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Environmental Justice

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Credit: Michael Hunter

• UPCOMING EVENTS •

Annual Alabama Water Resources Conference

Sept. 8 – 10, 2021
Orange Beach, AL

https://bit.ly/alwatercon

Extension Disaster Education Network Annual Meeting

Sept. 21 – 24, 2021
Raleigh, NC

https://bit.ly/extannualmeeting

International Conference on Harmful Algal Blooms

Oct. 10 – 15, 2021
Virtual

http://www.icha2020.com/Secciones/contenido/14

151st Annual Meeting: American Fisheries Society

Nov. 6 – 10, 2021
Baltimore, MD

https://afsannualmeeting.fisheries.org

Executive Orders Renew Focus on Environmental Justice

Kristina Alexander

On February 11, 1994, President Clinton signed an Executive Order addressing "Environmental Justice in Minority Populations and Low-Income Populations."[1] Nearly 27 years later, on his first day in office, President Biden signed an Executive Order titled "Advancing Racial Equity and Support for Underserved Communities Through the Federal Government."[2] President Biden was not finished addressing inequity regarding environmental impacts, however. On January 27, 2021 President Biden signed another Executive Order, "Tackling the Climate Crisis at Home and Abroad," which includes provisions on environmental justice.[3] That Biden Order amends the Clinton Order in part. This article will discuss these Executive Orders.

What Is Environmental Justice?

The term "environmental justice" is abstract, but it boils down to the concept that environmental harms should be fairly distributed rather than disproportionately born by minority and low-income communities. A bill before Congress in 2008 defined it as follows:

> The term environmental justice means the fair treatment and meaningful involvement of all individuals regardless of race, color, national origin, educational level, or income with respect to the development, implementation, and enforcement of environmental laws.[4]

Therefore, environmental justice is not just about unequal exposure to contaminants. It is also about the ability of people to participate in the planning and enforcement regarding the environmental harms and stressors that may affect them.

What Is an Executive Order?

An Executive Order (EO or Order) is issued by a President to direct executive agencies to take certain actions consistent with the President's policies. The President has the authority to issue an EO based on the U.S. Constitution, which in Article II, Section 1, states that "the executive Power shall be vested in a President of the United States of America." That means the President may direct actions of the executive branch of the government, which include departments, agencies, bureaus, and offices, and all of their employees. However, that authority has limits. To be lawful, the EO must be consistent with the will of Congress, as a President does not have the authority to create a law – only Congress can legislate. Thus, an EO can redirect executive agency priorities that are consistent with existing laws.

Executive Order Limitations

While EOs are easy to issue, they are hard to enforce. For example, any President can revise or repeal any EO literally by the stroke of a pen. Also, the tools to force an agency to comply are few. The President, of course, can direct employees to comply, being the boss of all executive agency employees. However, others cannot force agencies to follow an EO. This is because Executive Orders typically do not provide for judicial review, meaning a court cannot order an agency to follow an EO's terms.

Executive Order 12898

In 1994, President Clinton signed EO 12898 to balance some inequities faced by minority and low-income communities. The EO directed every federal agency to make "achieving environmental justice part of its mission" to the "greatest extent practicable."

A memorandum issued by President Clinton at the time of signing explained that the purpose of the EO 12898 was to focus federal attention on the issue of environmental justice. It addressed environmental justice's two underlying issues: the unequal adverse environmental impacts on underserved communities; and

the ability of those communities to be involved in government decision making affecting them. The Order intended "to provide minority communities and low-income communities access to public information on, and an opportunity for public participation in, matters relating to human health or the environment."[5]

According to EO 12898, federal agencies must identify and address the fact that minority and low-income populations experienced "disproportionately high and adverse human health or environmental effects" from government programs and policies. To make that happen, each agency was required to develop a strategy to enforce health and environmental laws in areas with minority or low-income populations, increase public participation, and improve research and data collection related to the health and environment of those populations. Going forward, federal agencies must conduct any activities that would substantially affect human health or the environment in a way that includes participation from disadvantaged communities and limits the adverse effects on those groups. The EO also set up an Interagency Working Group and required reports to the White House on agency progress toward the goals.

Language at the end of the EO makes clear that judicial review of the Order was not available: "This order … shall not be construed to create any right to judicial review involving the compliance or noncompliance of the United States, its agencies, its officers, or any other person."

Executive Order 13985

On January 20, 2021, President Biden signed EO 13985, an Order with broader goals than only environmental justice, yet still advancing the concept. Executive Order 13985's main goal was for the federal government to have a comprehensive approach to advance equity for all, "including people of color and others who have been historically underserved, marginalized, and adversely affected by persistent poverty and inequality."[6]

The Order established some fundamental principles to achieve parity. It pointed to "entrenched" policies of the government that pose barriers for underserved communities to benefit fairly. The Order defined an underserved community as one with "populations sharing a particular characteristic … that have been systematically denied a full opportunity to participate in aspects of economic, social, and civic life." The Order directed federal agencies to allocate resources to address the historic failure to invest "sufficiently, justly, and equally" in underserved communities.

