

NOTE

To Build a Septic System An Analysis of EPA's New Environmental Justice Policies for Rural Communities Lacking Adequate Wastewater Sanitation

LIZ GOLDSTEIN*

ABSTRACT

Wastewater sanitation systems treat wastewater to prevent dangerous bacteria and toxins from causing harm to the environment as well as to people. While to most Americans, wastewater sanitation is a luxury not often considered or seen, many rural communities are not so privileged. For many of these communities, it is not a mere water sanitation problem, but also an environmental justice concern compounded by systemic poverty, invisibility, inaccessibility of political or financial resources, and an inaccessibility to seek justice through the regulatory regime culminating in life-altering health conditions. For these communities it is not an invisible privilege but the ever-present sight, pervasive stench, and weighted air which saturates their everyday lives. Through new initiatives, the Environmental Protection Agency, has sought to address this problem through new funding opportunities and a rejuvenated use of their Title VI power under their new Office of Environmental Justice and External Civil Rights and the Bipartisan Infrastructure Law. Through these new opportunities, the Environmental Protection Agency has the ability to take initiative in addressing wastewater sanitation, an issue traditionally left to states and localities and to integrate environmental justice into wastewater sanitation policy. However, to truly meet intended goals asserted by the current Administration under Executive Order 14,008, Justice 40 and specific initiatives, the meaning and communities behind environmental justice scholarship cannot be forgotten through application. The goal of this Note is to apply theory to application: to consider the distributive, procedural, corrective, and social justice theoretical considerations, all of which are encapsulated by the environmental justice framework, the creation of new policy, and the application to real-life communities to adequately address wastewater sanitation issues.

* Liz Goldstein, B.A., *Sustainable Environmental Design*, U.C. Berkeley 2018, J.D., Georgetown University Law Center, 2023. © 2024, Liz Goldstein.

TABLE OF CONTENTS

Introduction	133
I. The Home: Defining The Wastewater Sanitation Issue	135
A. Defining Wastewater Sanitation	135
1. Large-Scale: State Municipality Sewage Treatment Systems	135
2. Medium Scale: Satellite Systems	136
3. Small-Scale: Individual Wastewater Treatment Plants	137
B. Defining The Problem	137
C. Defining The Legal Framework	139
II. The Pipes: Discussion Of EPA Opportunities.	140
A. New Funding With New Opportunities	141
1. Closing America's Wastewater Access Gap Community Initiative	141
2. Environmental Justice Grants.	143
3. Clean Water State Revolving Fund Program.	143
B. Unwielded Potential Under Title VI	144
III. The Tank: Frameworks Of Environmental Justice	148
A. Foundations Of Environmental Justice Scholarship	149
1. Dr. Robert Bullard's Environmental Justice	149
2. Principles of Environmental Justice.	150
B. A Taxonomy Of Environmental Justice.	152
C. Critiques Of Utopian Environmental Justice Principles In The Real World.	154
IV. The Treatment: Recommendations For Improving Epa's Opportunities To Better Serve Communities.	156
A. New Power For Communities Through Grant Requirements and Procedures	156
1. Distributive Justice	157
2. Procedural Justice	157
3. Corrective Justice	158
4. Social Justice	159
B. Renewed Power to Communities Under Title VI Enforcement	161
1. Distributive Justice	161
2. Procedural Justice	162
3. Corrective Justice	163
4. Social Justice	163
Conclusion	164

INTRODUCTION

The right to water sanitation is a human right.¹ However, in America today, an estimated 2.2 million people lack adequate water sanitation.^{2,3} Although this number appears statistically small at 0.64 percent of households, it still represents 2.2 million people whose basic needs are unsatisfied, who suffer life-altering health complications, and whose quality of life is deeply impacted.⁴

One of these communities is Lowndes County, Alabama. The rural county is home to a majority Black population with many of its members living below the poverty line.⁵ There are two municipalities that maintain centralized wastewater treatment plants for a minority population, but the majority of county members must fend for themselves and are responsible for their own on-site septic-tank sanitation systems.⁶ With a septic tank in Lowndes costing anywhere from a couple thousand to tens of thousands of dollars per installation,⁷ many in Lowndes cannot afford this cost, so they live without proper sanitation.⁸ As a result, raw sewage regularly floods the area. In 2017, medical researchers, alongside organizational efforts from activists like Catharine Coleman Flowers, were diagnosed with infections caused by the wastewater, including hookworm, afflicting Lowndes County residents.⁹ The wastewater had seeped into the soil, the homes, and the people of Lowndes: leaving its mark on the county.

1. G.A. Res A/64/292, at 2 (Aug. 3, 2010) (“The right to safe and clean drinking water and sanitation as a human right that is essential for the full enjoyment of life and all human rights”).

2. Water sanitation includes “the following services within the housing unit: (a) hot and cold piped water, (b) bathtub or shower, (c) flush toilet. This definition has been more or less consistent since 1970.” Randolph Adams, *Still Living Without Basics in the 21 Century*, Rural Community Assistance Partnership 7 n. 4 (2015), <https://perma.cc/933N-97B4>.

3. *Closing America's Wastewater Access Gap Community Initiative*, EPA (last updated Apr. 6, 2023), <https://perma.cc/NU7Y-R6UH>.

4. *Id.*; see also Randolph Adams, *Still Living Without Basics in the 21 Century*, Rural Community Assistance Partnership 1, 7 (2015), <https://perma.cc/933N-97B4>.

5. In Lowndes the per capita income is \$21,936 and roughly 28.3% of the population lives below the poverty line. “Lowndes County, Alabama”, U.S. Census, <https://www.census.gov/quickfacts/fact/table/lowndescountyalabama/PST045222>.

6. Erika Weinthal, Elizabeth A. Albright, Catherine Coleman Flowers & Emily Stewart, *Solution-Centered Collaborative Research in Rural Alabama*, SOCIAL SCI. RES. COUNCIL (March 6, 2018), <https://perma.cc/N2KV-SRFR>.

7. The reason these tanks are so expensive is due to the soil. The soil is composed of a “firm sedimentary limestone bed overlain with a layer of dark, rich soils” requiring more expensive above-ground septic tanks because traditional underground septic systems cannot function properly in this type of soil. McKenna ML, McAtee S, Bryan PE, et al, *Human Intestinal Parasite Burden and Poor Sanitation in Rural Alabama*. 97(5) AM. J. OF TROPICAL MEDICINE AND HYGIENE. 1623-1628 (2017); *Poor Alabama Residents Fighting for Sewage and Wastewater Management*, EQUAL JUSTICE INITIATIVE (Apr. 18, 2012), <https://perma.cc/W85D-ZZVS>.

8. Catherine Coleman Flowers, *Waste: One Woman's Fight Against America's Dirty Secret*, 128 (NY Press, 2020).

9. Erika Weinthal, Elizabeth A. Albright, Catherine Coleman Flowers & Emily Stewart, *Solution-Centered Collaborative Research in Rural Alabama*, SOCIAL SCI. RESEARCH COUNCIL (March 6, 2018), <https://perma.cc/N2KV-SRFR>.

