different public participation requirements for permit approval. The federal requirements are the minimum and cannot be obviated. *See, e.g.*, 42 U.S.C.A. § 7661d (state permitting authorities must provide the EPA Administrator with a copy of each permit the agency proposes to be issued, which the Administrator will review for compliance with the requirements of the Clean Air Act, including public participation).

66. In addition, the applicant must follow any additional public participation requirements outlined in the EPA's rules and regulations, which will be outlined later. *See, e.g.*, Resource Conservation and Recovery Act, 42 U.S.C. § 6974(b)(2) (detailing the EPA administrator's obligation to develop public participation and minimum public participation guidelines under RCRA, including publication in major local newspapers and written notice to local governments when the Administrator intends to issue a new permit); Clean Water Act, 33 U.S.C.A. § 1342(a) (requiring opportunity for a public hearing prior to issuance of a permit for pollutant discharge); Clean Air Act, 42 U.S.C.A. § 7661a(b)(6) (requiring the Administrator to publish minimum requirements for permit programs, including an opportunity for public comment and a hearing).

permit program,[67] and both notice and public hearing for several other permits;[68] the CAA requires public notice and an opportunity for public comment and a hearing for all permit programs;[69] and the RCRA requires public notification of the agency's intent to issue a permit through publication in major local newspapers and a radio station broadcast, with an informal public hearing required if the Administrator receives written notice of opposition.[70] These provisions constitute the only mandatory public participation requirements in permit decision-making. And, further, none of these statutes indicate *how* decision-makers should use public input.[71] Instead, the Environmental Appeals Board (EAB)[72] has determined that EJ has no footing in RCRA permit denials; rather, the EPA is required to approve a permit where an applicant meets statutory requirements and regulation.[73] Consequently, community comments, while procedurally required, do not bear on the permitting decision itself—the authority is bound to approve the permit upon demonstration of regulatory compliance, irrespective of public opposition.

These statutory requirements do not, however, stand alone. Agency regulation fills the gaps created by statutory vagueness, with the EPA promulgating regulations detailing public

67. 33 U.S.C.A. § 1342 (permits for discharging pollutants into navigable waters).

68. 33 U.S.C.A. § 1344 (permits for discharging dredge or fill material into navigable waters); 33 U.S.C.A. § 1312 (permit modifications to sewage discharge limits on water quality).

69. Clean Air Act, 42 U.S.C.A. § 7661a(b)(6) (outlining EPA Administrator's duties for permit programs administered by air pollution control agencies).

70. In addition, the Administrator may choose to hold an informal hearing of their own volition. If an informal hearing is scheduled, notice must be provided to the public, and it must be held in a location that is convenient for the community nearest to the proposed facility. 42 U.S.C.A. § 6974 (permits for the treatment, storage, or disposal of hazardous wastes).

71. *See, e.g.*, Clean Air Act, 42 U.S.C.A. § 7661a(b)(6) (specifying only that the EPA Administrator must promulgate regulations that address procedures for public notice, public comment, and a hearing, without specifying if the Administrator must include regulations on the manner in which decisionmakers utilize said public input).

72. The EAB is an administrative appellate tribunal that hears appeals from federal permitting decisions under 40 C.F.R. § 1.25(e).

73. Chem. Waste Mgmt. of Ind. Inc., 6 E.A.D. 66, 72 (EAB 1995) (finding that while decisionmakers "should" exercise discretion to expand public comment opportunities where a facility may disproportionately impact a low-income or minority population, "under the existing RCRA scheme, the Agency is required to issue a permit to any applicant who meets all the requirements of RCRA and its implementing regulations"); Resource Conservation and Recovery Act, 42 U.S.C. § 6925 ("Upon a determination by the Administrator (or a State, if applicable), of compliance by a facility for which a permit is applied for . . . the Administrator (or the State) *shall issue* a permit for such facilities").

participation requirements.[74] Thus, while Congress provides limited requirements for public participation,[75] agency guidance typically governs how public participation processes, including EJ considerations, will influence decision-making.[76] These requirements create a more thorough administrative record and ensure that decision-makers acknowledge community concerns. However, they do not alter the underlying decision-making framework: permitting authorities are not required to give substantive weight to public input when determining whether to approve a permit.

Federal agencies and states receiving EPA financial assistance or undertaking administrative permitting functions under the CWA and RCRA must align, at minimum, with the primary public participation mechanisms outlined by the EPA under the administrative rulemaking processes.[77] The regulations outline the manner in which permitting authorities notify the public of permit applications, public comment periods, and hearings.[78] Following the public comment period, the Regional Administrator must issue a decision on the final permit, alongside a "response to comments," which must indicate which provision, "if any," has been changed from the draft permit, explain why there was a change, and "briefly describe and respond to all significant comments."[79] These regulations state only that community "viewpoints and preferences [are] *considered* by the decision-making official."[80] Similarly, EPA regulations for CAA permits,

74. Glasgow, *supra* note 48, at 78.

75. *See supra* Part I.C.

76. Skinner-Thompson, *supra* note 25, at 427–28 (noting that while the EPA has authority to address EJ considerations, "bureaucratic inertia at the EPA (and likely other regulatory agencies) routinely resists, undermines, and disparages environmental justice reform"). President Clinton, for example, initiated federal government considerations of EJ with Executive Order 12898—Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations, which called for federal agencies to identify and address disproportionate environmental and health effects on minority and low-income communities, including for agencies to develop a strategy for implementing EJ. Exec. Order No. 12898, 3 C.F.R. 859 (1995).

77. Public Participation in Programs under the Resource Conservation and Recovery Act, the Safe Drinking Water Act, and the Clean Water Act, 40 C.F.R. § 25.1 (1979).

78. *Id.* § 25.4(b)(2), (c) (including providing interested and affected parties with free informational materials clearly stating the social, economic, and environmental consequences of proposed decisions. In addition, this section defines "public consultation" as "an exchange of views between government agencies and interested or affected persons and organizations" by public hearing, public meeting, advisory groups, or other less formal consultation mechanisms).

79. *Id.* § 124.17.

80. *Id.* § 25.3(b) (emphasis added).

permit modifications, and renewals[81] require public notice, hearing, and comment procedures.[82] The permitting authority must keep a record of all commenters and issues raised during this process, as well as respond "in writing to all significant comments."[83] While both these regulations are stricter than their corresponding statutes, none of the above provisions require that permitting authorities incorporate citizen input into the final decision.[84]

EPA guidance similarly reflects an aspirational commitment to more robust forms of participation but stops short of requiring permitting authorities to adopt them.[85] The agency's public participation framework outlines five "levels" of engagement—inform, consult, involve, collaborate, and empower.[86] The least participatory level indicates that the agency is not seeking public buy-in, and the most participatory level signifies that the agency intends to "give decision-making authority to the public."[87] The CAA, CWA, and RCRA permit processes would likely fall into the "consult/info exchange" level in the EPA's spectrum of participation, where the permitting authority requires public meetings, listening sessions, and public notice and comment

81. 40 C.F.R. § 70.7(h) (any applications for an initial permit, renewal, or major modification must comply with the public participation requirements set out in this regulation. Permits for a "minor" modification are not required to comply with these public participation requirements, where the application meets the criteria for minor permit procedures as stated in 40 C.F.R. § 70.7(e)(2)(i)).

82. *Id.* (namely, providing notice via either newspaper of general circulation or website of all draft permits, including information relating to the facility activities and a description of the hearing and comment procedures available to the public. In addition, the permitting authority must provide at least 30 days for the public to provide comments and 30-day advance notice of any public hearing.).

83. 40 C.F.R. § 70.7(h)(5)–(6).

84. Other than the requirement that permitting agencies respond to public comments (discussed above), the regulations do not require agencies to incorporate those comments into their final decisions. Moreover, the response requirement does not specify that agencies must modify or deny permits based on citizen input.

85. *See e.g.*, U.S. ENV'T PROT. AGENCY, *Public Participation Guide: Process Planning* (Sep. 12, 2025) https://www.epa.gov/international-cooperation/public-participation-guide-process-planning#step3 [https://perma.cc/4VX8-32X2] (framing meaningful public participation practices as recommended approaches, rather than obligations).

86. *Id.*

87. *Id.* The EPA's framework for categorizing levels of public participation parallels aspects of Arnstein's citizen participation ladder. Unlike Arnstein, however, who distinguishes between genuine participation and lower levels of engagement characterized as "nonparticipation" and "degrees of tokenism," the EPA appears to classify each level as a form of public participation. This distinction illustrates the potential gap between nominal opportunities for participation and meaningful community influence. *See* Arnstein, *supra* note 44, at 217.

periods.[88] This guidance appears misleading. None of the above-mentioned permitting statutes or regulations delineate when or how the "empower" stage, when community input would require the agency to defer decision-making authority to the community, should occur.[89] EPA training materials—seemingly designed for agency decision-makers—explicitly differentiate between public relations and information programs and the public participation process.[90] Yet the EPA's public participation spectrum includes forms of engagement that more closely resemble public relations, suggesting that in some contexts, the agency treats "participation" as information outreach, rather than meaningful involvement in decision-making.[91] This gap between guidance and legal obligation suggests that, in practice, federal permitting law often treats participation less as a constraint on agency decision-making than as a structured channel for information exchange.

Judicial review reinforces this gap between procedural form and substantive effect. Federal courts apply the arbitrary and capricious standard to environmental permit approvals through final agency decisions.[92] This standard of review affords

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88. SHEILA R. FOSTER, *Public Participation*, *in* THE LAW OF ENVIRONMENTAL JUSTICE: THEORIES AND PROCEDURES TO ADDRESS DISPROPORTIONATE RISKS 229 (Michael B. Gerrard & Sheila R. Foster eds., ABA 2d ed. 2008) (where Table 1 outlines the EPA's public participation spectrum, stating that the "consult/info exchange" level of participation is guided by questions of "Are you required or willing to ask the public for data/information regarding the program . . . . Can the information be considered and used to inform decisions?").

89. While the EPA public participation modules include the "empower" stage, which signifies that the EPA intends to "give decision-making authority to the public," there are no requirements for this form of decision-making methodology under CWA, CAA, or RCRA. There is also no indication that permitting agencies are encouraged or required to engage stakeholders in a manner that seeks to use consensus to identify a solution as provided by the EPA's public participation level 4: collaborate. *See* U.S. ENV'T PROT. AGENCY, *Public Participation Guide: Process Planning*, *supra* note 85.

