When a facility installs and operates the required pollution control equipment, we normally think of the pollution problem as solved. But there still may be bursts of pollution associated with start-up, shut-down, accidents or external events. A recent study of pollution in Texas shows that these events have substantial health impacts, involving significant deaths and overall costs of about a quarter billion dollars a year in that state. Ironically, the study comes out at the same time as Trump's EPA has proposed to approve Texas's lax treatment of these "exceptional events." Texas purports to bar federal courts from even considering civil penalties for permit violations due to those events.

These events may be exceptional, but that does not make them harmless. The study by researchers at the University of Indiana proved that excess emissions from exceptional events impact public health. According to the researchers, in 2014, there were over three thousand excess emissions events in Texas. Those events were responsible for 22,472 tons of releases of common pollutants like particulates and 5,506 tons of volatile organic compounds (which contribute to ozone pollution). Using the Texas database of facility emissions and data from air monitoring, the study linked excess emissions with local air pollution levels. The study then linked the air pollution levels with health effects, finding over forty additional deaths of elderly people and other health impacts from the higher pollution.

In the meantime, EPA issued a formal proposal concerning the way Texas treats these excess emissions. The State Implementation Plan adopted by Texas gives companies an affirmative defense if an unexpected event results in excess emissions. Consequently, the company can avoid paying civil penalties for what would otherwise be a violation of its permit requirements. EPA had previously approved this provision, which the Fifth Circuit held to be within its discretion. However, in another case, the D.C. Circuit struck down a similar provision as applied to hazardous chemicals. The Obama Administration then withdrew the approval of the Texas provision. In its current proposal, EPA says that the D.C. Circuit case does not apply because it involved a different section of the Clean Air Act, and that it considers the earlier approval sound. The Texas plan involves what are called "criterion pollutants" – common forms of air pollution such as sulfur dioxide and particulates – which are regulated under a section of the Clean Air Act that gives states some leeway in meeting national air quality standards.

EPA's legal analysis seems to give insufficient weight to the reasoning in the D.C. Circuit opinion — an opinion written by Brett Kavanaugh, notably. In rejecting the claim that EPA itself can provide a similar defense for exceptional events, Judge

Kavanaugh explained that the Clean Air Act "creates a private right of action, and as the Supreme Court has explained, 'the Judiciary, not any executive agency, determines 'the scope' – including the available remedies – 'of judicial power vested by' statutes establishing private rights of action.' Section 304(a) is in keeping with that principle. By its terms, Section 304(a) clearly vests authority over private suits in the courts, not EPA." Surely it would be even more unusual for Congress to vest control over federal judicial remedies in the states than in EPA. If the statute vests the power to determine remedies in the federal courts, that seems to preclude states from controlling those federal remedies..

Even assuming that EPA's current legal analysis is right, the Fifth Circuit case only seems to say that EPA *can* approve the Texas provision, not that it *must* do so. That still means EPA must justify the exercise of its discretion in approving the provision.

EPA's notice of its proposed approval does a poor job of explaining why it is choosing to exercise its discretion to favor the Texas approach. It says nothing at all about the possible health impacts of its decision. Indeed, it says that its decision does not impose sufficient costs to require a cost-benefit analysis. But the new study indicates strongly that the Texas provision may have serious harmful effects.

Moreover, EPA characterizes the Texas provision as very narrowly aimed at completely unavoidable emissions. Yet this does not appear to be how the provision operates. According to the Texas Observer, the Texas EPA issued fines over less than two percent of reported excess emissions. Moreover, polluters seem to routinely claim that emissions bursts are covered by the exemption. For instance, the Observer reports, "ExxonMobil regularly used it while the company illegally released 8 million pounds of pollutants, including benzene, carbon monoxide and hydrogen sulfide, from its massive Baytown Complex from 2005 to 2010." Indeed, an ExxonMobil executive testified in earlier litigation that he "claimed the loophole in all of the emissions reports he submitted to the state — regardless of whether the company actually met state criteria for the defense."

EPA needs to address the practical impacts of its proposal if it wants its decision to stand up in courts, not merely make legal arguments about its powers. It flies in the face of experience to say that the Texas provision is narrowly tailored and will not result in increased emissions. Notably, the majority of states do not provide similar defenses, and EPA is proposing to allow them only in the area of the country containing Texas. EPA nowhere explains why the defense is appropriate in this part

of the country but not elsewhere. Perhaps the reason is that the oil and gas industry is a particularly large presence in this area, and a particularly large source of pollution.

Even apart from the Texas situation, there's a broader lesson here. Ann Carlson has written previously about the importance of spatially concentrated pollution. Those pollution hotspots can cause serious effects even when average pollution levels in the larger region are acceptable. The same seems to be true of temporarily concentrated pollution. Like hotspots, pollution bursts can also be harmful. Looking at averages over wider areas or time periods may obscure important concentrated health impacts. We can't afford to simply brush aside those pollution concentrations as "exceptional."