Many may see the story of Lowndes, highlighted on popular television programs such as 60-minutes,¹⁰ and see a horrible tragedy for 11,000 residents. Although this is just one perfect storm of poverty, failing infrastructure and invisibility that comes with the reality of being rural and in the Black Belt,¹¹ this issue is not one of Lowndes County alone. Lowndes serves as an archetype, representative of many communities in America which face similar problems. For these communities, wastewater sanitation has impacted their whole lives. In addition this issue is more than just niche wastewater sanitation—this issue is environmental injustice.

In Executive Order 14,008 on *Tackling the Climate Crisis at Home and Abroad*, President Biden defines environmental justice as the fair treatment¹² of people¹³ of all races, cultures, incomes, and educational levels with respect to the development and enforcement of environmental laws, regulations, and policies.¹⁴ There are populations in the U.S. that suffer disproportional environmental and health conditions culminating from compounded systemic poverty, invisibility, inaccessibility of political or financial resources, and an inaccessibility to seek justice through the regulatory regime.

The goal of this Note is to consider wastewater sanitation as a real-life issue and to consider how administrative programs, which target environmental injustice, hold up to the ideals of environmental justice scholarship. This Note will consider these programs through a realistic lens of administrative law and environmental justice. It will also review some of the most relevant actions to wastewater sanitation assistance and analyze how these proposals in action hold up to the goals of environmental justice as defined by scholars, while considering how these programs may be improved to better serve these communities under the

10. Bill Whitaker, *60 Minutes Investigates: Americans Fighting for Access to Sewage Disposal*, CBS (Dec. 19, 2021), <https://perma.cc/M5YH-NEAW>.

11. “Black Belt”. ENCYCLOPEDIA BRITANNICA, <https://perma.cc/L79M-CZZN>.

12. Fair treatment, meaning that “no group of people should bear a disproportionate share of the negative environmental consequences resulting from industrial, governmental and commercial operations or policies.” *Learn About Environmental Justice*, EPA (last updated Aug. 16, 2023), <https://perma.cc/G6BG-KE78>.

13. Importantly, the President and EPA both acknowledge that populations considered are not just minorities but also low-income populations who are entitled to justice. Exec. Order No. 12,898, § 1-101, *Memorandum on Executive Order on Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations* (Feb. 11, 1994), <https://perma.cc/TE82-2ZYA>; *Id.*

14. Exec. Order No. 14,008, 86 Fed. Reg. 7619 (Feb. 1, 2021). Environmental Justice in EPA stemmed from Executive Order 12,898 (“E.O. 12,898”), by President Clinton in 1994 focused on extending environmental equity, addressing disproportionate burdens through enforcement of environmental laws and opportunities for public participation and Executive Order 13,985 (“E.O. 13,985”), a companion order, which acknowledged “inequities in the implementation of laws, policies and programs to promote equal opportunity for underserved communities that have been denied fair, just, and impartial treatment.” Exec. Order No. 12,898, 59 Fed. Reg. 7,629 (Feb. 16, 1994), Exec. Order No. 13,985 86 Fed. Reg. 7009 (Jan. 20, 2021); *see also Summary of Executive Order 12,898 – Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations*, EPA (last updated July 3, 2023), <https://perma.cc/NY3D-LP93>.

framework of environmental justice scholarship. First, this Note will introduce the issue, explaining the infrastructure of wastewater sanitation, provide examples of communities experiencing harms, and outline where EPA fits into these local problems. Second, it will review the most relevant of EPA's proposed actions under new opportunities funded by the Bipartisan Infrastructure Law and that received new manpower under EPA's new Office of Environmental Justice and External Civil Rights. Third, this Note will engage with scholarship of environmental justice and introduce the framework utilized to analyze EPA's administrative policies. Finally, through the lens of the environmental justice framework, this Note will analyze how these actions may be improved in practice to better serve these communities and make progress in seeking environmental justice in wastewater sanitation.

I. THE HOME: DEFINING THE WASTEWATER SANITATION ISSUE

In order to understand how these new policies apply to wastewater sanitation, it is important to understand what the specific wastewater sanitation issue facing Lowndes and other communities is. This includes accounting for the infrastructure, health implications, and regulatory frameworks that encapsulate this issue. This part focuses on defining the problem. To demonstrate the issues facing rural communities compared to what may be of issue in larger urban areas, the first section will explain the different types of wastewater sanitation. The next section will describe the health and environmental impacts which face the communities. The third section will explain what role EPA has in this issue and how the agency may wield its power to address it.

A. DEFINING WASTEWATER SANITATION

Wastewater sanitation systems are developed for the purpose of treating wastewater. This treatment involves removing harmful disease-causing bacteria and removing toxins from the water to reduce the harm the wastewater may cause to the surrounding environment as well as to humans. To accurately depict the focus this Note puts on infrastructure, this section of the Note will briefly describe the most common systems: small-scale treatment in rural communities, and distinguish it from other systems.

1. Large-Scale: State Municipality Sewage Treatment Systems

In highly populated areas, wastewater sanitation is controlled by state municipalities which utilize large wastewater treatment systems. In total, an estimated 14,748 large wastewater treatment plants service more than 238 million people.¹⁵ For a large sewer treatment system, the process begins when wastewater is

15. *U.S. Wastewater Treatment Factsheet*, UNIV. OF MICHIGAN, CENTER FOR SUSTAINABLE SYSTEMS, <https://perma.cc/8RL5-3H5R> (last visited on Dec. 13, 2022).

transported from each house through pipes to a larger sewer main which brings the wastewater to the treatment plant.^{16,17} Larger plants have different treatment levels depending on the planned future use of the wastewater and the sophistication of the plant. During the primary treatment, wastewater will be flushed into a set of pools where it will settle out into solids and liquids. Solids, known as sludge, settle to the bottom, while the oils and grease, known as scum, float to the top before these components are separated through screens from the liquid wastewater that subsequently drains into another pool.¹⁸ Then, a secondary treatment may be conducted in an aeration tank which removes additional solids, organic materials, and a significant amount of bacteria.¹⁹ Lastly, a tertiary treatment that uses chemicals to remove any remaining bacteria, phosphorous, and nitrogen may then take place.²⁰ Prior to output into a local water source, wastewater from plants is tested for pH levels,²¹ biochemical oxygen demand,²² dissolved oxygen,²³ suspended solids,²⁴ total phosphorous and nitrogen,²⁵ chlorine,²⁶ and coliform bacteria count.²⁷

2. Medium Scale: Satellite Systems

In some smaller suburban areas, states do not control the entire wastewater treatment system. The municipality is charged with wastewater collection through pipes much like the process described above, but these municipalities do not actually treat the water. This situation is one that involves satellite systems, which are systems where the sewage collection system operator is not the same

16. Interestingly, wastewater treatment plants are typically located downhill of the areas they serve and utilize gravity for wastewater to naturally flow through the pipes. For this reason, pipes will often follow creek beds and streambeds which also flow downhill for this reason. Marshall Brain, *How Sewer and Septic Systems Work*, HOW STUFF WORKS (Apr. 1, 2000), <https://perma.cc/WT8D-FLZL>.

17. A sewer main is a large pipe or tunnel typically 3 to 5 feet in diameter that runs through the city and connects building pipes to the wastewater treatment plant. *Id.*; *How do urban waste water systems work?* HOW STUFF WORKS, <https://perma.cc/B4A4-4YBM> (last visited Sept. 2, 2023).