90. U.S. ENV'T PROT. AGENCY, MODULE 1: INTRODUCTION TO MEANINGFUL PUBLIC PARTICIPATION PARTICIPANT WORKBOOK 3 (2018), https://www.epa.gov/sites/default/files/2018-01/documents/module_1_workbook.pdf [https://perma.cc/3TDJ-CV3J] (finding that public relations and public information programs are meant to "explain why a decision was made" and public participation processes are "designed for public input to actually matter.").

91. *See, e.g.*, OFF. OF SOLID WASTE & EMERGENCY RESPONSE, U.S. EPA, PUBLIC INVOLVEMENT IN ENVIRONMENTAL PERMITS: A REFERENCE GUIDE 42–58 (2000) (breaking down public participation activities into two categories: dissemination information and gathering and exchanging information, where the gather and exchange category only states that this period allows citizens to "have their comments *incorporated into the formal public record*," not into the final decision) (emphasis added).

92. *See, e.g.*, Sierra Club v. Johnson, 436 F.3d 1269, 1273 (11th Cir. 2006) (determining that the Clean Air Act provides no independent standard of review and applying the APA's arbitrary and capricious standard to an EPA decision on a state permit); Bering Strait

administrative permitting agencies "substantive deference" with respect to their decisions, encompassing the degree of discussion allocated to each issue and the sufficiency of data necessary to address it.[93]

Courts generally ask whether the agency considered the relevant comments and adequately explained its decision—not whether public participation meaningfully changed the agency's ultimate judgment.[94] The APA does not require public input to be incorporated into final permitting decisions.[95] Instead, cases like *Alabama ex rel. Siegelman v. U.S. EPA* indicate that federal courts read these statutes to require only minimal public participation procedure.[96] The absence of statutory requirements to incorporate input, compounded by permissive judicial deference, prevents communities from accessing the courts.

In instances where communities have successfully sought judicial relief, and the court affirmed the importance of integrating public participation into substantive outcomes, state law has governed. *Friends of Buckingham v. State Air Pollution Control Board*, for example, demonstrates the impact that public

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Citizens for Responsible Res. Dev. v. U.S. Army Corps, 524 F.3d 938, 949 (9th Cir. 2008) (applying the arbitrary and capricious standard to a Clean Water Act permit approval).

93. Sierra Club v. Van Antwerp, 526 F.3d 1353, 1361–63 (11th Cir. 2008) (holding that CWA claims must be viewed through "the deferential lens of the APA").

94. *See* Baltimore Gas & Elec. Co. v. NRDC, 462 U.S. 87, 105 (1983) (finding that in reviewing a licensing decision, the court's only task is to determine whether the decisionmaker considered the relevant factors and articulated a rational connection between the facts found and the agency's decision).

95. Amy J. Schulz et al., *Procedural Justice in Environmental Decision Making: An Analysis of Public Participation Language in State Level Cumulative Impact Legislation*, 18 ENV'T JUSTICE 412, 417 (2025) (APA does not require regulatory agencies to incorporate public input into decisions or provide an explanation for not doing so; thus "while procedures require that the public be informed about, and have opportunity to comment on, proposed decisions, mechanisms have not been established to assure that regulatory agencies integrate those comments into final decisions."). Importantly, EPA regulations require permitting authorities to provide written responses to significant comments but do not require agencies to incorporate that input into final decisions. *See, e.g.*, 40 C.F.R. § 70.7(h)(6) (mandating response to significant comments without requiring agencies to adopt or act upon the concerns raised).

96. *See generally* Alabama *ex rel.* Siegelman v. U.S. Env't Prot. Agency, 911 F.2d 499 (11th Cir. 1990) (rejecting petitioners' contention that the EPA failed to provide a meaningful opportunity for the public to participate in the permitting process because the EPA provided copies of relevant documents at the local public library, county probate judges' office, and the company trailer at the applicant's facility; provided a 17-page fact sheet to anyone who requested it; held a "public question and answer session," and public hearing; and left open the comment period for 86 days. The court did not acknowledge whether the EPA considered the comments received, instead finding that the aforementioned were enough to satisfy a "meaningful opportunity for public participation.").

participation could have when a community is successful *despite* "the absence of federal statutory protections against environmental justice and environmental racism."[97] There, the Fourth Circuit vacated a decision allowing the siting of a compressor station in Union Hill, Virginia, a predominantly Black community settled by formerly enslaved people in the late 1800s.[98] The court cited more than 5,300 comments received in the 40-day public comment period, and found that "environmental justice is not merely a box to be checked."[99] The court then rejected the environmental board's analysis of the character and degree of injury to the health of community residents and vacated the permit.[100] However, the court based this holding on a Virginia statute requiring the state permitting authority to consider facts and circumstances relating to the proposed activity's reasonableness, including the character and degree of harm caused to safety and health, when approving permits.[101] In addition, Virginia's energy policy requires the permitting authority to consider disproportionate impacts on minority and low-income communities.[102] The court concluded that this state permitting scheme required the permitting authority to consider EJ concerns in the decision-making process for this facility.[103] Yet even here, the court did not deny the permit outright; instead, the court remanded to the permitting authority to demonstrate whether the facility would still be suitable in Union Hill "in light of EJ and potential health risks."[104] The permitting process involved both the CAA and the Virginia regulatory scheme, yet only the Virginia law required a substantive change in the decision-making process. Without stronger underlying state law, an applicant will satisfy statutory requirements for permit approval if it engages in bare requirements of informing the public and holding a hearing.

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97. Friends of Buckingham v. State Air Pollution Control Bd., 947 F.3d 68, 92 (4th Cir. 2020). For further commentary on the case, see Regina Paparo, *Not a Box to be Checked: Environmental Justice and* Friends of Buckingham v. State Air Pollution Control Board (4th Cir. 2020), 45 HARV. ENV'T L. REV. 219, 223 (2021).

98. Paparo, *supra* note 97, at 220.

99. *Friends of Buckingham*, 947 F.3d at 92.

100. *Id.*

101. *Id.* at 86.

102. Friends of Buckingham v. State Air Pollution Control Bd., 947 F.3d 68, 87 (4th Cir. 2020).

103. *Id.*

104. *Id.* at 93.

These procedural shortcomings are exacerbated by the executive branch's historically discretionary engagement in environmental policymaking. The federal government first addressed environmental justice under the Clinton Administration, where President Clinton issued Executive Order 12898 (the "Clinton EO"), emphasizing the need to increase consideration of EJ in public participation processes.[105] Following the Clinton EO,[106] the EPA updated its guidance on public involvement, highlighting the importance of reviewing public input, actually using the information provided, and offering feedback to the public.[107] This guidance suggested that administrators and decision makers should gather and analyze public viewpoints and "carefully consider this input when making decisions."[108] This EPA guidance was superseded in 2024, with detailed updated guidance focused on identifying the expected level of participation and complementary engagement tools for each level."[109] Yet this more expansive approach was short-lived. The second Trump Administration quickly revoked the Clinton EO and all guidance on meaningful engagement has been removed from the EPA website, creating uncertainty as to how the agency will move forward.[110] The result is a federal environmental

105. Foster, *supra* note 88, at 233.

106. Exec. Order No. 12898, 3 C.F.R. 859 (1995) (calling for federal agencies to identify and address disproportionate environmental and health effects on minority and low-income communities, including for agencies to develop a strategy for implementing EJ), *reprinted as amended in* 42 U.S.C. § 4321 app. at 6111–13 (2024), *revoked by* Exec. Order No. 14173, 90 Fed. Reg. 8633 (Jan. 31, 2025).

107. Notice of New Public Involvement Policy, 68 Fed. Reg. 33946 (June 6, 2003) (archive) (delineating seven steps for public involvement: first, plan and budget for public involvement activities; second, identify the interested and affected public; third, consider providing technical or financial assistance to the public to facilitate involvement; fourth, provide information and outreach to the public; fifth, conduct public consultation and involvement activities; sixth, review and use input and provide feedback to the public; and seventh, evaluate public involvement activities).

108. *Id.*

109. U.S. ENV'T PROT. AGENCY, ACHIEVING HEALTH AND ENVIRONMENTAL PROTECTION THROUGH EPA'S MEANINGFUL ENGAGEMENT POLICY 5–8 (2024), https://www.epa.gov/system/files/documents/2024-09/achieving-health-and-environmental-protection-through-epas-meaningful-engagement-policy-august-2024.pdf [https://perma.cc/VQ7N-MD29].

110. *See generally* ANGELA C. JONES, CONG. RSCH. SERV., IF12922, TRUMP ADMINISTRATION ENVIRONMENTAL-JUSTICE-RELATED EXECUTIVE ORDERS: POTENTIAL IMPLICATIONS FOR EPA PROGRAMS (2025), https://www.congress.gov/crs-product/IF12922 [https://perma.cc/43SM-U4E6] (outlining EPA EJ programs and activities that may be impacted by three of President Trump's EOs addressing EJ). *See also* Kristie Ellickson, *The Trump Administration Is Waging an Attack on Environmental Health and Fair Representation*, UNION OF CONCERNED SCIENTISTS: THE EQUATION (Feb. 19, 2025), https://blog.ucs.org/kellickson/the-trump-administration-is-waging-an-attack-on-

permitting framework that remains perpetually vulnerable to executive will, offering affected communities procedural gestures rather than enforceable rights, and leaving meaningful participation contingent on the political priorities of whichever administration holds power.

II. LIMITATIONS IN FEDERAL REQUIREMENTS

A. FEDERAL GOVERNMENT IN FLUX: WHAT TO EXPECT?

This vulnerability is not merely a product of the current political moment—it is structural, rooted in the federal government's continued reliance on executive action and agency regulation, rather than durable statutory mandates, to advance environmental justice. In a time of great political polarization, environmental regulation and, particularly, environmental justice are at great risk.[111] Beyond the limited nature of federal requirements for public participation, changing administrations have made federal environmental regulation and enforcement unpredictable.[112]

During the Biden Administration, scholars predicted that industrial actors and government agencies would need to plan for an increased focus on environmental justice, including in agencies' permitting considerations and public engagement.[113] This call

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environmental-health-and-fair-representation/ [https://perma.cc/R4PR-FAWH] (describing the Trump Administration's actions against EJ, including rescinding prior EOs by Presidents Clinton and Biden addressing EJ, terminating federal employees working in the EPA Office of Environmental Justice, freezing grant funding, and taking down federal webpages on EJ).

111. Don Grant et al., *The Long Shadow of Partisan Hostility: How Affective Polarization Hinders Democracies' Ability to Mitigate Climate Change*, 91 AMER. SOCIOLOGICAL REV. 19, 41 (2026) (concluding that there is a positive correlation between political polarization and partisan hostility and increased carbon dioxide emissions from power plants); *Tracking the Damages of Regulatory Rollbacks*, INST. FOR POL'Y INTEGRITY, https://policyintegrity.org/tracking-regulatory-rollbacks [https://perma.cc/W26Q-DENG] (last updated Apr. 20, 2026) (calculating the economic losses and health consequences associated with the second Trump Administration's environmental deregulation).

