New York has enacted what may be the country's most stringent environmental justice law. The state deserves credit for its commitment to remedying the unfair pollution burdens placed on disadvantaged communities. The law is so broadly worded, however, that it may have the potential to prevent economic development that would aid those communities, or even new facilities like hospitals that are urgently needed by the community. It might also impede New York's clean energy program, including its effort to direct green spending to disadvantaged communities.

This language is the core of the New York law:

"The department shall not issue an applicable permit for a new project if it determines that the project will cause or contribute more than a de minimis amount of pollution to a disproportionate pollution burden on the disadvantaged community."

There are also provisions that require more extensive environmental study if a facility "may" cross over the de minimis level. ("De minimis" is lawyerese for "trivial").

One thing to note is that the trigger is whether the facility would cause pollution in a disadvantaged community, not whether it is located there. So any ban on new air pollution sources would apply not in the community but upwind.

Why might this provision be a problem: Consider a disadvantaged community that has disproportionate air pollution and also lacks good access to a hospital. If read strictly, the provision might prohibit putting a new hospital in or near the community. Hospitals generate vehicle traffic from patients, staff, supply delivery, ambulances, and visitors. That traffic would add to local air pollution.

Or to take another example, suppose a community needs a larger water treatment plant and that the existing site isn't suitable for an expansion. There's a provision of the law that seems to allow a permit seems to allow an existing permit to be renewed, despite contributing to pollution, if "it would serve an essential environmental, health, or safety need of the disadvantaged community for which there is no reasonable alternative." There's no similar exception for new projects, so the community would have to manage without adequate water treatment.

The potential problem would also extend to other forms of development. Suppose a

company wants to build a new electric vehicle factory in New York. Even apart whatever the factory itself emits, there’s the same problem of driving by workers (or extra bus service), deliveries of supplies and equipment, shipping of the finished cars, etc. The lesson seems to be that you shouldn’t build the factory anywhere near a disadvantaged community that has an air pollution problem. That might be the right answer in a particular case, but it can come with serious costs to the community. Putting the factory far away from the community means those new jobs will be inaccessible to community residents (and they also won’t benefit from any increase in the tax base.) There’s a statute that exempts some clean energy projects from preparing an environmental impact statement but it doesn’t seem to address exemptions from other environmental laws.

It’s possible that the drafters and supporters of the new law wanted exactly this result: either they didn’t think that beneficial projects would really be stopped or they prioritized dealing with environmental injustice about these other community interests. But I’m guessing that isn’t the case. Here are some potential options for avoiding these results:

1. **Creative statutory interpretation.** The state could interpret the “essential environmental, health, or safety” provision even to new permits, even though it specifically refers only to renewals. That seems like a real stretch, though.
2. **Narrowing coverage.** The department could define disproportionate burden in a way that limited the number of communities that came under this provision, and it could define de minimis broadly. This option would limit the impact of the provision in cases involving projects that benefit the community, but at the cost of limiting coverage in cases involving undesirable projects.
3. **Avoiding the need for permits**. The provision applies only to permits issued by the department rather than other authorities, so maybe the department or the developer could figure out ways to avoid the need to apply for a permit in the first place. For example, if facilities don’t need permits for air pollution they cause but don’t emit themselves, maybe the hospital can electrify and get all its power off the grid.
4. **Offsets.** Offsets could be used to allow construction. For instance, the new hospital might have to buy some existing pollution sources in the area and shut them down , so that the net effect would be only a de minimis increase in pollution levels.
5. **Project modifications.** Instead of one large facility, you could build two smaller facilities, neither of which would result in emissions that exceed the di

> minimis level. In many circumstances, however, this might not be a very practical option. Or maybe the facility could avoid having a significant effect on the area in question by building a really tall smokestack, so only areas farther down wind would be significantly impacted.

Maybe a close reading of the law would reveal some other escape hatches. Or, on the other hand, maybe the law really is supposed to be strict enough to stop the construction of hospitals in or near disadvantaged communities and of many facilities that would create jobs for those community. It will certainly be interesting to see how the implementation of the law proceeds. Alternatively,— and this seems to be what the governor has in mind — the legislature could amend the bill to allow construction of critical infrastructure.

Stay tuned for further developments.