18. *Id.*

19. *Id.*

20. *Id.*

21. A pH test measures the “water’s acidity once it leaves the plant. Ideally, the water’s pH would match the pH of the river or lake that receives the plant’s output.” *Id.*

22. A biochemical oxygen demand test measures “how much oxygen in the water will be required to finish digesting the organic material left in the effluent. Ideally, the BOD would be zero.” *Id.*

23. A dissolved oxygen test measures “the amount of oxygen in the water as it leaves the plant. If the water contains no oxygen, it will kill any aquatic life that comes into contact with it. Dissolved oxygen should be as high as possible and needs to cover the BOD.” *Id.*

24. A suspended solids test measures the amount of “solids remaining in the water after treatment. Ideally, suspended solids would be zero.” *Id.*

25. A total phosphorus and nitrogen test measures the amount of the “nutrients remaining in the water.” *Id.*

26. A chlorine test measures the amount of chlorine remaining “so it does not kill beneficial bacteria in the environment. Ideally, chlorine should not be detectable.” *Id.*

27. A coliform bacteria test measures the number of fecal bacteria remaining in the water. Ideally, this number would be zero.” *Id.*

as the owner of the treatment facility.²⁸ Authority over these systems is piecemeal, with state agencies having authority over the transport and another entity having authority over treatment.²⁹ Although treatment is left to a private or regional government entity, treatment in such a system remains similar to that of state-run municipalities.

3. Small-Scale: Individual Wastewater Treatment Plants

Being far from urbanized areas, individuals in rural communities often do not have the option of state-run municipalities or satellite systems. Commonly, these individuals will turn to septic tanks as their best alternative option to serve their personal needs for their home. In a septic tank system, the wastewater sanitation process begins when wastewater from the home travels through a main drainage pipe into a container, or tank, that is buried on a homeowner's property and made from concrete, fiberglass, or polyethylene.³⁰ In the tank, wastewater settles into solids and liquids. Sludge and scum, like in other treatments, are separated from liquid wastewater that drains from the tank into a drainfield, a covered shallow pool.³¹ In the drainfield, soil filters the wastewater, naturally removing harmful coliform bacteria, viruses, and nutrients, and allowing filtered clean water to percolate through and discharge into groundwater aquifers.³² The septic tanks are owned and operated by an individual homeowner who has the legal responsibility for installation, operation, maintenance, and upkeep of the system, including repairs or replacement.³³

B. DEFINING THE PROBLEM

As mentioned previously, an estimated 2.2 million people in the U.S. lack complete plumbing facilities.^{34,35} This number includes people in rural communities, like Lowndes, which fall into this third category of small-scale wastewater treatment. The purpose of this section is to highlight some of these communities

28. Memorandum from EPA to the General Public, <https://perma.cc/7XQJ-RNN5> (citing 75 Fed. Reg. 30395, 30400 (June 1, 2010)).

29. *Id.*

30. *How Septic Systems Work*, EPA, <https://perma.cc/GT93-6XBQ> (last updated, Aug. 7, 2023).

31. *Id.*

32. *Id.*

33. *Frequent Questions on Septic Systems*, EPA, <https://perma.cc/U38F-QFDE> (last updated Aug. 7, 2023).

34. "It is important to note that the U.S. Census definition of 'lacking complete plumbing facilities' is the lack of any of the following services within the housing unit: (a) hot and cold piped water, (b) bathtub or shower, (c) flush toilet. This definition has been more or less consistent since 1970. We take this definition to be equivalent, for purposes of this report, to the more general understanding of what constitutes basic water and sanitation facilities." Randolph Adams, *Still Living Without Basics in the 21 Century*, Rural Community Assistance Partnership 7 n. 4 (2015), <https://perma.cc/933N-97B4>.

35. *Closing America's Wastewater Access Gap Community Initiative*, EPA (last updated Apr. 6, 2023), <https://perma.cc/NU7Y-R6UH>.

in order to demonstrate the width of communities as well as describe in depth the impact of the health issues caused by wastewater sanitation issues can have on individuals in these communities.³⁶

In Lowndes County, there are two municipalities that maintain centralized systems.³⁷ The issue here is that most residents cannot afford to construct, maintain, or upkeep a septic tank.³⁸ A septic tank in Lowndes costs between \$6,000 and \$30,000 per installation due to the soil's high clay content.³⁹ This is unaffordable for many individuals in the county, some of whom earn only \$700 a month,⁴⁰ with the median income of the county being \$31,961 per household annually.⁴¹ Without septic tanks, the wastewater pools and overflows, creating unregulated cesspools which sit uncovered in the open yards of the community.⁴² Without the covered and controlled septic separation process, the soil cannot filter out harmful coliform bacteria, viruses, or nutrients.⁴³ Instead, these harms sit in the open, percolating into the ground, the homes, and the people who live there. First person narratives describe the result of these uncovered pools as the lost American dream—raw sewage creates a moat around the home, and toilet paper and feces float next to the entrance of the home and in the children's playground as the water, sludge, and scum all seep into the walls of the home.⁴⁴ Children who live in these conditions have higher rates of asthma due to mold and bacterial inhalation.⁴⁵ In addition, surveyors found that 34.5 percent of the population tested positive for hookworms, in addition to the presence of other related diseases.⁴⁶

36. Wastewater sanitation issues are not exclusive to rural communities. For example, in 2016, EPA filed a lawsuit against the city of Greenville, Mississippi for hundreds of violations of the Clean Water Act due to consistent spillage of raw sewage into local waters. As climate change worsens, the unpredictability of flooding increases, storm events increase, and sea levels rise. These impacts of climate change will exacerbate issues across all three categories of wastewater sanitation systems and will likely lead to similar problems to those currently experienced by rural communities. ALA. CTR. FOR RURAL ENTER., COLUM. L. SCH. HUMAN RTS. CLINIC & INST. FOR STUDY HUMAN RTS. COLUM. UNIV., *FLUSHED AND FORGOTTEN: SANITATION AND WASTEWATER IN RURAL COMMUNITIES IN THE UNITED STATES*, 22 (May 2019); *United States v. City of Greenville*, No. 4:16-CV-00018-DMB-DAS, LEXIS 45319 (N.D. Miss. Apr. 4, 2016). Flowers, *supra* note 8, at 8.

37. Erika Weinthal ET AL., *Solution-Centered Collaborative Research in Rural Alabama*, SOCIAL SCI. RESEARCH COUNCIL (March 6, 2018), <https://perma.cc/N2KV-SRFR>.

38. *Id.*

39. *Poor Alabama Residents Fighting for Sewage and Wastewater Management*, EQUAL JUSTICE INITIATIVE (Apr. 18, 2012), <https://perma.cc/W85D-ZZVS> (Traditional underground septic systems cannot function properly under these conditions, which require installation of much more expensive above-ground septic tanks.)

40. WASTE at 128.

41. "Lowndes County, Alabama", U.S. Census, <https://perma.cc/KC8Q-S7EP>.

42. WASTE at 10.

43. How Septic Systems Work, EPA (last updated: Aug. 23, 2022), <https://perma.cc/7YB2-JT4S>.

44. WASTE at 10.

45. *Id.*

46. *Id.* at 17 (Dr. Peter Hotez, a renowned tropical disease specialist and founding dean of the National School of Tropical Medicine at the Baylor College of Medicine conducted this study and published in 2017.).