112. MICHAEL E. KRAFT, ENVIRONMENTAL POLICY AND POLITICS 84 (8th ed., Routledge 2022) (outlining how changes in political climate have led to environmental policy shifting with changing administrations, including the anti-environmental deregulation movement during the Reagan Administration, the Obama Administration's drastic shift from the preceding Bush Administration, and the Trump Administration's strong moves towards deregulatory policies in his first term).

113. Lauren Bachtel et al., *Navigating Environmental Justice Issues in Federal Permitting*, 36 NAT. RES. & ENV'T, Fall 2021, at 4 (outlining the ways in which industry actors should engage in early action to keep up with evolving EJ policy).

came following a variety of EJ-centered actions, including Executive Order 14008 Tackling the Climate Crisis at Home and Abroad, which simultaneously (1) established an Environmental Justice Interagency Council, (2) stated that agencies must make EJ part of their missions, and (3) issued directives to specific agencies, including the EPA.[114] In October 2024, the National Environmental Justice Advisory Council called on then-EPA Administrator Michael Regan to implement cumulative impact assessments to inform regulatory decision-making, particularly in overburdened communities.[115] The Council concluded that "no one is exposed to pollution in the way it is regulated," because the regulation does not consider the lived experience of communities

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114. Exec. Order No. 14008, 3 C.F.R. 477 (2022), *reprinted as amended in* 42 U.S.C. § 4321 app. at 6124–30 (2024), *revoked by* Exec. Order No. 14148, 90 Fed. Reg. 8238 (Jan. 28, 2025). In its relevant provisions, Executive Order 14008 read:

> Sec. 219 . *Policy*. To secure an equitable economic future, the United States must ensure that environmental and economic justice are key considerations in how we govern. That means investing and building a clean energy economy that creates well-paying union jobs, turning disadvantaged communities—historically marginalized and overburdened—into healthy, thriving communities, and undertaking robust actions to mitigate climate change while preparing for the impacts of climate change across rural, urban, and Tribal areas. Agencies shall make achieving environmental justice part of their missions by developing programs, policies, and activities to address the disproportionately high and adverse human health, environmental, climate-related and other cumulative impacts on disadvantaged communities, as well as the accompanying economic challenges of such impacts. It is therefore the policy of my Administration to secure environmental justice and spur economic opportunity for disadvantaged communities that have been historically marginalized and overburdened by pollution and underinvestment in housing, transportation, water and wastewater infrastructure, and health care.
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> Sec. 220 . *White House Environmental Justice Interagency Council*. (a) Section 1-102 of Executive Order 12898 of February 11, 1994 (Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations), is hereby amended to read as follows:
>
> > "(a) There is hereby created within the Executive Office of the President a White House Environmental Justice Interagency Council (Interagency Council). The Chair of the Council on Environmental Quality shall serve as Chair of the Interagency Council.
> >
> > . . . .
> >
> > "(d) Mission and Work. The Interagency Council shall develop a strategy to address current and historic environmental injustice by consulting with the White House Environmental Justice Advisory Council and with local environmental justice leaders. The Interagency Council shall also develop clear performance metrics to ensure accountability, and publish an annual public performance scorecard on its implementation."

115. NAT'L ENV'T JUST. ADVISORY COUNCIL, REDUCING CUMULATIVE AND DISPROPORTIONATE IMPACTS AND BURDENS IN ENVIRONMENTAL JUSTICE COMMUNITIES 1 (2024).

in analyses and assessments informing decisions.[116] No EPA regulations were promulgated in response to this call to action.

Instead, only months later, the incoming Trump Administration rescinded the initial Clinton EJ Executive Order addressing disproportionate impacts on minority and low-income populations, closed EPA regional EJ offices, and revoked all other EJ policies and guidance.[117] These actions follow a similar pattern during the first Trump Administration: increased efforts to diminish or eliminate environmental enforcement through weakened regulations.[118] As noted above, EPA regulations govern the majority of federal public participation requirements in permit decisions and siting.[119] During the first few months of the second Trump Administration, the executive branch implemented a deregulation initiative, requiring all regulations to be reviewed for their consistency with the Trump Administration's policy.[120] Environmental organizations fear that "hollow[ing] out federal agencies" will strip the EPA of "its power to regulate and protect against environmental harms."[121] This threat to administrative regulations could have a significant impact on permit and siting processes.[122]

This is not the first time federal environmental laws have come under attack. The United States experienced similar deregulation during the Reagan Administration, where President Reagan

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116. *Id.*

117. Exec. Order No. 14173, Ending Illegal Discrimination and Restoring Merit-Based Opportunity, 90 Fed. Reg. 8633 (Jan. 31, 2025); *see also* Keith Rushing, *Trump Guts Environmental Justice Policies, but the Fight for Justice Continues*, EARTHJUSTICE (Mar. 14, 2025), https://earthjustice.org/article/trump-guts-environmental-justice-policies-but-the-fight-for-justice-continues [https://perma.cc/VSP6-AW79].

118. David J. Hayes, *The Vanishing Federal Role in Enforcing Our Environmental Laws*, THE REGUL. REV. (Oct. 12, 2020), https://www.theregreview.org/2020/10/12/hayes-vanishing-federal-role-enforcing-environmental-laws/ [https://perma.cc/N33F-69V7] (detailing the first Trump Administration's decrease in environmental inspections and cases while simultaneously attacking various environmental regulations).

119. See *supra* Part I.C and accompanying discussion. *See also* Glasgow, *supra* note 48, at 78.

120. Exec. Order No. 14215, 90 Fed. Reg. 10447 (Feb. 24, 2025); *Fact Sheet: President Donald J. Trump Reins in Government Overreach and Begins Deconstruction of Unconstitutional Administrative State*, THE WHITE HOUSE (Feb. 19, 2025), https://www.whitehouse.gov/fact-sheets/2025/02/fact-sheet-president-donald-j-trump-reins-in-government-overreach-and-begins-deconstruction-of-unconstitutional-administrative-state/ [https://perma.cc/L7WP-2ZRB].

121. Matthew Tejada, *Environmental Justice at Risk Under Project 2025*, NRDC (Nov. 20, 2024), https://www.nrdc.org/bio/matthew-tejada/environmental-justice-risk-under-project-2025 [https://perma.cc/68F2-V825].

122. *See supra* Part I.C (describing baseline federal public participation requirements).

sought to reduce environmental enforcement through his executive power.[123] The unreliability of federal environmental enforcement,[124] and the particular instability of regulation, suggests that EJ communities face not only the direct consequences of dismantled federal EJ protections, but also a deeper, structural inability to depend on federal regulation as a meaningful safeguard for their interests.

B. ENVIRONMENTAL JUSTICE CRITIQUES

Industrialization consistently encroaches on EJ communities around the United States, permeating the places these communities live and work.[125] EJ communities often shoulder environmental burdens with little or no means of influencing siting decisions.[126] Federal courts have identified that Congress intended for public participation rules to be more than "lip service," yet the threshold required for significant comments to become material, and thus require agency response, is high.[127] Structural barriers to public input further limit communities' power to combat siting.

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123. *See generally* Philip Weinberg, *Masquerade for Privilege: Deregulation Undermining Environmental Protection*, 45 WASH. & LEE L. REV. 1321 (1988) (outlining the Reagan Administration's methods of deregulation, including cutting budgets and enforcement capacity, requiring cost-benefit analysis for regulations, adding OMB oversight of environmental rules, delaying or refusing to issue required regulations, weakening existing standards, and promoting market-based alternatives instead of regulatory limits).

124. *See* Citizens Against Ruining the Env't v. Env't Prot. Agency, 535 F.3d 670, 678 (7th Cir. 2008) (finding that the EPA has broad enforcement authority for noncompliance, with agency discretion to refrain from extensive fact-finding during permitting processes); *see also* N.Y. Pub. Int. Rsch. Grp. v. Whitman, 321 F.3d 316, 331 (2d Cir. 2003) (finding that the EPA's decision not to invoke an enforcement mechanism is not generally subject to review under the APA). Given that enforcement is driven by the executive branch, this leaves open the possibility for profound variations in EPA enforcement based on presidential policy.

125. Kaswan, *supra* note 33, at 1034 (the disproportionate siting of undesirable land uses in communities of color and low-income communities is common in the industrial United States).

126. *See, e.g.*, Cannon, *supra* note 33, at 297–300 (finding that in a case study of Kettleman City, California—where 97.1 percent of residents self-identified as Hispanic or Latinx—residents did not learn that an oilfield waste disposal was being converted to a hazardous waste disposal landfill until five years after its expansion, despite industry actors meeting the legal requirements for public notice).

127. *See, e.g.*, Adams v. U.S. Env't Prot. Agency, 38 F.3d 43, 51–52 (1st Cir. 1994) (despite stating that "imposing a scientific and legal burden on general members of the public" would cut off a participant's ability to challenge a final permit, the court held that the EPA acted arbitrarily and capriciously for not responding to a public comment that referenced the Water Quality Act of 1987 that challenged the design and location of the discharge point, accuracy of the information presented by the engineers, and related calculations).

Federal courts apply "strict rules of procedural default" to EPA permit approvals such that the EPA must only consider and respond to those public comments which are raised during the public participation process.[128] Yet the process itself is often inaccessible to the public. Even where public participation opportunities exist, low-income communities and communities of color often encounter structural obstacles—including late-stage solicitation, highly technical agency documents, language barriers, and lack of expert resources—that render such participation largely illusory.[129] It is difficult to imagine how communities are meant to effectively challenge permits when they are unable to adequately raise concerns in public comment, and thus are barred from the courts.[130]

The lack of requirements or guidelines for integrating information gleaned from participatory processes into the decision-making process further entrenches this issue. Unless public participation has an *effect* on the decision, the participatory model will not achieve its intended purpose.[131] Instead, rather than creating societal benefits, the "promise" of public participation

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128. City of Taunton v. U.S. Env't Prot. Agency, 895 F.3d 120, 132 (1st Cir. 2018) (rejecting plaintiff's claims that were proffered for the first time during the administrative appeal stage).