As part of the mandate for the heads of federal agencies to act, EO 13985 required them to consult with members of communities that have been historically underrepresented. This harkened back to EO 12898's directive that agencies increase public participation among minority and low-income communities. In language similar to that found in EO 12898, EO 13985 stated that it did not create a right enforceable by law.

Executive Order 14008

A week after signing EO 13985, President Biden signed EO 14008 addressing climate change. Sections of that EO explicitly addressed the issue of environmental justice. Notably, the Order amended EO 12898, expanding its reach. EO 14008 made environmental justice a priority in the actions of the federal government, identifying economic and environmental justice as "key considerations in how we govern." As with other EOs, it did not create a right to sue to enforce its terms.

EO 14008 created a White House Environmental Justice Interagency Council (EJ Council) with the goal of developing a strategy to address current and historic environmental injustice by consulting with local environmental justice leaders. The EJ Council also was required to evaluate EO 12898 and make recommendations. That report was issued in May 2021.[7]

The EJ Council's report recommended 24 pages of changes to EO 12898, vastly exceeding the length of the original 2,100-word Order. Those changes included giving environmental justice a definition, which is:

> the just treatment and meaningful involvement of all people regardless of race, color, national origin, or income, or ability, with respect to the development, implementation, enforcement, and evaluation of laws, regulations, programs, policies, practices, and activities, that affect human health and the environment.

It also defined "meaningful participation" as requiring that agencies consider potentially affected peoples' viewpoints in the decision-making process. Under the

recommendations, agencies would be required to take affirmative steps to establish meaningful participation, such as:

- seeking and facilitating involvement of potentially affected populations;
- providing appropriate communication sensitive to culture, language, and disabilities;
- considering factors affecting participation such as transportation and location; and
- making technical assistance available to increase participation.

The recommendations did not suggest changing the language regarding judicial review of EO 12898.

Application of EO 12898

It is too early to determine the impacts of President Biden's EOs on environmental justice. However, the impact of EO 12898 has endured. After all, until President Biden, none of the three Presidents following President Clinton amended or revoked EO 12898. Nevertheless, true to its terms, enforcement of the Order is outside of the courts' domain, perhaps limiting its effectiveness.

For example, in 2021 a federal court in Kentucky considered a claim that the Department of Veterans Affairs (VA) failed to evaluate the environmental justice impacts of siting a hospital as required under EO 12898.[8] In particular, the community bringing the suit was concerned about noise impacts from having the hospital nearby, which was in the greater Louisville, KY area.[9] The court noted that EO 12898 did not authorize a right to judicial review, but that courts still considered whether the goals of the Order were assessed under other laws, such as the National Environmental Policy Act (NEPA), which requires agencies to take a hard look at impacts affecting health and the human environment when planning federal projects and actions. Additionally, an agency's environmental justice review becomes part of the administrative record of decision and courts may consider whether the review was consistent with the standard set out in the Administrative Procedure Act, i.e. not "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[10]

The *Crossgate* court found the VA considered environmental justice issues when choosing where to site the facility, "specifically with respect to minority populations and low-income populations." In its evaluation, the VA found that no community of concern (meaning minority or low income) was located within a 1-mile radius of the VA hospital location at either alternative site, "thus the environmental or health impacts from construction or operation of the medical center would not be disproportionately borne by any low income or minority communities."[11] The court held that the VA had demonstrated compliance with its environmental justice obligations via this analysis.

In 2020 a different court considered EO 12898. The issue in that case was whether the U.S. Air Force had adequately considered the impacts on environmental justice communities when choosing cities as permanent sites for conducting Urban Close Air Support training missions. The environmental advocates who brought the lawsuit claimed that low-income communities were more likely to be adversely affected by noise from the jets due to inadequate housing. In this case, unlike in *Crossgate*, the court found the agency's reviews under NEPA and EO 12898 were flawed. The Air Force had concluded that no citizens would be adversely affected by noise impacts from its training, and therefore, minority and low-income citizens would not be disproportionately impacted. After noting that there was no cause of action created by the EO, the court rejected the Air Force's efforts regarding disadvantaged communities: "the USAF's consideration of environmental justice impacts are too cursory."

Making Environmental Justice into Law

Thus, it is fair to say that EO 12898 has remained intact, albeit unevenly applied, over nearly 30 years. When subsequent administrations did not necessarily require strict compliance with its terms, Congress has taken note. For example, in 2008, the Senate Minority Report on the bill S.2549, "The Environmental Justice Renewal Act," reported that the EPA had not fully implemented EO 12898 and that the National Environmental Justice Advisory Council met half the amount of times as it had under the Clinton Administration.[12] One purpose of S.2549 was to "ensure that every Federal Agency take environmental justice into account when carrying out activities and programs," in effect, making the provisions of EO 12898 enforceable under law. The bill was not brought to a vote.

More recently, the Senate tried again to give environmental justice evaluations the force of law. The "Environmental Justice for Law Act" was introduced in March 2021.[13] In its findings the bill describes agencies as "inconsistent" regarding their obligations under EO 12898 to update strategic plans for environmental justice and report on their progress in enacting those plans. It is pending before the Senate Committee on Environment and Public Works.