Although not fatal, hookworms can have significant health impacts such as physical and mental developmental problems in children, intestinal diseases, fatigue, abdominal pain, and diarrhea.⁴⁷ Although Lowndes may be one of the most studied communities, it is far from the only one. This experience is shared by many other rural communities across the Southern Black Belt where hookworm surveys have been expanded to identify the true breadth of the epidemic.⁴⁸ In Puerto Rico, communities are struggling to rebuild septic systems after hurricanes ravaged their past wastewater systems.⁴⁹ In the Southwest, 1,300 border towns near the U.S.-Mexico border, often referred to as Colonias, lack access to wastewater sanitation systems of any kind.⁵⁰ The EPA itself has acknowledged that from the Central Valley of California to Native Villages in Alaska, rural communities are struggling with adequate waste sanitation.⁵¹

Furthermore, the focus of this Note is on the health impacts and experiences experienced by these rural communities which are bound to spread and worsen with climate change. Rising sea levels, heavy rains, and increased storm events put pressure on all wastewater infrastructure.⁵² Oversaturated soil and flooding could destroy systems, bringing the conditions experienced by these rural, impoverished communities to wealthy urbanized areas alike. Even with working septic tanks, drainfields could overload, causing toilets and sinks to overflow.⁵³ Similar to Puerto Rico, predictions for Miami-Dade County, Florida, forecast that with sea level rise and increased hurricanes, 64% of septic tanks will malfunction by 2040.⁵⁴ Likewise, in larger systems, pipes could burst from pressure and sewer channels could overflow, filling the streets with wastewater as in Lowndes County.⁵⁵ The issue is present, growing, and needs to be addressed as efficiently as possible.

C. DEFINING THE LEGAL FRAMEWORK

EPA's regulatory authority wains as the scale of wastewater treatment gets smaller. Generally, authority is left to states to control wastewater sanitation systems within its boundaries. Under the Clean Water Act § 403, large-scale state municipality-owned sanitary sewers are included as Publicly Owned Treatment Works ("POTW") and permitted by EPA under the National Pollutant Discharge

47. *Id.*

48. WASTE at 18.

49. *Closing America's Wastewater Access Gap Community Initiative*, EPA (last updated Apr. 6, 2023), <https://perma.cc/NU7Y-R6UH>.

50. Randolph Adams, *Still Living Without Basics in the 21 Century*, Rural Community Assistance Partnership 20 (2015), <https://perma.cc/933N-97B4>.

51. EPA, *supra* note 48; WASTE at 20

52. EPA, *supra* note 44.

53. EPA, *supra* note 31.

54. WASTE at 20.

55. Memorandum from EPA to the General Public, *supra* note 29.

Elimination System (“NPDES”) regime to ensure water quality standards.⁵⁶ In addition to State NPDES inspectors, EPA has authority to assess wastewater sanitation systems to evaluate compliance with permit conditions and to bring enforcement under the Clean Water Act if conditions are not met.⁵⁷ In addition, EPA’s Environmental Appeal Board has held that EPA may require medium-scale satellite systems to be controlled by a NPDES permit, though many are not.⁵⁴ In truth, however, when it comes to small-scale rural wastewater sanitation, the EPA is required to do very little under law. There is no NPDES permit or grounds for enforcement action by EPA. Permitting and enforcement is left to local officials, typically a health or environmental county department charged with ensuring compliance along with some state overhead.⁵⁸

Furthermore, there is no federal environmental statute to ensure individual septic systems are affordable, working as designed, and protecting communities. Under current regulatory frameworks, authority over these issues is with states, local governments, and municipalities, with little authority or control in the hands of EPA.⁵⁹ Although deference is typically afforded to states or localities in establishing regulatory standards, EPA may assert demands through funding mechanisms, grant requirements, and enforcement actions linked to federal funding.⁶⁰ Through these mechanisms, EPA, state, and local officials work cooperatively, acknowledging a need for communication between state and federal governments and negotiating terms in which EPA may set requirements in exchange for funding and other resources.⁶¹

II. THE PIPES: DISCUSSION OF EPA OPPORTUNITIES

EPA’s recent renewed efforts in addressing environmental justice present an opportunity for EPA involvement in addressing rural wastewater sanitation problems through funding mechanisms, grant requirements, and enforcement of actions linked to federal funding. Included in E.O. 14,008, Justice40 mandated

56. 40 C.F.R. § 403.3(q) (The term Publicly Owned Treatment Works (“POTW”) “means a treatment works as defined by section 212 of the Act, which is owned by a State or municipality (as defined by section 502(4) of the Act). This definition includes any devices and systems used in the storage, treatment, recycling and reclamation of municipal sewage or industrial wastes of a liquid nature. It also includes sewers, pipes, and other conveyances only if they convey wastewater to a POTW Treatment Plant.”); 40 C.F.R. § 122.41(e). *See also* 33 U.S.C §§ 1311(b)(1)(B)-(C); OFF. OF GEN. COUNS., EPA, EPA LEGAL TOOLS TO ADVANCE ENVIRONMENTAL JUSTICE 78 (May 2022).

57. 40 C.F.R. § 122.41(e) (“The permittee shall at all times properly operate and maintain all facilities and systems of treatment and control (and related appurtenances) which are installed or used by the permittee to achieve compliance with the conditions of this permit”). EPA, *supra* note 54; *In re Charles River Pollution Control District*, 16 E.A.D. 623, (EAB 2015); EPA *Legal Tools to Advance Environmental Justice* at 78.

58. EPA, *supra* note 31.

59. DENNIS C. CORY & TAUHIDUR RAHMAN, ENVIRONMENTAL JUSTICE AND FEDERALISM, 90 (Edward Elgar, 2012).

60. *Id.* at 89.

61. *Id.* at 11-12.

that at least 40% of benefits of certain government programs flow to “disadvantaged communities.”⁶² This order brings a renewed opportunity for action with new funding through the Bipartisan Infrastructure Law and various funding programs committed to wastewater sanitation. In addition, EPA announced its new Office of Environmental Justice and External Civil Rights, with more than 200 EPA staff committed to “solving environmental challenges in communities that have been underserved for far too long.”⁶³ Released documents including the Final National Program Guidance⁶⁴ and FY 2022-2026 EPA Strategic Plan detail programs utilizing this new manpower and funding to implement environmental justice initiatives including various opportunities ripe for addressing wastewater sanitation.⁶⁵ This Part of the Note will focus on the best viable options for rural communities like Lowndes to utilize these new opportunities. The first section will focus on new opportunities through EPA funding through the Bipartisan Infrastructure Law and the second section will focus on EPA’s renewed commitment to enforcement actions through Title VI with its newfound manpower.

A. NEW FUNDING WITH NEW OPPORTUNITIES

Within the Bipartisan Infrastructure Law, approximately 50 billion in funding is committed to addressing water-based infrastructure.⁶⁶ In addition, EPA has released a list of 72 programs eligible for the Justice40 Initiative to illustrate which programs are eligible for service to “disadvantaged communities,” including various directly applicable to wastewater sanitation.⁶⁷ Under these actions, three large funding opportunities have become available for rural communities lacking wastewater infrastructure: (1) the Closing America’s Wastewater Access Gap Community Initiative; (2) the introduction of new environmental-justice-focused grants for states and; (3) the Clean Water State Revolving Fund Program.