129. *See, e.g.*, Natalie R. Sampson et al., *Improving Public Participation to Achieve Environmental Justice: Applying Lessons from Freight's Frontline Communities*, 7 ENV'T JUST. 45, 51 (2014) (empirical study concluding that participants in the public participation process cited concerns of inaccessibility due to highly technical information and uncertainty regarding procedures; inadequate, and sometimes discriminatory processes where participation was solicited too late into the decision process or to counter private interests; and community members and leaders needing to address their concerns with minimal or no agency support); Kaswan, *supra* note 33, at 1131–32 (poor communities and communities of color may face greater obstacles to participation because they receive less notice due to unfamiliarity with the administrative process and mail notice, which is generally only required for landowners and not renters; difficulty responding to highly technical agency documents where there are less educational resources; language barriers; and fewer financial resources to hire experts to assist in the process).

130. Under the doctrine of procedural default, federal courts will not consider challenges to permit decisions that were not first raised during the administrative comment period. Communities that face structural barriers to meaningful participation are therefore not only shut out of the agency process but foreclosed from judicial relief as well. *See City of Taunton*, 895 F.3d at 131–32.

131. Marc B. Mihaly, *Citizen Participation in the Making of Environmental Decisions: Evolving Obstacles and Potential Solutions Through Partnership with Experts and Agents*, 27 PACE ENV'T L. REV. 151, 164–66 (2009) (when participation alters the substantive outcome or underlying process, society will benefit through, for example, improved decision-making with more accurate information, informing decision-makers of the significance of stakeholder concerns, providing a vehicle for public policy advocacy, giving legitimacy to the governmental process, and countering corruption).

tends to leave in place social and power dynamics that serve to reinforce the constraints of our society.[132] Those same underlying systemic failures that have led to distributional environmental equities play out in the interactions between EJ communities and powerful industry representatives and permitting authorities.[133] These actors are not neutral parties; scholars find that the way in which these actors design public participation processes exacerbate inequities and quash public voices.[134] Current federal law does nothing to subvert this power structure, and thus, does not serve the EJ movement nor affected communities.[135] In 1991, the First National People of Color Environmental Leadership Summit adopted the overarching principles that have defined the EJ movement.[136] Critically, the EJ movement calls for communities who suffer the harms of a given decision to have an equal role in making said decision.[137] Effective public participation processes can move the needle through adequately informing the public about the issues at hand; creating collaborative environments for government, industry, and communities to resolve problems and identify alternatives together; and being transparent about how permitting authorities will use communities' input in the final decision.[138]

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132. LUKE W. COLE & SHEILA R. FOSTER, *Processes of Struggle: Grassroots Resistance and the Structure of Environmental Decision Making*, *in* FROM THE GROUND UP: ENVIRONMENTAL RACISM AND THE RISE OF THE ENVIRONMENTAL JUSTICE MOVEMENT 103, 104–05 (New York University Press 2001).

133. *Id.* (describing how public participation processes are part of a broader social structure, where the social status of EJ communities makes them vulnerable to more powerful players—like state permitting authorities or industry representatives—in environmental permitting decisions).

134. Jill K. Clark, *Designing Public Participation: Managing Problem Settings and Social Equity*, 78 PUB. ADMIN. REV. 362, 363 (2017) (describing how engagement efforts stem from motivations of the institutions that structure them, who emphasize efficiency over empowerment and use outdated engagement methods that create barriers for communities).

135. *See, e.g.*, Kaswan, *supra* note 33, at 1129–31 (detailing that initial permit application reviews tend to involve only the permit applicant and permitting authority, without community input, and once the public participation process is initiated, there tends to be unequal opportunities for low-income and minority communities to contribute).

136. Delegates to the Nat'l People of Color Env't Leadership Summit, *Principles of Environmental Justice*, EJNET.ORG (Oct. 1991), https://www.ejnet.org/ej/principles.html [https://perma.cc/5FTV-BVMW] (last visited June 7, 2026) (including that EJ requires that public policy be free of discrimination or bias, affirming the fundamental rights to self-determination, and the "right to participate as equal partners at every level of decision-making").

137. COLE & FOSTER, *supra* note 132, at 106.

138. Neenah Estrella-Luna, *Public Participation in Environmental Decision-Making*, 22 DEL. L. 11, 12–14 (2004).

Rather than seeing public commentary and input integrated into decision-making in federal permitting law, regulatory decisions are "often buried among engineering analyses or modeling assumptions" that do not consider the lives at stake.[139] Rather than empowering communities to assess the impacts and claim an equal seat at the table, EPA public participation regulations orient the citizen "at the greatest distance from the issue."[140] While guidance has suggested how the EPA should inform their decisions equitably and integrate public participation, this is not a requirement. There is no guarantee that suggestive policies will have meaningful impacts on existing public engagement practices.[141]

Instead, scholars call for a rethinking of the underlying roles and power relationships between administrators and citizens.[142] Lawmakers must convert the hierarchy of control created through the administrator's control of public engagement processes to one of equal partnership, where citizens play an early role before any decisions are made.[143] This is where public participation in state permitting laws comes in: if public participation requirements at the state level are meaningful and effective such that they overcome these barriers, communities can protect themselves from harm before it arrives at their doorstep.

C. A GLIMPSE INTO WHAT COULD BE: NEW JERSEY CUMULATIVE IMPACT LAW

State and local governments can combat the unreliability and failures of federal environmental policy by enacting legislation that sits above the federal baseline.[144] Most states mirror federal

139. Skinner-Thompson, *supra* note 25, at 402.

140. King et al., *supra* note 43, at 320.

141. Minovi, *supra* note 39.

142. *See, e.g.*, King et al., *supra* note 43, at 320 (imploring that public participation be reframed as a more "authentic" form of participation where administrators work alongside citizens, rather than simply seeking input); *see also* Arnstein, *supra* note 44, at 217 (outlining the gradations of citizen participation and noting that citizen power in participatory processes arises where there is a redistribution of power).

143. King et al., *supra* note 43, at 320 (describing how within this "practitioner-client" hierarchy, the permitting authority or administrator is often in the role of the expert, with authority and technical knowledge that the community or "client" is unable to easily question; despite this separation from the public, the administrator is often presented as representative of the community).

144. Federal environmental statutes have a cooperative federalism structure, establishing minimum standards while allowing states to enact stricter pollution controls.

permitting regulations,[145] and often allow private companies to initiate permitting processes by applying with the state environmental agency after choosing the specific location.[146] Cumulative impact laws—addressing the combined burden of pollution and social stressors that EJ communities are subject to—have the potential to substantively impact site choice and permit decision-making based on the communities' existing burdens.[147]

It is not surprising that New Jersey was the first to develop a comprehensive cumulative impact permitting law with a trigger for mandatory permit denials, as it comes after decades of environmental racism that caused New Jersey's air quality to continuously rank "among the worst in the nation."[148] Through grassroots activism,[149] the EJ movement successfully pushed for cumulative impact legislation meant to correct the historical injustices of disproportionate siting of environmental and public health stressors in low-income communities and communities of color.[150] However, while New Jersey's newly enacted Environmental Justice law suggests the possible reach of new state legislation, it fails to adequately address the gaps that EJ communities have fought to close.

Union Elec. Co. v. Env't Prot. Agency, 427 U.S. 246, 247–48 (1976) (holding that states are not precluded from submitting an implementation plan that is more stringent than federal law demands under the Clean Air Act).

145. COLE & FOSTER, *supra* note 132, at 110–11 (finding that most states' requirements for waste facility permit processes are modeled after federal permitting regulations); Kaswan, *supra* note 33, at 1126–27 (outlining the general process for state permitting, where private entities are required to follow some form of state permitting processes that, with minor variation, includes some form of public notice requirement and an opportunity for participation through comment).

146. Foster, *supra* note 88, at 239 (all states require minimal public participation procedure, with public notice and a public comment period for written or oral comments).

147. *See* Ana Isabel Baptista et al., *A Resource Database of Cumulative Impacts Permitting Policies: Emerging Opportunities to Protect Environmental Justice Communities from Additional Burden*, 18 ENV'T JUST. 400, 408–09 (2025) (finding that cumulative impact permitting policies are a step towards realizing environmental injustice and "allow[ ] an opportunity to disrupt entrenched practices of unequal siting" depending on their scope, mandatory versus discretionary authority, and exceptions to the policy).

148. Peter Kizima IV, *Justice Delayed: New Jersey's Battle with Environmental Justice and a Call for the Feds to Follow Suit*, 48 SETON HALL J. LEGIS. & POL'Y 479, 480 (2024).

149. The environmental justice community in New Jersey fought for decades to integrate cumulative impacts into the permitting process. The fight began in the early 2000s, establishing the first dedicated grassroots committee to push for cumulative impact policy in 2008. Nicky Sheats et al., *They Said it Couldn't be Done: A Case Study of New Jersey's Landmark Environmental Justice Law (S. 232)*, 18 ENV'T JUST. 366, 368 (2025).

150. Press Release, N.J. Env't Just. All., New Jersey Releases Rules for Landmark Environmental Justice Law, (June 6, 2022), https://njeja.org/press-release-nj-ej-law-rules/ [https://perma.cc/3HA7-LH2S]; N.J. STAT. ANN. § 13:1D-157 (2020).

The New Jersey law primarily focuses on the potential impacts of concrete cumulative impact assessments in siting. The law targets facilities that could have negative environmental impacts on overburdened communities.[151] However, the legislature specified that the law is meant to provide overburdened communities with a "meaningful opportunity to participate in *any* decision" where a facility has the potential to increase stressors.[152]

Prior to submitting a permit application, if the applicant plans to operate such a facility in an identified overburdened community, the applicant must first draft an environmental justice impact statement ("EJIS") assessing the possible environmental and public health stressors associated with the proposed facility, including those stressors already experienced by the community due to existing conditions, and provide public participation opportunities similar to those required under federal law.[153] Yet, while the notice and hearing requirements align with federal regulations, the statute itself institutes a more fulsome process for addressing concerns, requiring industry actors to adequately notify communities and provide sufficient time and opportunity for written and oral comments.[154]

The implementing rules provide further leverage for integrating community input, as the New Jersey Department of Environmental Protection (DEP) must review both the EJIS and

151. N.J. STAT. ANN. § 13:1D-160 (2020).

152. N.J. STAT. ANN. § 13:1D-157 (2020) (emphasis added).

153. N.J. STAT. ANN. § 13:1D-160 (2020).

154. *Compare* Environmental Justice Law N.J. STAT. ANN. § 13:1D-160 (2020) (requiring the permit applicant to organize and conduct the public hearing in the overburdened community itself; to publish notice of the hearing at least 60 days in advance in at least two newspapers circulating within the community, including a local non-English language newspaper where applicable; to provide the notice to the department, which must publish it on its website and in its statutory monthly bulletin; to send the notice to the municipality's governing body and clerk and invite the municipality to participate; to present clear, accurate, and complete information about the facility and its potential stressors at the hearing; to accept both written and oral comments from any interested party and provide an opportunity for meaningful public participation; and to transcribe the hearing and submit the transcript and written comments to the department within 10 days), *with* Clean Air Act 42 U.S.C. § 7661a(b)(6) ("The Administrator shall promulgate . . . regulations that establish the minimum elements of a permit program . . . [including procedures] for public notice, including offering an opportunity for public comment and a hearing . . . ."), and Resource Conservation and Recovery Act 42 U.S.C. § 6974(b)(2) ("The Administrator must publish notice of agency's intention to issue a permit in major local newspapers and broadcast over local radio, provide written notice to local government of intention to issue, and provide an informal hearing if the Administrator receives written notice of opposition . . . .").

public testimony to determine if a permit denial is required.[155] Based on this input, and any other relevant information, DEP is required to deny a permit for a proposed new facility where approval would "cause or contribute to adverse cumulative environmental or public health stressors in the overburdened community that are higher than those borne by other communities within the State."[156] Whereas federal law requires only that the department *consider* public comments received, the New Jersey law *obligates* the department to reject a permit for a new facility where community comments and the EJIS demonstrate this facility would contribute to additional cumulative stressors.[157] This has the potential to transition public participation from one of passive consideration to active decision-making by using public comments to deny permits.