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Endnotes

1. Exec. Order 12898 (Feb. 11, 1994), 56 Fed. Reg. 7629 (Feb. 16, 1994).
2. Exec. Order 13985 (Jan. 20, 2021), 86 Fed. Reg. 7009 (Jan. 25, 2021). This Order also revoked Exec. Order 13958 of Nov. 2, 2020, which established a Presidential Advisory 1776 Commission.
3. Exec. Order 14008 (Jan. 27, 2021), 86 Fed. Reg. 7649 (Feb. 1, 2021). *See* "Securing Environmental Justice and Spurring Economic Opportunity" in Sections 219-223 of EO 14008.
4. The Environmental Justice Renewal Act, S.2549, § 2(5) (110th).
5. President William J. Clinton, Memorandum on Environmental Justice (Feb. 11, 1994).
6. Exec. Ord. No. 13985 (Jan. 21, 2021), 86 Fed. Reg. 7009 (Jan. 25, 2021).
7. White House Environmental Justice Advisory Council, *Final Recommendations: Justice40 Climate and Economic Justice Screening Tool & Executive Order 12898 Revisions* (May 21, 2021).
8. City of Crossgate v. U.S. Dep't of Veterans Affairs, 2021 WL 1069041 (W.D. Ky. March 18, 2021).
9. According to Wikipedia, Crossgate, KY has approximately 251 people, 96% white, with a median household income of $66,000.
10. 5 U.S.C. § 706(2)(a).
11. *City of Crossgate*, 2021 WL 1069041, *15 (internal quotations omitted).
12. S.2549 (110th).
13. S.872 (117th) (March 18, 2021).

In Sum.

A Summation of the Facts and Figures of Interest in this Edition

★ *Year the last slave ship landed in United States (in Mobile, AL):*	1860
★ *Year President Clinton issued an Environmental Justice Executive Order:*	1994
★ *Year President Biden issued an Executive Order about Environmental Justice:*	2021

Waiting for Environmental Justice in Lowndes County, Alabama

Anna Sewell and Catherine Coleman Flowers

Guest Experts

On September 28, 2018, residents of the predominantly Black and low-income community of Lowndes County, Alabama and the Alabama Center for Rural Enterprise (now the Center for Rural Enterprise and Environmental Justice) filed a civil rights complaint with the U.S. Department of Health and Human Services (HHS) regarding the inequitable access to basic sanitation in Lowndes County. In Lowndes County, many residents' septic tanks have failed, leading to raw sewage pooling in lawns and ditches, and contaminating local waters. Today, this complaint is still pending, sewage continues to contaminate homes, and Lowndes County residents are still waiting for justice.

Earthjustice, on behalf of the Alabama Center for Rural Enterprise and several residents, filed the 2018 complaint under Title VI of the Civil Rights Act of 1964.[1] Title VI prohibits recipients of federal funds from discriminating against individuals on the basis of race, color, or national origin. The complaint alleges that the Alabama Department of Public Health (ADPH) and Lowndes County Health Department (LCHD), as recipients of federal funds, violated Title VI by discriminating against the Black community of Lowndes County when they failed to address the county's sanitation crisis and affirmatively misled the public about the associated public health risks.

Background

For decades, Lowndes County has suffered from inadequate sanitation conditions caused by a lack of access to functional septic tanks. More than 80% of the county's residents have no access to a municipal sewer system, and accordingly must use some type of septic system to dispose of household wastewater. Conventional septic systems are most common, but they are incompatible with impermeable soils, like those found in Lowndes County and in other parts of the Black Belt[2] of Alabama. Specially engineered septic tanks that function better in these soils can cost tens of thousands of dollars. Many families in Lowndes County cannot afford to install this type of septic tank. As a result, the ADPH estimated in 2011 that 40-90% of residences in the county have no septic system or an inadequate one, and 50% of homes with septic systems are failing, although the exact figures are unknown.

Many Lowndes County families with conventional septic systems have problems with raw sewage backing up in their yards or in their homes, and families that have abandoned their failing systems or cannot afford to install systems have historically resorted to homemade solutions such as "straight pipes." Straight pipes are generally metal or PVC pipes that lead from a home's plumbing to an outdoor area. The pipes can be buried or visible, and they can discharge all or only some of a home's sewage. Lowndes County is not the only county in Alabama with a lot of straight pipes. A survey of 289 homes in neighboring Wilcox County, Alabama revealed that 93% of residences had some form of unpermitted sewage system, 60% with a visible straight pipe and 34% with a hidden straight pipe or other form of unknown, unpermitted system.

Disproportionate Access to Functional Sanitation

Access to functional, affordable septic systems is disproportionately lacking for Black residents in Lowndes County and other counties in the Black Belt. The analysis conducted for our Title VI complaint demonstrates that as the proportion of white residents increases in a Black Belt county, so does the number of new septic tank permits or septic tank repair permits issued per every thousand residents. Conversely, as the proportion of Black residents increases, the number of permits issued per every thousand residents decreases.

