

Do Bad Sewage Systems in Alabama Violate Civil Rights Law?

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Hookworm is in Lowndes County, Alabama, and a legal complaint blames racism for its presence. “For decades, the black residents of rural Lowndes County, Alabama have suffered disproportionately from inadequate access to basic sanitation.” That is the first sentence of a formal complaint against the federal government for the raw sewage contamination affecting black residents in Lowndes County.¹ The complaint was brought under the Civil Rights Act of 1964, which outlaws excluding any person from programs receiving federal funds on the grounds of race, color, or national origin.² In this case, the Alabama Center for Rural Enterprise (ACRE), the group which filed the civil rights complaint, alleges that the U.S. Department of Health and Human Services (HHS) denied reliable sanitation to certain residents due to their race. The complaint shines a light on how pollution disproportionately affects low-income Americans, and how laws to prevent that pollution can do little to right that wrong.

Title VI Civil Rights Claims

Under the applicable civil rights regulations, a recipient of HHS funding may not deny a person any service or benefit provided under the program because of their race.³ To succeed, a complaint must show that African Americans did not get the same benefit from a federally-funded program as white people. The Civil Rights Act prohibits “practices having a disparate impact on protected groups, even if the actions or practices are not intentionally discriminatory.”⁴

The complaint states that the Alabama Department of Public Health (ADPH) and the Lowndes County Health Department (LCHD) received HHS funding but failed to address the wastewater contamination issue. ADPH received federal funding of \$100,522,413 in 2017, and \$57,497,378 in 2018. (Complaint, p. 4.) LCHD is the local arm of ADPH.

Under the Civil Rights Act, if a federally-funded group is acting in a discriminatory manner, the federal funds can be cut off. The procedure under the law is to file a written complaint with the offending agency, in this case HHS.⁵ That agency will then investigate the complaint. There must be an opportunity for a hearing for the accused federal recipients to address the allegations before funding is cut. As mentioned, tens of millions of dollars are at stake.

The complainant is in the difficult position of not being able to seek relief that would fix the problem: notably, changing the sanitation systems of low income residents of Lowndes County. Title VI does not give the victims of race discrimination money; it forces the recipient of federal funds to change its behavior. To satisfy the complaint, ACRE wants HHS to investigate the contamination along with the Department of Justice Civil Rights Division, among other actions discussed later in this article.

Hookworm Forms the Basis of the Complaint

The basis of the suit is that 19 people in Lowndes County were diagnosed with hookworm in 2017, but ADPH denied that the study was true.⁶ Hookworm is an intestinal parasite that is spread when people come in contact with human feces containing the parasite. Touching contaminated soil, for example, such as by walking barefoot, can lead to the disease. It is associated with poor sewage disposal. The disease was considered all but eradicated in the United States by the 1980s, when almost everybody had adequate wastewater treatment. In Lowndes County people with unsanitary sewage systems tend to be black, and people with functioning wastewater systems tend to be white, according to the complaint.

A study published in 2017 revealed that 19 people from the 24 households tested in Lowndes County tested positive for hookworm.⁷ The information is alarming. According to the complaint, 40 to 90 percent of residences

in Lowndes County have an inadequate septic system or none at all. Of the homes that have septic systems in the county, 50 percent are failing. A United Nations' Human Rights Council observer visited Lowndes County in 2017, describing homes surrounded by cesspools of sewage flowing from broken or non-existent septic systems. According to that official, ADPH "had no idea of how many households exist in these conditions."⁸

Under Alabama law, every person owning or occupying property must install the appropriate sewage collection and disposal system in a sanitary manner approved by the State Board of Health.⁹ Because of the nature of the soil in the lower elevations of Lowndes County, where the low income population tends to live, residents must install a special, engineered septic system, instead of the basic unit usable at sites with soils that allow water to drain easily. An engineered septic system costs between \$6,000 to \$30,000; whereas a basic system costs between \$2,000 to \$3,000. Over a third of Lowndes County residents, and 40 percent of the county's black residents, live in mobile homes. The median value of those homes is \$23,900, sometimes making the engineered septic system more expensive than the home it is servicing, and making most septic systems an unaffordable expense. (Complaint, p. 10.) The complaint alleges that many people whose septic system stopped working substituted "straight pipes," which are pipes that take the sewage from a house and discharge it directly into ditches or woods, untreated. This means there is a significant amount of untreated sewage in the soils of Lowndes County.