The New Jersey legislature, however, provided a backdoor for new facilities: DEP may still issue a new facility permit where the facility will "serve a compelling public interest" in the community.[158] The NJ administrative code defines "compelling public interest" as a demonstration by the proposed facility to serve an essential environmental, health, or safety need to the community, where the facility is necessary to serve such need, and there are no other means reasonably available outside the community to meet such need.[159]

Despite clear language signaling the necessity of public participation in initial DEP permit decisions, this exception has no public participation requirements.[160] In contrast, DEP may consider public comments only if "there is a significant degree of public interest in favor or against an application."[161] This

155. N.J. STAT. ANN. § 13:1D-160(c) (2020).

156. *Id.*

157. *Compare* N.J. STAT. ANN. § 13:1D-160 (2020) (DEP *shall* review the public hearing transcript, all public comments, and the environmental justice impact statement to determine if the facility will create an unavoidable disproportionate impact and *must* deny the proposed permit if it will cause or contribute to adverse cumulative impacts), *with* 42 U.S.C.A. § 6974 (before issuing a RCRA permit, the Administrator shall make public notice of intent to issue the permit and hold an informal hearing if the Administrator receives written notice of opposition—there is no language delineating how the Administrator must utilize or consider public comment).

158. N.J. STAT. ANN. § 13:1D-160 (2020).

159. N.J. ADMIN. CODE § 7:1C-1.5 (2023).

160. N.J. ADMIN. CODE § 7:1C-5.3 (2023) (where consideration of public input is optional, not mandatory).

161. *Id.* ("(d) The Department *may* consider, as relevant, public input as to whether a compelling public interest is demonstrated if there is a significant degree of public interest

language has the potential to subvert the effectiveness of public participation, as DEP is not required to consider public comments before determining the compelling public interest standard is satisfied.[162] The structure of this decision-making, where the permit applicant and DEP analyze and decide what is in the interest of a community, without providing, at minimum, a requirement that DEP integrate community input for a compelling public interest, directly contradicts EJ principles that the community "speak for [it]self."[163]

The statute creates a distinction between new and existing facilities that further limits its potential. When existing facilities apply for an expansion of an existing facility or renewal for the existing facility's major source permit, the department *may* apply conditions to the permit after evaluating public input and the EJIS.[164] This permissive language signifies that DEP will not reject any permit renewals or expansions but will simply impose further conditions upon that facility. This mirrors the presumption in federal permitting processes that agencies will approve permits if they meet application requirements.[165] The statute's leniency for existing facilities is a significant structural

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in favor of or against an application from individuals residing in the overburdened community. In addition to any other public comment provided pursuant to this chapter, the Department may seek input from the public whenever it determines such comments may clarify whether the compelling public interest standard is met.") (emphasis added).

162. *Id.*

163. Delegates to the Nat'l People of Color Env't Leadership Summit, *supra* note 136 ("The Principles of Working Together reaffirm that as people of color we speak for ourselves. We have not chosen our struggle, we work together to overcome our common barriers, and resist our common foes.").

164. N.J. STAT. ANN. § 13:1D-160 (2020).

165. *Compare id.* ("the department *may*, after review of the environmental justice impact statement prepared pursuant to paragraph (1) of subsection a. of this section and any other relevant information, including testimony and written comments received at the public hearing, apply conditions to a permit for the expansion of an existing facility, or the renewal of an existing facility's major source permit, concerning the construction and operation of the facility to protect public health, upon a finding that approval of a permit or permit renewal, as proposed, would, together with other environmental or public health stressors affecting the overburdened community, cause or contribute to adverse cumulative environmental or public health stressors in the overburdened community") (emphasis added), *with* Clean Water Act 33 U.S.C.A. § 1342(a) ("[T]he Administrator *may*, after opportunity for public hearing issue a permit for the discharge of any pollutant, or combination of pollutants . . . upon condition that such discharge will meet either (A) all applicable requirements under sections 1311, 1312, 1316, 1317, 1318, and 1343 of this title, or (B) prior to the taking of necessary implementing actions relating to all such requirements, such conditions as the Administrator determines are necessary to carry out the provisions of this chapter.") (emphasis added).

weakness because, as noted above, the majority of environmental pollution and harm derives from existing facilities.

The New Jersey Department of Environmental Protection has reviewed only one existing facility permit request requiring an EJ decision; the statute did not block its approval.[166] The NJDEP reviewed the application under Administrative Order No. 2021-25, which was issued to guide EJ reviews prior to the 2023 EJ rules.[167] In this case, an existing sewage facility requested an expansion for on-site emergency backup power generation, alleging this was needed to prevent the diversion of raw sewage into the Passaic River and Newark Bay in the event of a severe power outage.[168] DEP reviewed the public participation methodology and proposed project, and found that the host community was substantially overburdened and subject to adverse cumulative impacts, with five times greater density of permitted air pollution sites than geographic comparisons.[169] DEP finalized the EJ review for the proposed project by requiring avoidance and minimization measures, along with attaching special conditions to any future permits that would lead to a "net overall reduction in facility-wide emissions of air pollutants."[170]

Community members opposed this expansion—asserting that the Ironbound community, where the facility is located, is one of the very communities the EJ law was meant to protect.[171] The community has feared that an incoming state administration can easily lift the special conditions imposed on the company, leaving the community subject to greater environmental harm.[172] The department simply "recognize[d]" a joint community letter drafted by grassroots EJ organizations, but did not heed their call that the

166. *See generally* Passaic Valley Sewerage Commission, *Env't Justice Decision and Imposition of Special Conditions pursuant to Administrative Order No. 2021-25*, N.J. DEP'T OF ENV'T PROTECTION (July 18, 2024).

167. *Id.* at 1.

168. *Id.* at 2.

169. *Id.* at 7.

170. *Id.* at 12–13.

171. Steven Rodas, *Newark is 'Choked Daily' by Fumes and Doesn't Need 4th Power Plant, Mayor says*, NJ ADVANCE MEDIA (Feb. 20, 2025), https://www.nj.com/essex/2025/02/construction-can-start-on-power-plant-in-one-of-njs-most-polluted-cities-regulators-say.html [https://perma.cc/JX44-89CW] (quoting the EJ alliance in New Jersey, which stated that Ironbound is an EJ community under the New Jersey law and "has been continuously sacrificed for the sake of industry, capital, and economic gains").

172. *Id.* (finding that advocates worry about possible actions taken by future administrations).

approval of this project constitutes further discrimination against the Ironbound community.[173]

On its face, New Jersey's EJ law offered a chance to close the gap on the federal law's unreliability. Leaders in the New Jersey EJ movement initially cited this law as the end of "polluting industries . . . operat[ing] in obscurity and without [community] input."[174] The legislation and implementing rules, however, do not provide adequate mechanisms for realizing procedural justice, as community input is sidelined for possible compelling interest exceptions and existing facility permits. The primary concerns of EJ critiques are absent: there is no clear power redistribution that provides equal weight for EJ communities' input with industry's.[175] Thus, while these EJ laws may increase the number of community comments and general participation,[176] there is no mechanism for change. Procedural justice will remain out of reach if the input citizens provide in these fora are not integrated and ingrained in subsequent decision making.[177]

The implications of the law are still unclear. The effectiveness of this law will depend in part on communities' ability to put industrial actors on notice of the cumulative stressors they are experiencing, and largely on how the New Jersey DEP defines and analyzes "compelling public interest" when reviewing permit applications in EJ communities.[178] Even if DEP analyzes this

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173. Passaic Valley Sewerage Commission, *supra* note 166, at 12.

174. Press Release, New Jersey Environmental Justice Alliance, New Jersey Releases Rules for Landmark Environmental Justice Law (June 6, 2022), https://njeja.org/press-release-nj-ej-law-rules/ [https://perma.cc/3HA7-LH2S].

175. *See* Robert D. Bullard, *Environmental Justice in the 21st Century: Race Still Matters*, 49 PHYLON 3/4 151, 165–66 (2001) (arguing that "[u]nequal interests and power arrangements" in American society have produced disproportionate environmental burdens, leaving grassroots communities no choice but to "force their inclusion into the mainstream of public decision making"). *See also* Arnstein, *supra* note 44, at 216 (finding that a redistribution of citizen power in participation requires that those citizens who have been excluded from political and economic processes are "deliberately included in the future" and join in sharing the benefits of society).

176. *See supra* note 154 (outlining the more detailed notice procedures utilized in the NJ statute to target overburdened communities).

177. *See* Arnstein, *supra* note 44 at 216 (citizen participation is the "redistribution of power that enables the have-not citizens, presently excluded from the political and economic processes, to be deliberately included in the future"); Skinner-Thompson, *supra* note 25, at 402 (achieving environmental justice requires providing impacted communities with the ability to engage as equal partners in all levels of decision-making).

178. *EJ Rules Upheld, But Will They Stick?*, SIERRA CLUB N.J. CHAPTER (Mar. 2, 2026), https://www.sierraclub.org/new-jersey/blog/2026/03/ej-rules-upheld-will-they-stick#:~:text=The%20EJ%20Law%20and%20the,traction%20they%20expected%20to%20have [https://perma.cc/5L9K-MTGT] (establishing that members of the New Jersey EJ community worry

interest in favor of communities, the law ultimately lacks the follow through on community input needed to realize procedural justice.[179] In short, if community members are able to voice concerns about how they experience cumulative harm, but the permitting authority does not need to heed these warnings, the law is still not addressing the primary objectives of procedural justice.[180] Yet these shortcomings need not be disqualifying. The New Jersey statute provides a blueprint for EJ reform, both as a foundation for continued progress within the state and as a model to be used across the United States.