Human Health Impacts

The discharges of raw sewage in Lowndes County pose numerous health risks for residents. For example, these discharges include many different kinds of pathogens, including enteric viruses, giardia cysts, and cryptosporidium oocysts. The risk of exposure to these pathogens comes not only from direct exposure to contaminated soils in yards, but also from exposure to contaminated groundwater or surface water. One study estimated that failing septic tanks

cause groundwater contamination that puts approximately 340,000 low-income rural Alabamans at risk of contracting a waterborne disease. The parasites, bacteria, and viruses in raw sewage can cause a variety of health problems ranging from infections, to diarrhea, to intestinal worms.

Alarmingly, the raw sewage stemming from failing septic tanks and straight pipes has led to a hookworm outbreak in Lowndes County. Although hookworm was previously believed to be mostly eradicated from this country decades ago, two studies have reported hookworm in Black Belt counties in modern times. A 1993 study from Wilcox County revealed that approximately one-third of all children under the age of ten at one clinic in the 1991-1992 fiscal year had parasitic worms such as hookworms—a health condition associated with poor sanitation conditions. Then, in a highly startling peer-reviewed study published in 2017, nineteen of fifty-five participants (34.5%) tested positive for low levels of hookworms in Lowndes County. Contrary to the study's findings, on April 9, 2018, ADPH announced on its website that the 2017 hookworm study did *not* find the presence of hookworm in Lowndes County.

Impacts to Water Quality

Untreated human sewage is also a significant water pollutant, regardless of whether it comes from sewer overflows in urban areas or failing septic tanks and straight pipes in rural areas. In spite of the population density difference between urban and rural areas, rural surface waters can become impaired due to pathogens associated with raw sewage, even without any large livestock sources of manure nearby. In the southeastern United States, many rural streams and rivers are specifically listed as "impaired" under the Clean Water Act (CWA) due to elevated fecal coliform levels, often due in large part to straight pipes and failing septic systems. In Alabama's most recent CWA impaired waters list, forty-two water bodies are listed as impaired due to pathogens, and several of those listings specifically include onsite wastewater systems as the source of impairment. These water impairments impede the public's ability to use and recreate in surface waters.

ADPH's Actions

In addition to ADPH's many repeated failures to address the sanitation crisis in Lowndes County, the state agency has affirmatively taken at least two actions that have exacerbated the sewage crisis there. First, ADPH's publication of the public notice on its website incorrectly stating that the 2017 hookworm study did not find evidence of hookworm in Lowndes County covered up this severe public health risk and allowed the parasite to spread unchecked and untreated. The 2017 hookworm study was a peer-reviewed study using the most up-to-date and sensitive methods to detect parasitic worms in stool samples, and it found the presence of hookworm in 34.5% of study participants. ADPH's rejection of the study's findings misled the public by incorrectly assuring residents there is no evidence of a hookworm outbreak in Lowndes County.

Second, ADPH previously, and discriminatorily, used the criminal justice system to attempt to force compliance with sanitation laws. Alabama state law makes it a criminal misdemeanor to "build, maintain or use an insanitary sewage collection,"[3] meaning any system that is not a permitted septic tank. In addition to the potential for jail time, a violation of the insanitary conditions law is punishable by a fine of $500. From 1999 to 2002, ADPH issued arrest warrants for at least ten Black Lowndes County residents for violating the insanitary sewage collection law. One woman even spent four days in jail for not having a septic tank. Because the high cost of specially engineered systems that function in Lowndes County soil is the primary barrier to onsite wastewater permits in this low-income county, the state's misdemeanor sewage law effectively criminalizes poverty. At a public hearing held in 2002, one resident spoke of the pain of being fingerprinted and "treated like a criminal" for his inability to afford a septic tank. Another resident said at the same public hearing in 2002 that her husband told authorities: "you can kill me, bury me, put me in jail, the situation gonna still be there when I get out."

Title VI Complaint

In our complaint, we alleged that ADPH and LCHD discriminated against residents of Lowndes County on the basis of race by failing to clean up the raw sewage discharges throughout the county, failing to affirmatively take action to overcome the effects of their prior discriminatory behavior issuing arrest warrants for wastewater code violations, dismissing a credible outbreak of hookworm, and failing to maintain sufficient data regarding the lack of sanitation services.

The complaint requests that ADPH and LCHD be brought into compliance with Title VI by requiring them to:

a) retract ADPH's public notice that there is no evidence of hookworm in Lowndes County;
b) inform the residents of Lowndes County and neighboring counties about the nineteen confirmed cases of hookworm and educate the public about risks of infection and available treatment;
c) request that the Centers for Disease Control and Prevention (CDC) or another appropriate federal agency investigate the extent of hookworm in Lowndes County, including in residences around wastewater treatment lagoons such as the Hayneville lagoon, and provide or facilitate access to medical treatment necessary to eradicate hookworm in all infected individuals in Lowndes County;
d) request that the CDC or another appropriate federal agency conduct an independent survey of the extent of failing septic systems, straight pipes, and other forms of inadequate onsite wastewater systems without threat of fines or arrests;
e) maintain racial and ethnic data showing the extent to which members of minority groups are beneficiaries of the onsite wastewater disposal systems program;
f) adopt a policy of non-enforcement of the sanitation misdemeanor,[4] and recommend to the Alabama legislature that they repeal this statute; and
g) support any community or federal efforts to develop and implement a program that provides adequate and functional septic tanks to low-income homeowners who cannot afford adequate onsite wastewater disposal in Lowndes County, as well as other Black Belt counties containing soil that is incompatible with conventional septic systems.