1. Closing America’s Wastewater Access Gap Community Initiative

In the interest of assisting communities lacking wastewater sanitation infrastructure, the Bipartisan Infrastructure Law includes funding for the Closing America’s Wastewater Access Gap Community Initiative where EPA and the U.S. Department of Agriculture Rural Development (“USDA-RD”) are to

62. OFF. OF MGMT. & BUDGET, EXEC. OFF. OF THE PRESIDENT, OMB MEMO. NO. 21-28, INTERIM IMPLEMENTATION GUIDANCE FOR THE JUSTICE40 INITIATIVE 1 (July 20, 2021).

63. EPA OFF. OF THE ADMIN., EPA LAUNCHES NEW NATIONAL OFFICE DEDICATED TO ADVANCING ENVIRONMENTAL JUSTICE AND CIVIL RIGHTS, EPA (Sept. 24, 2022), <https://perma.cc/FC4Z-CXD3>.

64. OFFICE OF ENVIRONMENTAL JUSTICE AND EXTERNAL CIV. RTS. COMPLIANCE OFFICE, FINAL NATIONAL PROGRAM GUIDANCE FY 2023-2024, EPA (Aug. 26, 2022), <https://perma.cc/4RAG-96WU>.

65. *Id.* at 2-3.

66. EPA, FACT SHEET: EPA AND THE BIPARTISAN INFRASTRUCTURE LAW, EPA (Nov. 6, 2021), <https://perma.cc/8R5B-C5E7>.

67. EPA, JUSTICE40 INITIATIVE COVERED PROGRAMS LIST FOR THE ENVIRONMENTAL PROTECTION AGENCY (June 24, 2022), <https://perma.cc/UKB6-XQ8H>.

collaborate to provide technical assistance resources to help “historically underserved communities identify, and pursue, federal funding opportunities.”⁶⁸ The initiative pilot is set in eleven communities, including Lowndes, where residents lack wastewater infrastructure. Other pilot communities are located in Alabama, Kentucky, Mississippi, New Mexico, North Carolina, West Virginia, as well as the tribal nations of Santo Domingo Pueblo in New Mexico and San Carlos Apache in Arizona.⁶⁹

The initiative has three stages it will follow: the assessment stage, the plan stage, and the long-term capacity building stage. In the assessment stage, technical experts will assess the current infrastructure in communities.⁷⁰ In addition, engagement from the community, local state and tribal officials, and impacted residents will be sought to determine what additional technical, managerial, and financial support may be required.⁷¹ In the following development stage, experts will develop a Wastewater Community Solutions Plan from their assessment.⁷² This plan provides recommendations for funding sources and organizes physical infrastructure recommendations into three solution categories: (a) connecting homes that are near, but not currently connected to centralized wastewater systems, (b) developing shared systems for clustered homes that are currently on individual decentralized systems, and (c) installing individual systems for isolated homes.⁷³ The last stage will focus on building Long-Term Capacity by providing trainings and technical programs to identify funding and support structures for the long-term operation and maintenance of the wastewater systems.⁷⁴ In addition, EPA and USDA-RD will also utilize the Rural Partners Network to expand job creation, infrastructure development, and community improvement.¹¹² The initiative seems built to encapsulate much of the environmental justice framework—it targets communities that are disproportionately burdened; seeks direct inclusion, representation, and communication between decision makers and a community or decisions; and does not take wastewater on its own, instead including consideration of systemic factors. In practice, it will need to be tested.

68. Infrastructure Investment and Jobs Act, Pub. L. No. 117-58, § 50210, 135 Stat. 429 (2021); EPA, CLOSING AMERICA’S WASTEWATER ACCESS GAP COMMUNITY INITIATIVE, <https://perma.cc/XFM3-A8XL> (last updated Apr. 6, 2023).

69. *Id.* (The selected communities are in Bolivar County, Mississippi, Doña Ana County, New Mexico, Duplin County, North Carolina, Greene County, Alabama, Halifax County, North Carolina, Harlan County, Kentucky, Lowndes County, Alabama, McDowell County, West Virginia, Raleigh County, West Virginia, San Carlos Apache Tribe, Arizona and the Santo Domingo Pueblo, New Mexico).

70. *Id.*

71. *Id.*

72. *Id.*

73. *Id.*

74. *Id.*

2. Environmental Justice Grants

In addition, the EPA, through the Bipartisan Infrastructure Law, has also projected it will provide 40 million dollars in environmental justice focused grants in this fiscal year alone. This is more than double the money provided in previous years.⁷⁵ Although many of these grant opportunities are committed to assisting air pollution and drinking water concerns, there are grants that could be used to serve communities which suffer from lack of wastewater sanitation.

One is the State Environmental Justice Cooperative Agreement Program (“SEJCA”), a cooperative agreement program between EPA and states that aims to create model systems for addressing struggling communities through measurable improvements to environmental and public health.⁷⁶ Specifically, SEJCA aims to build relationships between officials and impacted communities by seeking projects which utilize state and local data and leadership.⁷⁷ In addition, SEJCA focuses specifically on integrating environmental justice into state policies long-term to promote change for communities in historically burdened areas which have been left behind by past policies.⁷⁸ SEJCA anticipates funding five projects, up to \$200,000 each, for a two-year project period.⁷⁹

3. Clean Water State Revolving Fund Program

The Clean Water State Revolving Fund (“CWSRF”) program was originally created by the 1987 amendments to the Clean Water Act (“CWA”) as a financial assistance program. The program provides for water infrastructure projects with additional subsidies for the purpose of assisting recipients who are under in need of financial assistance under state-defined affordability criteria.⁸⁰ Through CWSRF, States may grant loans to individuals seeking financial aid for the water quality-based needs including wastewater sanitation infrastructure.⁸¹ In 2022, through the Bipartisan Infrastructure Law, \$11.7 billion dollars were added to the CWSRF with 49% of the funding available for full principal forgiveness.⁸²

75. THE WHITE HOUSE, *JUSTICE40: A WHOLE-OF-GOVERNMENT INITIATIVE* (July 20, 2021), <https://perma.cc/F2HS-H2RY>.

76. EPA, THE ENVIRONMENTAL JUSTICE GOVERNMENT-TO-GOVERNMENT PROGRAM, <https://perma.cc/NQB8-8U8A>, (last updated Nov. 10, 2022).

77. EPA, The Environmental Justice Government-to-Government Program <https://perma.cc/5UWP-AA83>, (last updated Nov. 10, 2022).

78. EPA, *supra* note 77.

79. *Id.*

80. 33 U.S.C.A. § 1383 (2021); EPA, LEARN ABOUT THE CLEAN WATER STATE REVOLVING FUND (CWSRF) (last updated Apr. 11, 2022), <https://perma.cc/2ASG-7TDJ>. Affordability criteria are established by each individual State based on income and unemployment data, population trends, and other data, if determined relevant, including recipients’ location in an economically distressed area. The statute also states that an eligible individual must not have more than 50% of the median nonmetropolitan household income for the State. U.S.C. A. § 1383(i)(2) and (j).

81. 33 U.S. C. A. § 1383; EPA, CWSRF, *supra* note 77.