The Duties of ADPH and LCHD

According to the complaint, instead of addressing the unsanitary conditions, ADPH "rejected a peer-reviewed finding of hookworm in the county." The ADPH official Notice regarding the hookworm report states that the November 2017 report did *not* find hookworm in Lowndes County, claiming the testing was no good. However, the complaint indicates that the peer-reviewed hookworm study used three different methods to test for the parasite. The only other official action reported in response to the hookworm study is a survey conducted in Lowndes County about water safety, which failed to ask or inform about hookworm.

Under the relevant laws and regulations, ADPH and LCHD had the duty to "take 'proper steps' to abate nuisances to public health ... and abate insanitary conditions." (Complaint, p. 2.) The complaint makes clear that the charges are on-going; the unsanitary conditions have not been stopped by LCHD or ADPH. More specifically, the complaint states that the failure of ADPH and LCHD regarding oversight of wastewater disposal programs disproportionately affected minority residents. The complaint claims that more than half of the people in the state that lack adequate plumbing are black, but African Americans make up only 25 percent of the state's population. (Complaint, p. 22.)

Accordingly, the civil rights complaint is alleging that ADPH and LCHD discriminated against the minority population in Lowndes County by "failing to take affirmative action to overcome the effects of prior discrimination," referring to the poverty of the area and the failure of the agencies to correct the insanitary conditions. The complaint alleges three ways ADPH and LCHD acted in a discriminatory way:

- Failed to abate known insanitary conditions;
- Dismissed a credible outbreak of hookworm; and
- Failed to maintain sufficient data regarding the lack of wastewater services, despite [knowing] ... the high rate of insufficient onsite wastewater systems in the county.

Enforcement of Inadequate Sewage Systems

Poverty is the complicating factor in this situation. It is against Alabama law to have a straight pipe or to dump untreated waste. However, according to the complaint, enforcement by the state cannot stop the problem because the people with the illegal straight pipes cannot afford to fix the sewage systems. Enforcing sewage laws can have a positive benefit only if the offenders have the money to correct the problem. Otherwise, enforcement yields convictions but no results.

The complaint alleges that Alabama arrested several black residents and either jailed or fined them for failing to have adequate sewage systems. However, the crime of an improper sewage system cannot be avoided when the offender cannot pay the thousands of dollars it takes to repair the system. The complaint indicates that in addition to heaping suffering on the poor, the enforcement

created a chilling effect: Lowndes County residents were afraid to complain to LCHD or ADPH about the insanitary conditions because they were worried about being arrested.

Improving the Situation

The complaint offers five ways in which the actions of ADPH and LCHD would not have been discriminatory. For example, the agencies could have done the following:

- Notified the county residents of the 19 cases of hookworm;
- Investigated the hookworm outbreak;
- Requested medical treatment to eradicate the parasite in the infected individuals;
- Surveyed the county to learn of failing septic systems, straight pipes, and other inadequate wastewater disposal; and
- Kept data to show racial and ethnic divides of onsite wastewater disposal systems. (Complaint, p. 25).

If the agencies fail to come into compliance, the complaint requests that federal funds be suspended or terminated. But the complaint offers possible remedies. The complainant wants ADPH to do the following:

- Retract its public notice that there is no hookworm in Lowndes County;
- Inform and educate residents and nearby areas of the risks of infection;
- Request that the Centers for Disease Control and Prevention (CDC) investigate hookworm in the county;
- Conduct an independent survey of failing wastewater systems without the threat of fines or arrests;
- Maintain racial and ethnic data of the extent to which minorities are users of onsite wastewater disposal systems;
- Adopt a non-enforcement policy of the sanitation misdemeanor; and
- Support any community or federal effort to create a program that provides functional onsite wastewater treatment to low-income homeowners in Lowndes County and other counties with soil incompatible with conventional septic systems. (Complaint, pp. 25-26.)

Septic Systems in Wetlands

Using Civil Rights law to address water pollution is an unusual approach. The Clean Water Act (CWA) is the more obvious tool to address water quality,¹⁰ but the CWA targets the offenders with civil penalties or criminal enforcement, and, as discussed above, when the offenders lack the resources to stop the illegal dumping, enforcing the law makes no impact. Therefore, when it comes to environmental justice issues underlying the Lowndes County hookworm contamination, the law falls short.