Update

Unfortunately, almost three years after filing the Title VI complaint, HHS has not completed a prompt investigation, much less made a finding of discrimination or required that ADPH or LCHD take any measures to come into compliance with Title VI. As HHS drags its feet, the residents of Lowndes County continue to suffer from a lack of adequate sanitation options. Earthjustice and the Center for Rural Enterprise and Environmental Justice will continue to urge HHS to fulfill its obligations to fully investigate this complaint and bring much needed relief for community members.

We will also continue fighting in the halls of Congress and in the public for the policy changes and funding needed to bring sanitation solutions to places like Lowndes County. Lowndes County is far from the only community of color that is burdened by failing sanitation systems and raw sewage sitting in neighborhood yards and ditches. These communities include places like Centreville, Illinois, Mount Vernon, New York, Allensworth, California, St. James Parish, Louisiana, and many more. We aim to shine a light on this hidden problem. In May of 2019, we held congressional briefings for the Senate and the House of Representatives highlighting the many faces of sanitation challenges in rural communities throughout the United States. More recently, in November of 2020, Catherine Flowers, the founder of the Center for Rural Enterprise and Environmental Justice, published a book entitled "Waste: One Woman's Fight Against America's Dirty Secret." The Center for Rural Enterprise and Environmental Justice is partnering with *The Guardian* to investigate inadequate sanitation around the country. We continue to tell these communities' stories in the hope that government officials will do their job and fight to end this environmental injustice in Lowndes County and all of the other "Lowndes Counties" throughout the country.

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Catherine Coleman Flowers is the founder of the Center for Rural Enterprise and Environmental Justice, where she works on sanitation equity.

The views and opinions expressed in this article belong to the authors and do not necessarily reflect the views and opinions of the Mississippi-Alabama Sea Grant Legal Program.

Endnotes

1. 42 U.S.C. § 2000d.
2. The term is based on the region's black topsoil, but sometimes also is used to refer to the presence of slave labor that worked the area in the 18th and 19th centuries.
3. Ala. Code § 22-26-1.
4. Ala. Code § 22-26-1.

Citizen Suits Can Advance Environmental Justice

Kristina Alexander

Justice means that circumstances are made fair under the law. Environmental justice means that environmental impacts, such as pollution, are born evenly by communities regardless of socioeconomic status. Thus, under the concept of environmental justice, it is not fair to place a new landfill, chemical manufacturer, or water treatment plant based on where property values are lowest. Such placement only perpetuates the low prices and the low quality of life for residents there. Instead, environmental impacts should be evenly distributed.

Built into the notions of justice and environmental justice is the ability of people to contest government decisions, to seek a review of an agency determination, and the opportunity to be heard. This is identified as due process. Due process does not guarantee results, only that people affected by a government decision have the ability to have their viewpoints considered.

A step further into environmental justice is the right of people to sue the government when they believe actions are not lawful. This requires a waiver of sovereign immunity, which is the principle that the government cannot be sued for its official actions. Without sovereign immunity, governments could be paralyzed from acting as there will always be someone who objects to something. Therefore, a waiver of sovereign immunity must be explicit: the government must give permission within a law for someone to sue under it for alleged violations or harms.

Environmental statutes, such as those governing pollution and wildlife protection, not only waive the sovereign immunity of the federal government, but they also permit people to act to enforce those laws against businesses and individuals when they believe the government is not acting or is ignoring lawlessness. These statutory provisions are commonly known as citizen suit provisions.

Federal Laws Allowing Citizen Suits

Some of the environmental laws addressing pollution which contain citizen suit provisions are:

- Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), addressing cleanup of hazardous waste sites;
- Resource Conservation and Remediation Act (RCRA), regulating generators, transporters, users, and disposers of most hazardous substances;
- Clean Water Act (CWA), improving the quality of waters of the United States; and
- Clean Air Act (CAA), improving the quality of air in the United States.

The waivers of sovereign immunity in those laws and the authorization for people to act as citizen enforcers – sometimes called private attorneys general – make citizen suits a powerful tool for achieving environmental justice.

The citizen suit provisions in these laws use almost identical language. In general, citizen suit provisions contain language that:

1) identifies what violations may form the basis of a suit;
2) provides the government the opportunity to step in and correct any enforcement shortcoming instead of the citizens; and
3) offers court costs and attorneys' fees depending on the success of the suit.