82. EPA, CLOSING WASTEWATER ACCESS GAP, *supra* note 66.

As of 2021, many have benefitted from the CWSRF loans, which have provided \$153 billion (\$48.1 billion being federal) to improve wastewater sanitation.⁸³ The Ohio CWSRF program, for example, has committed to serving individuals in need of small-scale systems, working with local health officials to select local applicants with failing onsite systems.⁸⁴ Since 2016, Ohio's CWSRF program has awarded almost \$80 million to eligible homeowners.⁸⁵ With the Bipartisan Infrastructure Law, there is additional funding available to provide for loans and to increase the loans which can be fully forgivable. Overall, CWSRF and other funding programs offer great opportunities for rural communities to improve wastewater sanitation. Although these programs are aimed at seeking environmental justice, there is currently much opportunity for EPA to better integrate the environmental justice framework in implementing these opportunities.

B. UNWIELDED POTENTIAL UNDER TITLE VI

In addition to funding, one of EPA's best opportunities to enforce environmental justice efforts for wastewater sanitation is through Title VI of the Civil Right Act of 1964. Title VI forbids discrimination by any state, local, or other programs⁸⁶ receiving federal financial assistance.⁸⁷ This allows EPA to bring environmental justice challenges against programs or activities that affect human health or the environment that use criteria, methods, or practices that discriminate on the basis of "race, color, or national origin."⁸⁸ For rural wastewater sanitation, Title VI may provide a remedy for communities if the funding received by local agencies has not been allocated to assist local health and environmental impacts as intended or if discriminatory practices have led to worsened realities for minority groups. Examples of reviewable local agency decisions include: inequitable locating of water treatment systems; providing disproportionate financial

83. *Id.*

84. See EPA, ARRA CLEAN WATER STATE REVOLVING FUND GREEN PROJECT RESERVE REPORT 29–33 (2015), <https://perma.cc/2M47-ALJP> (Local government agencies responsible for implementing signed agreements. Agreements detailed the terms and conditions of receipt of funds, including Buy American and Davis-Bacon provisions, and other requirements, such as permission to enter the property, documentation of payment of the homeowner's percent cost share, agreement to obtain an operation permit as locally required, and any maintenance or service contracts required for the installed system for the life of the system).

85. *Home Sewage Treatment Systems (HSTS)*, Ohio EPA, <https://perma.cc/6X2A-AUJJ> (last visited Nov. 18, 2022).

86. For larger scale state operated treatment system, Title VI also applies to NPDES permits. Cory, *supra* note 57, at 19.

87. *Id.*, *Title VI and Environmental Justice*, EPA (last updated Feb. 1, 2023), [<https://perma.cc/89WD-ECJU>].

88. 42 U.S. Code § 2000d; see also, *Presidential Memorandum for the Heads of All Departments and Agencies Executive Order for Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations* 1994 PUB. PAPERS 241 (Feb. 11, 1994).

assistance to some under-resourced groups, but not others; and over-penalizing people who cannot afford to fix individual septic tanks.⁸⁹

The Civil Rights Division of the Department of Justice (“DOJ”) conducted an environmental justice investigation under Title VI into the wastewater disposal and infectious disease and outbreaks programs of the Alabama Department of Public Health and Lowndes County Health Department.⁹⁰ Although not led by EPA, this is an important moment for Lowndes and other counties experiencing water sanitation problems and will greatly impact EPA’s future investigations of similar issues. The DOJ’s investigation examined whether the wastewater disposal, infectious disease, and infectious disease outbreak programs/the wastewater disposal and infectious disease and outbreak programs had been run in a manner that led to disproportionately adverse health effects associated with inadequate wastewater treatment⁹¹ and discriminated against the Black residents of Lowndes County.⁹² In this inquiry, the DOJ organized a series of meetings in which they invited residents to discuss their wastewater issues in Lowndes.⁹³

After an 18-month long inquiry, the DOJ found the Alabama Department of Public Health and the Lowndes County Health Department “acted with neglect and discrimination toward the county’s residents by not only denying them access to basic sanitation, but imposing fines and even liens against them while ignoring the grave health impacts the situation created.”⁹⁴ The DOJ ordered the agency to cease prosecution of residents for sanitation law violations, to develop a plan to address wastewater needs in collaboration with residents, and to work with the Centers for Disease Control and Prevention to improve public health in the county within a year. This federal investigation and agreement “mark[ed] the first

89. For example, in Lowndes, the health department penalizes individuals who lack septic tanks. However, due to claimed understaffing, the penalization system lacks organization and leads to disproportionate penalization of certain individuals over others. Those penalized are mostly chosen by those who are reported by their neighbors. Meaning some individuals are penalized over and over again, while some are not penalized at all. WASTE at 8.

90. *Justice Department Announces Environmental Justice Investigation into Alabama Department of Public Health and Lowndes County Health Department*, DOJ OFF. PUB. AFF. (Nov. 9, 2021), <https://perma.cc/UB2K-UNSE>.

91. *Cf. id.* (“‘Sanitation is a basic human need, and no one in the United States should be exposed to risk of illness and other serious harm because of inadequate access to safe and effective sewage management,’ said Assistant Attorney General Kristen Clarke for the Department of Justice’s Civil Rights Division. ‘State and local health officials are obligated, under federal civil rights laws, to protect the health and safety of all their residents. We will conduct a fair and thorough investigation of these environmental justice concerns and their impact on the health, life, and safety of people across Lowndes County, Alabama.’”).

92. *See id.*

93. *DOJ To Hold Community Meetings into Lowndes County Wastewater Problems*, WSFA 12 NEWS Staff (Mar. 31, 2022), <https://perma.cc/A22C-Q68Z>.

94. Katie Myers, *A Landmark Investigation Brings Environmental Justice to Rural Alabama*, GRIST (May 8, 2023), <https://perma.cc/AVU5-ZUP> (quoting DOJ as stating “Our work in Lowndes County should send a strong message regarding our firm commitment to advancing environmental justice, promoting accountability, and confronting the array of barriers that deny Black communities and communities of color access to clean air, clean water, and equitable infrastructure across our nation.”)

time an environmental justice inquiry has fallen under the Civil Rights Act.”⁹⁵ If these requirements are not met, the DOJ has asserted an investigation will be reopened, which could lead to the revocation of federal funding under Title VI.⁹⁶

Although in theory Title VI litigation provides promise for addressing environmental justice concerns, in practice it has been utilized sparingly, especially by EPA. In addition, people are rarely able to take the matter in their own hands and are dependent on agency action due to the Supreme Court’s holding in *Sandoval* that individuals may only bring a suit under Title VI § 601 for intentional discrimination.⁹⁷ In addition, “federal judges have systematically resisted granting environmental justice plaintiff’s relief,” making private suits even more challenging.⁹⁸ Federal agencies, however, are not limited in this way and hold significantly more power to utilize Title VI. Under § 602, EPA may still preclude a recipient of federal funding assistance from engaging in activities that have a discriminatory effect “if facially neutral, even without intentional discrimination.”⁹⁹ In addition, EPA has passed specific prohibitions on grant recipients using criteria or methods which have disparate impacts on minority groups or choosing locations for facilities which have the purpose or effect of denying benefits to minority groups.¹⁰⁰ If a

95. *Id.*

96. *Justice Department Announces Environmental Justice Investigation into Alabama Department of Public Health and Lowndes County Health Department*, DOJ Office of Public Affairs (Nov. 9, 2021), DOJ Guidance indicates that “[i]f noncompliance is found, and if administrative alternatives are ineffective or inappropriate and court enforcement is still not feasible, section 602 procedures may be completed and assistance finally refused.” See 28 C.F.R. § 50.3(c)(II)(A)(2) (“If noncompliance is found, and if administrative alternatives are ineffective or inappropriate and court enforcement is still not feasible, section 602 procedures may be completed and assistance finally refused.”).