III. STATE LAW: CUMULATIVE IMPACT LEGISLATION

State cumulative impact legislation can offer what federal law does not: an enforceable, statutory mechanism for ensuring that community input shapes, rather than merely informing, facility siting decisions. Permitting agencies who follow bare procedure without substantive follow-through in public participation processes are not violating applicable federal law. Thus, a permit can, and likely will, be granted despite community opposition. New Jersey's cumulative impact law demonstrates the power that community voices can seize to alter permitting decisions. While New Jersey is the first state to enact legislation where the cumulative impacts on an overburdened community are determinative of a permit denial, several other states have since enacted similar cumulative impact legislation.[181]

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about how DEP will define and apply the compelling interest exception and also worry that DEP will not incorporate proposals from community comments, but instead take the applicant's recommendations).

179. *See supra* note 166 (where the New Jersey DEP approved a permit despite widespread community opposition and a history of environmental injustice in the area).

180. Ana Isabel Baptista et al., *A Resource Database of Cumulative Impacts Permitting Policies: Emerging Opportunities to Protect Environmental Justice Communities from Additional Burden*, 18 ENV'T JUST. 400, 409 (2025) (finding that the most critical provision in a cumulative impact statute is whether permit denials are obligatory or discretionary following a determination of cumulative burdens).

181. *See, e.g.*, MASS. GEN. LAWS ch. 164, § 69H (2025) (any determination made by the energy facilities siting board shall include findings that give due consideration to "any cumulative burdens on host communities and efforts must be taken to avoid or minimize, or, if impacts cannot be avoided or minimized, efforts to mitigate such burdens"); MINN. STAT. § 116.065(5)(b) (2023) ("the commissioner must deny a permit subject to this section for a facility in an environmental justice area if the cumulative impacts analysis determines that issuing the permit . . . would have a substantial adverse impact on the environment or health of the environmental justice area and its residents").

The rise in proposed legislation[182] offers an opportunity for states to move beyond bare requirements and implement statutes and regulations that actualize procedural justice for overburdened EJ communities. And yet, while new, more stringent statutes have been enacted, there is still a gap.[183] To be effective, states must move beyond the faults of New Jersey and implement clear participatory tools within this process.[184]

States do not need to reinvent the wheel. This Note proposes that, rather than develop a novel solution to public participation, states can integrate a proven participatory tool into cumulative impact legislation: community advisory groups.[185]

A. COMMUNITY ADVISORY GROUPS: UTILIZING EXISTING COMMUNITY INVOLVEMENT PROGRAMS AT SCALE

This Note largely draws from Professor Jonathan Skinner-Thompson's analysis that Community Advisory Groups (CAGs)

182. Schulz et al., *supra* note 95, at 414 (identifying 44 pieces of state cumulative impact legislation that addressed overburdened communities and enhanced public participation since 2024, with 30 that have been introduced but not passed).

183. New York, for example, recently enacted what some scholars believe is the "strongest environmental justice . . . law in the United States." Michael B. Gerrard & Edward McTiernan, *New York Adopts Nation's Strongest Environmental Justice Law*, N.Y. L.J., May 10, 2023, at 1. Going beyond the New Jersey statute, New York's EJ law prohibits approval of new or existing facility permits where there is an increased disproportionate burden on the community. N.Y. ENV'T CONSERV. LAW § 70-0118(3) (McKinney 2024) (requiring the NY department to deny a new permit where the facility will contribute "more than a de minimis amount of pollution" in the EJ community and deny a permit renewal for an existing facility where the facility would "significantly increase the existing disproportionate pollution."). While the New York statute appears, on its face, to be more stringent than that of New Jersey, final rulemaking is still in process, and it is unclear if the regulations will include additional details regarding the statute's nods towards public participation. *Proposed, Emergency, and Recently Adopted Regulations*, N.Y. DEP'T OF ENV'T CONSERV., https://dec.ny.gov/regulatory/regulations/proposed-emergency-recently-adopted-regulations [https://perma.cc/Y4AC-J6G5]; N.Y. ENV'T CONSERV. LAW § 48-0103 (McKinney 2024) (defining "meaningful involvement" in public participation to include citizen participation in decision-making, including "opportunities for two-way dialogue").

184. As noted above, the New Jersey statute's denial trigger is based largely on community comments and the EJ analysis provided by the industry actor. If the statute provided a more robust public participation scheme, this trigger would become an element of procedural justice. *See* Skinner-Thompson, *supra* note 25, at 438 ("[P]ublic participation is only meaningful (and fair) if the public has the capability to provide comments that agencies cannot ignore.").

185. Community Advisory Groups (CAGs) were developed by the EPA to include communities in cleanup decisions at hazardous waste sites through the Superfund process. *Community Advisory Groups: Partners in Decisions at Hazardous Waste Sites Case Studies*, U.S. EPA, https://www.epa.gov/superfund/community-advisory-groups-partners-decisions-hazardous-waste-sites-case-studies [https://perma.cc/PXG7-KB62] [hereinafter *Community Advisory Groups*].

offer a particularly apt model for procedural justice in environmental regulation,[186] where consensus-based community groups provide permitting authorities with recommendations for permit approval or denial. Expanding on Professor Skinner-Thompson's claim, this Note argues that state-level cumulative impact laws should integrate the CAG model to ensure that EJ communities have a clear role in the decision-making process to challenge permit decisions in their communities.

Congress created the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) and Superfund, the associated trust fund, to remediate and clean up abandoned and uncontrolled hazardous waste sites.[187] The first iteration of CERCLA suffered because the EPA struggled to gain community trust, so early community involvement in the cleanup process largely failed.[188] Congress responded to these deficiencies by requiring public participation procedures in the subsequent reauthorization of CERCLA.[189] This added requirement prompted the EPA to develop the CAG model.[190]

CAGs bring together diverse community members to exchange information, particularly regarding community needs and concerns relating to the decision-making process.[191] Groups

186. *See generally* Skinner-Thompson, *supra* note 25 (theorizing that EJ communities can meaningfully influence environmental regulation).

187. *Superfund*, NAT'L GEO. (Nov. 24, 2025), https://education.nationalgeographic.org/resource/superfund/ [https://perma.cc/MUM4-7QHM]. The Love Canal site is a well-known Superfund site where over 21,000 tons of hazardous chemicals were abandoned in a landfill, which was later covered and the property converted into a school and residential area. Larry J. Zaragoza, *The Environmental Protection Agency's Use of Community Involvement to Engage Communities at Superfund Sites*, 16 INT'L J. ENV'T RES. & PUB. HEALTH, Oct. 29, 2019, at 1–2.

188. Zaragoza, *supra* note 187, at 2 (citing the failure to address impacts on EJ communities, failure to provide adequate information to communities, and prioritizing communities with adequate resources for legal support, among other deficiencies); *see also* Dorothy M. Daley, *Citizen Groups and Scientific Decisionmaking: Does Public Participation Influence Environmental Outcomes?*, 26 J. POL'Y ANALYSIS & MGMT. 349, 352 (2007) (explaining that the initial Superfund program was ripe with scandal and mismanagement, which pushed Congress to stipulate that the EPA must improve its community relations programs in the Superfund Amendments and Reauthorization Act).

189. Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C.A. § 9617 (requiring notice, public meeting, and opportunity for public comment, including that any final plan must be accompanied by a discussion of any significant changes to the proposed plan and response to significant comments and criticisms).

190. Daley, *supra* note 188, at 352 (noting that Congress' requirement for Community Involvement Plans fostered the creation of CAGs). *See generally* CMTY. INVOLVEMENT & OUTREACH CTR., U.S. ENV'T PROT. AGENCY, OSWER Directive 9230.0-28, GUIDANCE FOR COMMUNITY ADVISORY GROUPS AT SUPERFUND SITES 1 (1995).

191. *Community Advisory Groups*, *supra* note 185.

consist of a diverse set of community members, intended to represent all community stakeholder interests.[192] The EPA does not create or control these groups; instead, the EPA provides guidance, and sometimes technical support,[193] in furthering discussion.[194]

Permitting agencies engage in an ongoing dialogue facilitated by CAGs, where the communities located near the Superfund site provide recommendations and object to decisions of how to clean up the contaminated site.[195] The community involvement program focuses on informing the public living around a Superfund site of the environmental problems and risks, remedial responses, and ongoing progress; involving the public in the cleanup decision-making process; and identifying and resolving conflicts within the process.[196] The intention is that the group will provide recommendations, ideally with consensus, in the decision-making process, and if the EPA's decision or response differs from the CAG preference, the EPA must provide an explanation for that decision.[197] Through the combination of enhanced technical expertise using government grants, and real integration of community input into EPA decision-making, CAGs have been fairly successful in achieving procedural justice.[198]

The Superfund in Golden, Colorado provides an apt example. There, a research facility had conducted research on mining and processing metals and radioactive materials, draining waste into a drinking water source for nearby communities for nearly one

192. *Id.*

193. Community groups can also hire an independent technical advisor through the EPA's Technical Assistance Grants program, which enables the community to more effectively participate in the decision-making process. CMTY. INVOLVEMENT & OUTREACH CTR. (1995), *supra* note 190, at 1.

194. *Id.* at 2.

195. *See* Susan Charnley & Bruce Engelbert, *Evaluating Public Participation in Environmental Decision-Making: EPA's Superfund Community Involvement Program*, 77 J. ENV'T MGMT. 165, 167 (2005) ("The fundamental principle is that people who live and work near a site should know what EPA is doing to clean it up, and should have input into the cleanup decision-making process.").

196. *Id.* at 167.

197. CMTY. INVOLVEMENT & OUTREACH CTR. (1995), *supra* note 190, at 3 (acknowledging that EPA must still retain final decision-making authority by law).