The structure of those provisions facilitate bringing people together for a common good, another feature of environmental justice. This is because there is no financial gain for bringing a suit; the laws do not authorize money damages for proving somebody violated the law (although the expenses of bringing the suit may be awarded). Citizen suits are limited to what is called injunctive relief, which means the court can force someone to follow the law. For example, a citizen suit under the Clean Water Act may seek to prevent a business from discharging waste into a river, or require the government to revoke a permit that allowed a company to discharge waste into a river. But the plaintiffs will not receive money for having to live near a polluted river. The goal of a citizen suit action is the opportunity to improve the environment and human health under existing law.

Notice to the Government

Citizen suits require giving notice to the government and the alleged polluter before filing the suit. Without demonstrating that written notice was provided to the right authority, suit will be dismissed.

The time period for that notice is generally 60 days. There are some exceptions to the time periods, such as when the pollution poses an emergency. The 60-day notice period gives the government a chance to do its thing: investigate and/or prosecute. As the U.S. Supreme Court said regarding citizen suits, they are "to supplement rather than to supplant governmental action."[1] Therefore, a citizen suit is not allowed to move forward if a government, state or federal, is acting to enforce the law. Such enforcement must be more than a show, however. The test is whether the government is "diligently" prosecuting the polluter or cleaning up the contamination, either itself or by having the polluter do it.

Under the Clean Water Act (CWA) even if the government is diligently prosecuting the alleged polluter, a citizen suit may continue if the plaintiff has filed suit within 120 days of giving notice.[2]

One Alabama case illustrates how a citizen suit can prevail even where the government was pursuing the alleged polluter. That case involved claims that a coal company was discharging waste into the Black Warrior River. The plaintiffs had complied with both provisions of the CWA, waiting more than 60 days from giving notice on May 16 to file suit in federal court on July 27 which was within 120 days of the notice. However, on July 20, the Alabama Department of Environmental Management (ADEM) began investigating and ordered the coal company to pay a $15,000 fine, which the coal company agreed to. The coal company tried to have the federal suit dismissed, but the trial court refused. The 11th Circuit Court of Appeals upheld the trial court.[3] The court of appeals held that where a citizen suit meets both timing provisions in the statute – giving notice before state or federal action is commenced, and filing suit within 120 days of the notice – a federal suit under the citizen suit provision cannot be dismissed even if the state commenced investigation prior to suit.

Right to Intervene

Although a citizen suit may not be allowed when the government already has initiated a lawsuit, common language in citizen suit statutes generally authorizes people outside of the government and the defendants to participate in the suit. That authorization is known as the right to intervene. For example, the Environmental Protection Agency (EPA) and a county board of health filed suit against a coal company in Alabama for violations of the CAA.[4] A citizen group sought to intervene in the case. All three parties – the EPA, the board of health, and the coal company – tried to limit the citizen group's role in the litigation, but the court said that based on precedent, intervenors are to be treated as original parties, except they cannot expand the scope of the litigation.

When the Court Has Jurisdiction

While the waivers of sovereign immunity in citizen suits are broad, not all actions are allowed. For example, a person sued the Mississippi Department of Environmental Quality and the owner of a silicon plant under the Clean Air Act (CAA) citizen suit provision. The plaintiff wanted to stop construction of the plant, claiming the CAA permit issued for emissions from the plant's operations did not follow the law. The court held there was no provision in the CAA for a citizen to bring a suit where a facility has the proper permit or is in the process of getting one. That meant the court lacked jurisdiction to hear the dispute, and it dismissed the suit.[5]

Another dismissal of a citizen suit for lack of jurisdiction occurred in Alabama regarding a leaking pipeline.[6] In that case, a landowner discovered gasoline leaking onto its property. It notified the pipeline company, which stopped the leak. A citizen suit was brought under the CWA and the Resource Conservation and Recovery Act (RCRA). According to the court, the CWA claim failed because it authorizes only injunctive relief – asking the court to stop an ongoing violation – and the landowner failed to show the leak was ongoing. In other words, without an ongoing violation to enjoin – a pipe that was still leaking – the court lacked jurisdiction under the CWA. However, the other basis for the citizen suit, RCRA, allows lawsuits for past actions if the disposal of the hazardous waste is a present threat to health or the environment. Nonetheless, the court dismissed the RCRA citizen suit because it found no evidence that the gasoline spill, which had been remediated, still posed a threat to humans or the environment. Dismissal did not mean the polluter got off scot-free. The court noted that the pipeline company spent years working with ADEM to clean up the gasoline and improve conditions in the area.

Court Costs and Attorneys' Fees

One way that citizen suits aid environmental justice is that they provide for attorneys' fees and costs if the suit has some measured success. This allows residents without deep pockets to challenge the system, as litigation can take years and is very expensive.