97. 532 U.S. 275, 285-86 (2001) (holding no private right of action under § 601 of Title VI to enforce disparate-impact regulations promulgated).

98. CORY ET AL., *supra* note x, at 20-21.

99. External C.R. Compliance Off., EPA, FREQUENTLY ASKED QUESTIONS (FAQS) FOR CHAPTER 1 OF THE U.S. EPA’S EXTERNAL CIVIL RIGHTS COMPLIANCE OFFICE COMPLIANCE TOOLKIT (Jan. 18, 2017) (“Violations of federal civil rights laws can result not only from intentional discrimination, but from discrimination based on disparate impact, *i.e.*, policies and practices that are neutral on their face, but have the effect of discriminating”).

100. See 40 C.F.R. § 7.35(b)-(c). Title VI authorizes agencies to adopt implementing regulations that prohibit discriminatory effects that have an unjustified adverse disparate impact. See Cory, *supra* note 57, at 21; (*Alexander v. Choate*, 469 U.S. 287, 292-94 (1985); *Guardians Ass’n v. Civil Service Comm’n*, 463 US 582, 580 (1983).). Under Section 602, an agency may take action against a state actor for discriminatory effect. The theory of discriminatory effect was recognized in by SCOTUS *Griggs v. Duke Power Co* under Title VII. In *Griggs*, Black employees alleged that Duke Power’s practice of requiring a high-school-diploma and intelligence-test constituted employment discrimination because the criteria disproportionately effected black applicants and was “directly traceable to” state-sanctioned discrimination in educational opportunities. However in looking towards the future of Title VI as a tool, it is also important to note the potential scope of Title VI as a means of seeking solutions. The decision of *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College*, may have narrowed this scope. It is unlikely that Title VI may be utilized to correct racial disparities that could be deemed to be in a race-conscious affirmative manner especially including efforts to target remediation of past discrimination. While the impact of this case on federal agencies is not definite, EPA and other agencies may be hesitant to take aggressive actions against state actors who have committed disparate discrimination under Title VI following this decision. *Griggs v. Duke Power Co.*, 401 U.S. 424, 436

grant recipient violates these prohibitions, EPA has authority to withdraw federal funding or refer the matter to the DOJ. Although EPA has this power and could use it to enforce consideration of rural wastewater sanitation, it has never withdrawn funding or referred a matter to the DOJ, for wastewater or any other issue.¹⁰¹ As a result of difficulties in bringing a Title VI § 601 private action, communities are often forced to rely on EPA.¹⁰² According to EPA's own regulations, the process by which a community can bring a complaint through EPA is as follows: (1) A citizen files a complaint in writing with supporting information to EPA, EPA confirms receipt, and within 20 days of confirmation, EPA accepts, rejects, or refers the complaint to the 'appropriate agency; (2) EPA reviews the complaint for jurisdictional requirements and issues a letter either accepting or rejecting conducting a formal investigation for the complaint; and (3) EPA notifies the recipient of its preliminary findings and recommendations and notifies the recipient of their right, if appropriate, to engage in further compliance negotiations, all within 180 days of the investigation.¹⁰³

Although this process is useful, history has demonstrated its deep flaws. In order for the current process to be of use for communities experiencing wastewater sanitation problems, EPA will need to address various flaws. For one, studies have shown that only half of the complaints filed receive any acknowledgment at all from EPA within a year from the filing date.¹⁰⁴ EPA has been accused and found in violation of its own regulations on multiple occasions, in some instances taking decades to begin with step one.¹⁰⁵ In addition, when EPA does respond, there have been only a handful of incidents of EPA reaching a formal determination of discrimination. In one investigation, EPA found that California pesticide laws allowed disproportionate exposure of soil fumigants to Latino children. Following this investigation, EPA reached a settlement agreement with California's Department of Pesticide Regulation.¹⁰⁶ Notably, complainants were

(1971); *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 600 U.S. 181, 223 (2023); see also Kimberly West-Faulcon, *The River Runs Dry: When Title VI Trumps State Anti-Affirmative Action Laws*, 157 U. Pa. L. Rev. 1075, 1124-25 (2009).

101. See 40 C.F.R. § 7.35(b)-(c), see also Cory, *supra* note 57, at 26.

102. See Cory, *supra* note 57, at 2.

103. 40 C.F.R. § 7.120 (2010).

104. Clifford Villa ET AL., *Environmental Justice Law, Policy, and Regulation* 143, 154 (3d ed. 2020).

105. In *Rosemere Neighborhood Ass'n*, the EPA was found in violation by the Ninth Circuit for failing to acknowledge receipt within 18 months of receiving a complaint. In *Padres Hacia Una Vida Mejor*, EPA was found in violation for failing to acknowledge receipt within 17 years of receiving a complaint. In the case of Genesee Power Station Title VI complaint, EPA did respond to claiming discrimination against minority populations in Flint, Michigan, the process took 25 years. *Rosemere Neighborhood Ass'n v. U.S. Env't Prot. Agency*, 581 F.3d 1169, 1175-76 (9th Cir. 2009); *Padres Hacia Una Vida Mejor v. McCarthy*, 614 F. App'x 895, 897 (9th Cir. 2015); VILLA *supra* note 105 at 148-155.

106. HARRISON at 73.

left out of settlement deliberations and no direct remedies were sought.¹⁰⁷ In another example, EPA found Michigan's Department of Environmental Quality had discriminated against black community residents by permitting an incinerator in Flint, Michigan; however, EPA only came to this conclusion twenty-five years after it first began its investigation.¹⁰⁸ Even then, EPA only issued nonbinding recommendations.¹⁰⁹ These serve as examples of how Title VI has failed and how far it needs to go in order to serve the communities it was intended to assist. As of today, it stands more as a paper tiger than a means of justice and change for real communities.

In response to renewed interest in expanding environmental justice efforts, EPA's Final National Program Guidance has expressed interest in committing its new manpower to conduct more efficient reviews under Title VI. With the new national Environmental Justice office and 200 EPA staff committed to Environmental Justice efforts, there is hope that these efficiency and timing issues may be resolved. In addition, there is renewed hope that progress can be made in making Title VI a more accessible and realistic solution to promote environmental justice efforts. Title VI, in conjunction with newly funded grant opportunities, could make a real difference on the ground for communities endangered by their lack of wastewater sanitation systems.

III. THE TANK: FRAMEWORKS OF ENVIRONMENTAL JUSTICE

In considering how these administrative tools may be used to address wastewater sanitation issues, it is also important to consider the meaning of environmental justice and consider how these programs hold up to the lens of scholarship. In seeking to tackle environmental injustice, it is important to acknowledge and utilize the deep history and knowledge of efforts in this field. Environmental justice efforts did not begin with EPA's proposed actions, but with years of dedicated scholars, grassroots efforts, and communities fighting for change. As EPA expands its efforts to address environmental justice, it is important to realize how these policies integrate the ideals of environmental justice scholarship while applying it to real-world in the context of wastewater sanitation. This part will focus on environmental scholarship relevant to analyzing EPA's proposed actions. The first section will focus on prominent foundations for environmental justice scholarship. The second section will discuss Robert Kuehn's *Taxonomy on Environmental Justice*, which will be used as an organizational framework for this Note's analysis.¹¹⁰ The third section will discuss prominent critiques of environmental justice and concerns raised in applying it to actual policy.