198. Daley, *supra* note 188, at 362 (when CAGs are present, EPA takes more stringent, health protective remedial actions at Superfund sites); Zaragoza, *supra* note 187, at 9 (CAGs provide communities with robust technical and administrative support that allow them to participate in site-related decisions).

hundred years.[199] When the EPA began seeking a remedy for disposing of the associated waste pile, it acknowledged that community acceptance of the remedy was important for moving forward.[200] The "potentially responsible party"[201] proposed an initial remedy and attempted to form the first community working group by hiring a third-party organization.[202] Through early community involvement, the EPA screened out these initial remedial alternatives "that the community simply would not accept" and developed a consensus on site remedy through regular communication between the EPA and the CAG.[203] Rather than engaging in simple procedure, the EPA did not accept any possible remedy if there was not community support.[204] This delineation of the CAG's role in the decision-making process—where community acceptance was required for an EPA decision—demonstrates the power that the CAG model can give communities.[205]

This success is transferable to the cumulative impact context. This Note advocates for incorporating the Community Advisory Group model, including technical assistance grants, into proposed state cumulative impact statutes. By codifying this public participation tool in legislation rather than administrative rulemaking, the new statutes will require permitting authorities to seek public input through established CAGs in each EJ community. Because of its placement in a statute, the CAG model would eliminate barriers to judicial review that communities currently face,[206] thus providing a more effective remedy to communities seeking to prevent facility siting. As with previous

199. CMTY. INVOLVEMENT & OUTREACH CTR., U.S. ENV'T PROT. AGENCY, OSWER Directive 9230.0-75, COMMUNITY ADVISORY GROUPS: PARTNERS IN DECISIONS AT HAZARDOUS WASTE SITES 36 (1996).

200. *Id.* at 37.

201. This is a term used by the EPA to denote those entities that are responsible for the contamination event in the community and are involved in the Superfund cleanup process. *Finding Potentially Responsible Parties (PRP)*, U.S. ENV'T PROT. AGENCY (Apr. 3, 2026), https://www.epa.gov/enforcement/finding-potentially-responsible-parties-prp [https://perma.cc/K2BB-8UXY].

202. CMTY. INVOLVEMENT & OUTREACH CTR. (1996), *supra* note 199, at 37, 39.

203. *Id.* at 40.

204. *Id.*

205. *Id.* at 41 (community members found that the CAG process allowed for two-way communication because the EPA listened to concerns, answered questions, and responded to community input in site decisions to ultimately create a "win-win solution").

206. *See* Skinner-Thompson, *supra* note 25, at 413 ("[P]rinciples of administrative law place the burden on the public to raise issues with reasonable specificity before they may challenge an agency action. This can function as a structural barrier to judicial review—especially for communities that are under-resourced and over-burdened.").

calls for reform, the statute should ensure that the CAG has a key decision-making role,[207] particularly when identifying and analyzing whether the proposed facility activity will have a substantial adverse impact. Where Superfund has been criticized—for the disproportionate ineffectiveness of cleanup efforts in overburdened communities and the discriminatory implementation of remedial measures[208]—applying this to cumulative impact laws would directly counteract these impacts. Instead of disproportionate application of the law negatively impacting overburdened communities, the state laws will require CAGs in identified EJ communities to prevent further cumulative impacts.

B. POTENTIAL CHALLENGES

Implementing this proposal could create challenges in a state's permitting scheme, particularly undue costs and delays to implement, counter-democratic arguments, and federal preemption concerns. While some of these challenges remain unanswered, states can and should continue to push towards more effective public participation to protect their communities.

1. *Undue Costs and Delays*

Formalized CAGs in cumulative impact statutes may lead to backlash from industry actors fearful of slow and uncertain state permitting decision timelines.[209] This may derive from criticisms that Superfund CAGs have been increasing the costs of implementing policy and creating unduly time-consuming permitting processes.[210] Yet, while empirical studies have found

207. *See* Deeohn Ferris, *Communities of Color and Hazardous Waste Cleanup: Expanding Public Participation in the Federal Superfund Program*, 21 FORDHAM URB. L.J. 671, 682 (1994).

208. *Id.* at 673.

209. Industry actors are already showing frustration at the increased costs and delays associated with cumulative impact analyses (without strenuous public participation requirements) in the New Jersey statute. *See, e.g.*, *NJBIA Responds to Superior Court Decision on Lawsuit Challenging NJ's EJ Rulemaking*, INSIDER NJ (Jan. 5, 2026, at 12:28 ET), https://www.insidernj.com/press-release/njbia-responds-to-superior-court-decision-on-lawsuit-challenging-njs-ej-rulemaking/ [https://perma.cc/R5UY-RC4A] (NJBIA Deputy Chief Government Affairs Officer argues that the EJ rules will have a chilling effect on businesses, as businesses are uncertain of how long the regulatory permitting process will take).

210. Charnley & Engelbert, *supra* note 195, at 166.

that there is a correlation between the presence of CAGs at a Superfund site and longer construction times for cleanup, these studies also acknowledge that the correlation could be because these sites are more hazardous.[211]

In contrast, scholars have noted that properly imposed collaborative public participation schemes can have positive effects that reduce delays in the long run. Early and truly collaborative engagement can prevent administrative appeals and lawsuits that contribute to ongoing project delays[212]—costs and inefficiencies that, without structured participation, are often deferred rather than avoided. The relevant comparison is not between CAGs and a frictionless permitting process, but between CAGs and the downstream litigation, remediation costs, and community harm that uninformed or illegitimate decisions tend to produce.[213] Instead, structured participation can improve relationships between permitting agencies and communities and increase perceived legitimacy and fairness for affected communities.[214]

Lastly, public participation procedures are already present in environmental regulatory law. CAGs simply structure this participation more effectively by creating a specific forum for generating community comments and integrating them into the decisions. Many cumulative impact statutes cite the historic

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211. Dorothy M. Daley & David F. Layton, *Policy Implementation and the Environmental Protection Agency: What Factors Influence Remediation at Superfund Sites?*, 32 POL'Y STUD. J. 375, 386 (2004) (noting that while there is a correlation between the presence of CAGs and significantly longer construction completion times, this may be due to local community groups being more likely to form and be active in decision-making at more severe sites).

212. PANEL ON PUB. PARTICIPATION IN ENV'T ASSESSMENT & DECISION MAKING, NAT'L RSCH. COUNCIL, PUBLIC PARTICIPATION IN ENVIRONMENTAL ASSESSMENT AND DECISION MAKING 127 (Thomas Dietz & Paul C. Stern, eds., 2008) (outlining a number of research studies on community participation, including one study finding that processes involving two-way communication between the U.S. Forest Service and stakeholders led to a lower probability of legal appeals compared to those where the Service only gathered or provided information to stakeholders).

213. *Community Support at Superfund Sites*, U.S. ENV'T PROT. AGENCY (Jan. 21, 2026), https://www.epa.gov/superfund-redevelopment/community-support-superfund-sites [https://perma.cc/2AGF-BH66] (finding that community engagement strengthens community and agency relationships, enhances the protectiveness of site remedies, reduces site stigma, and creates opportunities for reduced cleanup and remedy maintenance costs). *See also* PANEL ON PUB. PARTICIPATION IN ENV'T ASSESSMENT & DECISION MAKING, *supra* note 212, at 122 (including affected communities in decision-making from the beginning of the siting decision improves the likelihood that the remedy will reflect the anticipated use of the site and the communities' wishes).

214. *Id.* at 77 (explaining that when people view a decision as resulting from a public participation process, they are more likely to accept the result).

inequities that have led to overburdened communities today.[215] Thus, while implementing a tool like CAGs may be more costly or cause delays, they are more likely to lead to the overall outcomes that the statutes intend to address: preventing additional harm in communities who already carry more than their fair share of the environmental burden.[216]

2. *Federal Preemption*

Another consideration when implementing stringent or novel state legislation is the possibility of federal preemption.[217] As many state environmental programs operate under a cooperative federalism framework where the federal government sets environmental standards and delegates implementation authority to states,[218] industry and political opponents may challenge these state laws as conflicting with federal standards.[219] This is

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215. *See, e.g.*, Environmental Justice Law, N.J. STAT. ANN. § 13:1D-157 (2020) ("The Legislature finds and declares . . . that, historically, New Jersey's low-income communities and communities of color have been subject to a disproportionately high number of environmental and public health stressors, including pollution from numerous industrial, commercial, and governmental facilities located in those communities; that, as a result, residents in the State's overburdened communities have suffered from increased adverse health effects including, but not limited to, asthma, cancer, elevated blood lead levels, cardiovascular disease, and developmental disorders . . . and that it is past time for the State to correct this historical injustice.").

216. PANEL ON PUB. PARTICIPATION IN ENV'T ASSESSMENT & DECISION MAKING, *supra* note 212, at 85 (public participation processes are more likely to improve overall outcomes where the processes are "more participatory along the dimensions of breadth, timing, intensity, and influence").

217. The federal government has engaged in a variety of tactics to reduce state power relating to environmental law. *See, e.g.*, Adam Aton & Lesley Clark, *Trump Declares War on State Climate Laws*, POLITICO (Apr. 9, 2025, at 06:52 ET), https://www.politico.com/news/2025/04/09/trump-declares-war-on-state-climate-laws-politico-00280178 [https://perma.cc/8CU6-JC36] (outlining a federal campaign against state-level environmental regulations that were developed to counteract the first Trump Administration's retreat from climate policy, with the federal government directing the attorney general to target state laws that mention "environmental justice" and stop their enforcement through preemption claims).

218. Scott Josephson, *This Dog Has Teeth . . . Cooperative Federalism and Environmental Law*, 16 VILL. ENV'T L.J. 109, 112 (2005) (outlining that cooperative federalism, employed in CAA, CWA, and RCRA, creates a system where the federal government provides the law but does not directly regulate the states' programs of implementation). *See, e.g.*, Clean Air Act, 42 U.S.C. § 7410 (requiring states to adopt a state implementation plan to regulate air pollutants under the federal national air quality standards, which the Administrator will review and enforce).

219. When State, interstate, or substate agencies require use of an advisory group, the primary decision-making responsibility must remain with elected and appointed officials. Advisory groups are intended only to "assist elected or appointed officials with final decision-making responsibility by making recommendations to such officials on important

particularly challenging for CAGs, which would give greater decision-making authority to communities, thus limiting state permitting authorities' power.

But those concerns are likely overstated because cooperative-federalism statutes generally preserve state authority to adopt more protective environmental requirements and supplementary procedural safeguards.[220] Accordingly, states that retain authority to adopt more stringent environmental requirements may also have discretion to establish supplemental procedural mechanisms such as statutory Community Advisory Groups, to implement those requirements.[221] Rather than altering federal emissions or permitting criteria, state permitting authorities should use CAGs to determine if these criteria are met through advisory input.[222] Courts may be less likely to find federal preemption where a state adopts procedural governance mechanisms that do not subvert substantive environmental standards.[223] In particular, siting facilities is inherently a land use concern, which has historically been addressed primarily through state and local land use authority.[224] Lastly, allowing states to experiment with innovative

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issues." 40 C.F.R. § 25.7 (2026) (outlining the applicability and role of advisory groups in environmental permitting schemes under RCRA, CWA, and the Safe Drinking Water Act).