Fees are not awarded just for bringing a case, however. The plaintiffs have to win. On the other hand, the plaintiffs do not necessarily have to win it all in order to be eligible for fees and costs. The general language of citizen suit provisions regarding when a plaintiff is eligible to collect attorneys' fees and court costs (such as filing fees, expert witness fees, and copying costs) fall into two camps. One, found in RCRA and CERCLA, is that plaintiffs must prevail or substantially prevail in the action. The CAA and CWA use different language, authorizing judges to award attorneys' fees and court costs "when appropriate." Both versions leave it up to the judge to decide whether to award fees and costs, by saying the court "may award" such expenses. Additionally, the amount is also up to the court and is based on rates for that expertise where the violation is being enforced. For example, if a New York counsel whose rates are $950 an hour at home, is brought to Alabama to litigate the suit, she will get paid based on rates where the claim is brought.

It is not always clear when a citizen-suit plaintiff has substantially prevailed. For example, many lawsuits settle long before a court reaches a decision. In one case in Alabama, the lawsuit claimed runoff from a landfill was polluting rivers in Alabama.[7] After the suit was filed, the landfill defendant agreed to a consent order with ADEM that would change landfill operations to prevent runoff. The defendant paid the plaintiff's attorneys' fees at that point. However, instead of complying with the order, the defendant decided to close the landfill, which would involve several of the steps from the consent order such as stabilizing the slopes of the landfill and building a runoff control system. When none of those steps were in place after three years, the plaintiff moved to enforce the order, and defendants submitted a new closure plan. Eighteen months later, when the landfill was still operating, the plaintiff returned to court to enforce the plan.

The defendant argued it did not owe the plaintiff attorneys' fees for enforcing a consent order to close the landfill as that was not the goal of the plaintiff's original litigation. The court said the defendant's theory was too narrow, noting that precedent held that attorneys' fees were allowed for monitoring compliance with consent orders. The court awarded $250 an hour for each hour the attorneys spent on the case, not counting the time they spent trying to get those attorneys' fees.

When a *defendant* prevails in a citizen suit case, they may be entitled to attorneys' fees. Under the CAA and CWA, courts are authorized to award fees to any party "whenever the court determines such an award is appropriate." After dismissal of the Mississippi CAA case discussed above involving a permit for a silicone plant, the defendant sought attorneys' fees for having to spend time defending itself. The court held that because the court lacked subject matter jurisdiction over the suit under the CAA, that same law could not be used to justify attorneys' fees, and denied the motion.[8]

Conclusion

Thus, pollution statutes can be a useful method to equalize environmental impacts by pushing back when things are not working. When a government might not be aware of or chooses not to respond to a harm affecting human health and the environment, people can file suit to make things change. And by allowing reimbursement for meritorius actions, lower income plaintiffs have less of a barrier to access justice.

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Endnotes

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3. Black Warrior Riverkeeper, Inc. v. Cherokee Mining, Inc., 548 F.3d 986 (11th Cir. 2008). In a subsequent decision, the trial court held that the ADEM settlement with the mining company meant that the citizen suit was moot – there was no relief the court could offer because the consent order meant that the company was already paying for the violations and stopping the discharges. *Black Warrior Riverkeeper, Inc. v. Cherokee Mining*, Inc., 637 F. Supp. 2d 983 (N.D. Ala. 2009).
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5. 16 Front Street LLC v. Mississippi Silicon, LLC, 886 F.3d 549 (5th Cir. 2018).
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The Value of Community Input in Crafting Local Policy

Stephen Deal

In the early half of the 20th century, the city planning profession exercised its authority in ways that were not responsive to citizen needs. Planning policies from the 1950s, such as urban renewal and redlining, were notorious for their callous indifference to local residents and detrimental effects on the American urban fabric. Since then, the involvement of the general public in data acquisition and scientific inquiry has grown to the point that the term "citizen science" has been coined to describe the process. Citizen science encompasses many different techniques cities can employ to develop policies that are more responsive to public needs.

A History of Public Input in Planning

In the early days of the planning profession, public participation was scant, with input from local government officials and planning commissions serving as the primary methods for discerning local citizen's needs. During the high tide of post-war modernism, many planners felt that planning was a purely rational endeavor and that cities were amenable to improvement through scientific analysis and inquiry, so no public guidance was needed.[1] By the 1960s and 70s, the failures of this approach were becoming self-evident as federal urban renewal programs were displacing residents and undermining the urban fabric. This prompted many planners to advocate for new approaches to the profession. Chief among these was advocacy planning.

First mentioned in a 1965 article by Paul Davidoff, advocacy planning professed that planners needed to be more forceful advocates for different groups and individuals within the city rather than serving as impartial experts acting under some unitary public interest.[2] To achieve this, Davidoff suggested planners prepare multiple plans, rather than rely on a single, master plan to guide local decision making. Under this paradigm, planners would also be responsible to a particular interest group in the city and attempt to express the values and objectives of the group. Planners would still have their own ideas and thoughts about the wisdom of certain policies, but at the end of the process the preferences of the group must prevail. Advocacy planning signified a major shift away from the idea of planning as a purely rational exercise towards the idea that planners must reconcile competing group values to forge a plan that best represents a collective community vision.