As mentioned, it is illegal to dump untreated waste. The CWA makes intentionally pouring waste into the waters of the United States a crime, and allows enforcement against polluters, including shutting down the illegal pipes. In the case of the low income residents of Lowndes County who cannot afford to make the necessary changes, enforcement of the CWA seems unlikely to improve the situation. That does not mean the CWA could not be used to improve wastewater treatment. For example, in cases where the people exposed to open sewage are renters, it may be possible to enforce against the owners of those homes. However, the financial obstacles may lead to the owner choosing not to rent rather than to renovate with an expensive septic system.

One example of the CWA being used to enforce against septic violations occurred in Mississippi a decade ago. The lawsuit brought criminal charges against the developers for septic pollution in a mobile home park.¹¹ The suit claimed the developer deliberately installed septic tanks in mobile home units knowing that septic was not allowed due to the soil composition. The proof of the developer's knowledge included the fact that the developer's initial septic system plans were not approved by the Mississippi State Department of Health (MSDH), and instead, he hired a private engineer to certify the systems. The federal Environmental Protection Agency, MSDH, and other agencies sent cease and desist orders against the developer and his engineer to stop operating the non-complying septic systems.

Federal criminal charges were brought based on the nexus to the waters of the United States. The mobile homes were located on wetlands and tributaries that connected to those navigable rivers. Charges were not brought against the occupants of the mobile homes.

There was some dispute as to whether a septic tank could violate the CWA, as septic is specifically excluded from the act's coverage of regulated treatment works.

The court agreed that the CWA definition of “treatment works” did not include septic tanks. However, the court held that septic tanks are “point sources,” and the CWA regulates point sources for discharges into the waters of the United States. Additionally, the court noted that straight pipe septic systems, such as the types commonly used in Lowndes County, also are regulated point sources.

Conclusion: The Law Cannot Fix Broken Pipes

Unfortunately, Lowndes County demonstrates that where financial resources are lacking, enforcement of clean water laws will not lead to clean water. Although federal and state laws were designed to prevent the health consequences of polluted water, for those laws to work, they must be enforced. Additionally, the benefits of programs to promote the health effects of clean water must be available to people regardless of race. Unfortunately, as the HHS complaint alleges regarding ADPH and LCDH’s responses to hookworm disease, the existence of laws does not necessarily mean government will act in a way to benefit all of its citizens.

Additionally, the Lowndes County complaint highlights a significant problem unrelated to government apathy: compliance is not always affordable. It appears clear that the straight pipe sewage outlets used by low income residents are both the cause of the hookworm contamination and a violation of federal and state laws. However, the laws fail to offer complete relief to the problem because the victims

cannot afford the remedy, i.e. the appropriate septic systems. Thus, low income residents of Lowndes County pay the price for the limits of the laws and the people who enforce them. 🌊

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Endnotes

1. EarthJustice, *Complaint Under Title VI of the Civil Rights Act of 1964*, 42 U.S.C. § 2000e, 45 C.F.R. Part 80 (Sept. 28, 2018). The facts throughout this article are based on information within this complaint. The page numbers for reference are provided.
2. 42 U.S.C. § 2000d.
3. 45 C.F.R. § 80.3.
4. *Alexander v. Choate*, 469 U.S. 287, 293 (1985).
5. Exec. Order. 13160, § 4-401 (June 23, 2000).
6. ADPH, *Notice: Environmental study in Lowndes County, Alabama, fails to prove hookworm infection* (Apr. 9, 2018).
7. Megan L. McKenna, *et al.*, *Human Intestinal Parasite Burden and Poor Sanitation in Rural Alabama*, *The American Journal of Tropical Medicine and Hygiene*, Vol. 97, Issue 5, pp. 1623-1628 (Nov. 2017).
8. Complaint p. 6, quoting from Philip Alston, UN Special Rapporteur on Extreme Poverty, *Statement on Visit to the USA, by Professor Philip Alston, United Nations Special Rapporteur on extreme poverty and human rights* (Dec. 15, 2017).
9. Ala. Code Ann. § 22-26-2; Ala. Admin. Code r. 420-3-1-.02; 420-3-1-.05.
10. 33 U.S.C. §§ 1251-1387.
11. *United States v. Lucas*, 516 F.3d 316 (5th Cir. 2008).