220. Robert L. Glicksman, *From Cooperative to Inoperative Federalism: The Perverse Mutation of Environmental Law and Policy*, 41 WAKE FOREST L. REV. 719, 737–43 (2006) (explaining that federal environmental statutes employ cooperative federalism by establishing minimum federal standards while preserving state authority to implement and adopt more stringent environmental protections).

221. William W. Buzbee, *Asymmetrical Regulation: Risk, Preemption, and the Floor/Ceiling Distinction*, 82 N.Y.U. L. REV. 1547, 1565 (2007) (explaining that, barring Congress creating a regulatory ceiling, states retain authority to supplement federal regulatory schemes through institutions and procedures consistent with federal requirements).

222. For example, many proposed cumulative impact statutes develop a "trigger" where the permit must be denied. The use of CAGs can be integrated into this procedure to determine whether the trigger of substantial adverse impacts is met. *See, e.g.*, Cumulative Impacts Analysis Amendment Act of 2025, B. 26-104, 26th Council, Reg. Sess. (D.C. 2025) ("If the [Cumulative Impact Statement], or the supplemental [Environmental Impact Statement] prepared in lieu of a CIS, identifies a disproportionate impact *in consultation with a Community Advisory Group*, the Mayor, board, commission, or authority of the District government shall disapprove the action, unless, *in consultation and with approval from the Community Advisory Board*, the applicant proposes mitigating measures or substitutes a reasonable alternative to avoid the disproportionate impact.") (suggested changes italicized).

223. Train v. Nat. Res. Def. Council, Inc., 421 U.S. 60, 79 (1975) ("The [Clean Air] Act gives the Agency no authority to question the wisdom of a State's choices of emissions limitations if they are part of a plan which satisfies the standards of [general State Implementation Plan requirements] . . . .").

224. John R. Nolon, *Historical Overview of the American Land Use System: A Diagnostic Approach to Evaluating Governmental Land Use Control*, 23 PACE ENV'T L. REV. 821, 827 (2006) (outlining the historical development of land use controls in the United States).

governance approaches, including community participation mechanisms, is consistent with the cooperative federalism framework.[225] States and local governments have developed a variety of innovative tools for community participation across legal fields—including participatory budgeting,[226] community policing,[227] and health policy community advisory boards[228]—that are traditionally governed through state police powers, such as land use.[229] Given the possible benefits of allowing state

225. *See* Glicksman, *supra* note 220, at 778 (describing how state and local governments have engaged in "social and economic experimentation" within the cooperative federalism model); *see also* David L. Markell, *States as Innovators: It's Time for a New Look to Our "Laboratories of Democracy" in the Effort to Improve Our Approach to Environmental Regulation*, 58 ALB. L. REV. 347, 353–54 (1994) (describing how states have actualized Justice Brandeis's oft-quoted statement that states are the laboratories of democracy, with state governments at the forefront of environmental protection through innovation at the state and local level).

226. Participatory budgeting ("PB") is a democratic process at the local level where citizens are directly involved in formulating, executing, and monitoring the local government budget based on community priorities. *See* Mustafa Rezaie, *Participatory Budgeting: A Growing Approach for Citizen Empowerment in Marginalized Communities and Promoting SDGs*, DUKE SANFORD J. OF PUB. POL'Y (May 6, 2024), https://journal.sanford.duke.edu/article/participatory-budgeting-a-growing-approach-for-citizen-empowerment-in-marginalized-communities-and-promoting-sdgs/ [https://perma.cc/ER2D-A7CQ]. PB has been implemented in cities around the United States, including New York, Chicago, and Boston. *See Participatory Budgeting*, N.Y.C. COUNCIL, https://council.nyc.gov/pb/ [https://perma.cc/8N4K-JQ6W] (last visited Apr. 29, 2026); *Participatory Budgeting*, CHI'S 49TH WARD, https://www.49thward.org/participatory-budgeting-1 [https://perma.cc/3ACW-ZFXB] (last visited Apr. 29, 2026); *Participatory Budgeting*, CITY OF BOS., https://www.boston.gov/departments/participatory-budgeting [https://perma.cc/WFB9-QFBJ] (last visited Apr. 29, 2026).

227. *See, e.g.*, *Community Police Commission*, SEATTLE.GOV, https://www.seattle.gov/community-police-commission [https://perma.cc/YF3J-C7UH] (last visited Apr. 29, 2026) (providing an overview of the Seattle Community Police Commission, which is a coalition of community members who, independent from the Mayor, City Council, and Seattle Police Department, provide direction and priorities in the police reform process).

228. *See* Rebekka M. Lee et al., *Community Advisory Boards as Implementation Strategies to Center Partner and Patient Voice in Community Health Centers*, 9 J. CLINICAL & TRANSLATIONAL SCI., 1, 5 (2024) (outlining how local community advisory boards were utilized in the context of COVID-19 testing to improve community health center decision-making).

229. Each of the examples above the line, as with land use, is an application of state police power. *See* Hunter v. City of Pittsburgh, 207 U.S. 161, 179 (1907) (finding that municipalities are political subdivisions of the state, and using property for governmental purposes is within the absolute power of the state); United States v. Morrison, 529 U.S. 598, 618 (2000) ("The regulation and punishment of intrastate violence that is not directed at the instrumentalities, channels, or goods involved in interstate commerce has always been the province of the States."); Jorge E. Galva et al., *Public Health Strategy and the Police Powers of the State*, 120 PUB. HEALTH REPS. 20, 20 (2005) (outlining that, while there has been some federal limitation, the state police power includes the exercise of public health policy through quarantine, health, and inspection laws to prevent the spread of disease).

experimentation,[230] federal preemption concerns may overstate the limits imposed on states' authority to enact procedural mechanisms.

3. *Encouraging a New Race-to-the-Bottom*

More stringent state-level requirements for environmental regulation could encourage industry actors to prioritize siting in states with weaker regulations, thus leading to increased environmental injustice in those states.[231] While cumulative impact statutes operate differently from the traditional pollution limitations that created the original "race-to-the-bottom," imposing additional procedural hurdles could increase the cost or uncertainty of permitting.[232] This uncertainty may, in turn, lead industries to seek siting in states that solely comply with federal baseline standards.

This theory may overstate the issue. There are many considerations that impact location decisions beyond environmental regulation.[233] While increased uncertainty may play some role, industry actors select locations that fulfill their overall goals for the project.[234] Notably, the states that have enacted cumulative impact legislation—including California, New Jersey, New York, and Maryland—share common geographic and economic advantages, complicating predictions that stricter environmental requirements will necessarily lead to industry

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230. State experimentation allows for strategies to be tested and refined at a more local level, giving the federal government the power and flexibility to adopt successful strategies without inventing new solutions. *See* Markell, *supra* note 225, at 355–58 (outlining the benefits of state-level innovation in environmental regulation).

231. *See* Engel, *supra* note 64, at 294 (outlining that nationally uniform standards were intended to reduce the "economic benefit of relocating to states that possess either geographic features that are actually capable of assimilating larger quantities of pollution or are governed by political administrations willing to say they do").

232. *See* Emilie Lounsberry, *The Fight Over New Jersey's Tough Environmental Justice Law Is Now in the Courts*, INSIDE CLIMATE NEWS (Mar. 18, 2026), https://insideclimatenews.org/news/18032026/new-jersey-environmental-justice-law-legal-challenges/ [https://perma.cc/QRJ5-5ZNH] (outlining the New Jersey Business and Industry Association's disappointment with the New Jersey cumulative impact law, where one officer found that the statute's implementing "rules have had 'a chilling effect' on the business community" in the state).

233. *See* Engel, *supra* note 64, at 322 ("[T]he most important indicators of firm location are the percentage of unionized workers, proximity to markets and raw materials, access to transportation networks, quality of schools, and the costs of housing and energy.").

234. *Id.* at 321 (finding that, while there is a prevailing impression that environmental standards are a determinative factor in firm location, studies have concluded that the stringency of environmental standards is a minor determinant in firm location).

flight.[235] In addition, while there could be migration to states with weaker regulations, the increasing popularity of proposed cumulative impact statutes itself may counteract this migration.[236]

CONCLUSION

While some scholars have raised concerns about the capacity of public participation to produce meaningful change, particularly when participation occurs within existing institutional structures,[237] public participation is the primary forum that allows communities to engage with decisionmakers.[238] New cumulative impact legislation could increase procedural justice for EJ communities by helping them effectively proscribe industrial siting in their neighborhoods. Yet calls to increase "meaningful" public participation will remain empty if there is no clear manner to invoke community input. The environmental arena is a complex behemoth that requires a combination of lived experience and expertise. State statutory permitting authority is the key to EJ, allowing states to go beyond federal minimum requirements.[239] It is imperative that communities and lawyers push for additional state EJ legislation in the near future while simultaneously fortifying the procedural justice elements of existing legislation. By integrating a proven participatory tool within proposed cumulative impact legislation, citizens can more effectively shape environmental decisions that affect their communities.[240] CAGs

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235. *See id.* at 321–22 (explaining that firm location decisions are influenced by factors including transportation access, proximity to markets, and other economic considerations). *See also* U.S. DEP'T OF TRANS. BUREAU OF TRANS. STATS., PORT PERFORMANCE FREIGHT STATISTICS, 2026 ANNUAL REPORT 14 (2026) (including New York, New Jersey, California, and Maryland ports in the top 25 ports in the United States).

236. *See* Schulz et al., *supra* note 95, at 2 (identifying 44 legislative documents using cumulative impacts frameworks that were introduced or passed between 2017 and 2024).

237. *See, e.g.*, Curtis Ventriss & Walter Kuentzel, *Critical Theory and the Role of Citizen Involvement in Environmental Decision Making: A Re-Examination*, 8 INT'L J. ORG. THEORY & BEHAV. 520, 522 (2005) (arguing that citizen participation utilized by formal organizations limits the possibilities for change).

238. Estrella-Luna, *supra* note 138, at 11 (finding that public notice, comments, and hearings are the conventional way in which institutions and industry actors interact with the public).

239. Adam Aton, *The Weak Link in Trump's Anti-EJ Push: State Permits*, E&E NEWS: CLIMATEWIRE (Jan. 28, 2025, at 06:30 ET), https://www.eenews.net/articles/the-weak-link-in-trumps-anti-ej-push-state-permits/ [https://perma.cc/G496-BEZR].

240. Mihaly, *supra* note 131, at 172 (arguing that the value of citizen participation requires a combination of grassroots organization and expertise to actually change environmental decision-making).

are a tool that can push against power dynamics in decision-making and are crucial for achieving the crux of environmental justice—empowering communities to speak for themselves.