Another major innovation in the planning discipline to incorporate public input and decision making was the use of charrettes, which condense the planning process into short brainstorming workshops involving the public to resolve the issues. A charrette typically lasts between four and seven days and involves multiple design meetings and public workshops.[3] At the beginning of a charrette, organizers will convene a public workshop and divide participants into small working groups where they describe their vision of what the design site will look like after the plan is fully implemented. Based on this input, the organizers will develop various drawings and plans based on the public vision and project objectives. The drawings and plans are then subjected to another round of public input, input which the team uses to conceive the final, preferred design along with implementation strategies. At the final meeting, the design team showcases all the project elements and demonstrates how the plan will be conceived moving forward.

Charettes present the public with an opportunity to actively inform what type of land uses and community design principles are incorporated into local plans. Charrettes can be powerful tools to foster public participation, but they are not without their downsides. A poorly planned charrette can frustrate the public and if the city does not meaningfully act on public input from meetings it can lead citizens to believe that the city is merely offering a pretense of public involvement.[4]

Credit: Amy Walker

Community Input in Planning

Tensions remain in planning's role as a kind of arbitrator for competing notions of the collective good. These tensions often appear when rewriting zoning ordinances and comprehensive plans.

Staff of the City of Mobile, Alabama are rewriting the city's zoning and land development code, the first major rewrite of its kind since the 1960s.[5] One component of the plan is the creation of a new overlay district, called the Africatown Overlay District. The district is centered on the historic neighborhood of Africatown, home to 2,000 residents including descendants of 110 enslaved Africans brought to the Mobile region in 1860 on the slave ship *Clotilda*, known as the last slave ship to land in the United States.

Africatown has experienced a long history of social and economic discrimination, including in the land use surrounding the neighborhood, such as siting smog-producing paper plants and other heavy industries near the neighborhood. In light of past discrimination, residents and activists for Africatown are asking that additional protections be built into the code to protect the neighborhood from heavy industry.

Representatives with the NAACP and the Mobile Environmental Justice Action Coalition made many recommendations for addressing heavy industry nuisances, such as building 10-foot walls to separate residences from neighboring industries, imposing more beautification requirements on non-residential developers, and doing more to address waterfront conservation. As of May 18, 2021, the city's revised zoning code remains in limbo as local officials and Africatown residents continue to debate ordinance revisions.[6]

Citizens as Applied Problem Solvers

Citizen science can also help city residents better understand the environmental concerns within their community. One interesting initiative using citizen science to address environmental problems is Smell Pittsburgh. Smell Pittsburgh is a crowdsourced mobile app used to track noxious odors and emissions and report them to the Allegheny County Health Department.[7] That county received an 'F' in a 2021 State of the Air report. The mobile app is a valuable tool in helping the county get a better handle on lingering air pollution problems. Since Smell Pittsburgh was started in

2016, the app has triggered more than 20,000 reports to the Allegheny County Health Department.[8] The app's developers are now working on a similar version for Louisville, Kentucky. Once the app is running, University of Louisville researchers plan on using smell reports by correlating app data to statistics on hospital admissions in order to determine if the presence of noxious smells points to health impacts from air pollution.

Citizen science does not need a new app to succeed. Sometimes all it takes is subtle refinement to an existing initiative to transform community outreach into an information gathering exercise. In coastal Mississippi, a microplastic monitoring project looked at microplastic abundance in the Northern Gulf of Mexico, bringing together multiple partners spanning the Gulf from Texas to Florida.[9] Mississippi State and other project partners trained local citizens to sample and count microplastics from beach sediment and coastal waters. At the conclusion of the project, over 500 samples were collected by citizen scientists and critical data were gathered on the type of plastics found in coastal waters.

One of the simplest ways members of a community can aid local planning efforts is to play an active role in the reclamation and repurposing of public space. Over the past decade, such actions to repurpose public space have come to be associated with the term tactical urbanism. Tactical urbanism may be defined as different design fixes – either temporary or long-term – that aim to address common community problems, particularly in the realm of streets and public spaces.[10]

In Oxford, Mississippi, for example, local leaders installed temporary bike lanes to better understand future infrastructure needs. The project temporarily transformed a portion of a key road to include two bicycle lanes and additional crosswalks.[11] The project has been described as being consistent with Complete Street design principles, which aim to have roads that incorporate infrastructure for all users instead of just catering to automotive traffic. These temporary bike lines also have a citizen science component as well, as local volunteers have been involved in data collection to assess the project's effectiveness.

Since the completion of the project in 2016, similar pop-ups were installed in Oxford. In 2018, a 2,063-foot portion of another road was reconfigured to increase visibility of the bike lane and crosswalks and install other road modifications proven to be effective to control traffic. This portion of road was selected when speed data demonstrated that a majority of vehicles on this stretch of road traveled above the posted speed limit of 30 miles per hour. Don Feitel, a member of the Oxford Pathways commission, noted that "Using temporary material means that we can easily test various treatments and see which works best before anything is permanently installed. It brings a flexibility to the process the city might not otherwise have."[12]

Conclusion

By engaging with local members of the community, city governments can better address past problems while creating fruitful grounds for information exchange that can guide planning going into the future.

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