107. *Id.*

108. *Id.* at 79.

109. *Id.*

110. Robert R. Kuehn, *Taxonomy of Environmental Justice* 10,681 (2006).

A. FOUNDATIONS OF ENVIRONMENTAL JUSTICE SCHOLARSHIP

Although there are many foundations to environmental justice, two prominent foundations of scholarship are the works of Dr. Robert Bullard and the Principles of Environmental Justice. This section of the Note will focus on these works in order to understand the underlying theories behind the scholarship and its underlying goals.

1. Dr. Robert Bullard's Environmental Justice

Dr. Robert Bullard¹¹¹ defines environmental justice as the right to protection, the prevention of harm, the shifting of the burden of proof from the community, the obviation of proof of intent to discriminate, and the targeting of resources to redress inequities.¹¹² He considers the major elements to include “equal enforcement of laws and regulations and [eradication of] discriminatory practices and policies” and the reallocation of imbalanced negative impacts that “fall heaviest on a certain population” regardless of intention.¹¹³ He emphasizes the importance of addressing inequality in “nonscientific and undemocratic” decision-making through governing rules, regulations, evaluation criteria which are unequally applied, discretionary enforcement, and inaccessible public forums.¹¹⁴ Importantly,

111. Dr. Robert Bullard's was one of the first study to and document environmental discrimination under the Civil Rights Act, with his wife, Linda McKeever Bullard, when a solid waste landfill was sited in a majority Black neighborhood in Houston. He is well known as one of the original scholars on the subject and has also been the recipient of much recognition in the field and beyond. *Sierra Club Names New Environmental Justice Award After Dr. Robert Bullard*, SIERRA CLUB (Aug. 5, 2014), <https://perma.cc/9K8E-QAM5>; *Dr. Robert Bullard: Father of Environmental Justice*, <https://perma.cc/RP6E-E7QW> (last visited: Nov. 13, 2022) (Author of *Dumping in Dixie: Race, Class and Environmental Quality* (Westview Press, 2000), *Just Sustainabilities: Development in an Unequal World* (MIT Press, 2003), *Highway Robbery: Transportation Racism and New Routes to Equity* (South End Press, 2004), *The Quest for Environmental Justice: Human Rights and the Politics of Pollution* (Sierra Club Books, 2005), *Growing Smarter: Achieving Livable Communities, Environmental Justice, and Regional Equity* (MIT Press, 2007)), and *The Black Metropolis in the Twenty-First Century: Race, Power, and the Politics of Place* (Rowman & Littlefield, 2007 and notable awards for his work in environmental justice include: National Wildlife Federation Conservation Achievement Award in Science (1990), American Sociological Association, William Foote Whyte Distinguished Career Award (2007), Newsweek, one of 13 Environmental Leaders of the Century (2008), Co-op America, Building Environmental Stewardship Award (2008), Sierra Club, John Muir Award (2013), American Bar Association Excellence in Environmental, Energy and Resource Stewardship Award (2015), Children's Environmental Health Network, Child Health Advocate Award (2017), Climate One, Stephen H. Schneider Award for Outstanding Climate Science Communication (2019), Washington State University, William Julius Wilson Award for the Advancement of Justice (2019), United Nations Environment Program, Champions of the Earth Lifetime Achievement Award (2020), University of California Berkeley Ecology Law Quarterly Environmental Leadership Award (2022)).

112. Robert D. Bullard, *Overcoming Racism in Environmental Decisionmaking*, 36.4 ENVIRONMENT 10, 43 (May 1994).

113. Leah Thomas, *Intersectional Environmentalist: How to Dismantle Systems of Oppression to Protect People + Planet*, 46 (Hachette Book Group, Mar. 2022).

114. See Robert D. Bullard, *Leveling the Playing Field through Environmental Justice*, 23 VT. L. REV. 453, 457 (1999); see also, Robert D. Bullard, *Unequal Environmental Protection: Incorporating*

Dr. Bullard focuses on how environmental justice cannot be taken out of context and how it must be considered in larger systemic problems, linking environmental injustice to “discrimination in housing, land use, industrial planning, health care, and sanitation services.”¹¹⁵ Dr. Bullard’s scholarship also emphasizes environmental justice as forward-looking, seeking to eliminate “unfair, unjust, and inequitable conditions and decisions” not through the erasure of history, but through prevention of injustice in the future.¹¹⁶

2. Principles of Environmental Justice

In 1991, scholars, activists and politicians gathered in Washington D.C. at the first multinational People of Color Environmental Leadership Summit to “build a national movement of all people of color to fight the destruction and taking of our lands and communities” . . . “to ensure environmental justice,” “to promote economic alternatives,” and “to secure our political, economic and cultural liberation.”¹¹⁷ This summit produced a list of 17 Principles of Environmental Justice which served as a defining document for environmental justice scholarship:

- 1) Environmental Justice affirms the sacredness of Mother Earth, ecological unity and the interdependence of all species, and the right to be free from ecological destruction.
- 2) Environmental Justice demands that public policy be based on mutual respect and justice for all peoples, free from any form of discrimination or bias.
- 3) Environmental Justice mandates the right to ethical, balanced, and responsible uses of land and renewable resources in the interest of a sustainable planet for humans and other living things.
- 4) Environmental Justice calls for universal protection from nuclear testing, extraction, production and disposal of toxic/hazardous wastes and poisons and nuclear testing that threaten the fundamental right to clean air, land, water, and food.
- 5) Environmental Justice affirms the fundamental right to political, economic, cultural, and environmental self-determination of all peoples.
- 6) Environmental Justice demands the cessation of the production of all toxins, hazardous wastes, and radioactive materials, and that all past and

Environmental Justice in Decision Making, in *Worst Things First?: The Debate Over Risk-Based National Priorities* 253 (Adam M. Finkel & Dominic Golding eds., 1994).

115. Bullard, *supra* note 109, at 454; *see also* Leah Thomas, *Intersectional Environmentalist: How to Dismantle Systems of Oppression to Protect People + Planet*, 45-6 (Hachette Book Group, Mar. 2022) (quoting Dr. Bullard, the father of environmental justice, stating that Environmental Justice “embraces the principles that all communities, all people are entitled to equal protection of our environmental laws, health laws, housing laws, transportation laws and civil rights laws”).

116. Bullard, *supra* note 109, at 453.

117. *The Principles of Environmental Justice*, NATIONAL PEOPLE OF COLOR ENVIRONMENTAL LEADERSHIP SUM. (Oct. 24-27, 1991). *See also*, Paul Mohai, *Environmental Justice, and the Flint Water Crisis*, 32 *Mt. Socio. Rev.* 15-16 (2018).

- current producers be held strictly accountable to the people for detoxification and the containment at the point of production.
- 7) Environmental Justice demands the right to participate as equal partners at every level of decision- making, including needs assessment, planning, implementation, enforcement, and evaluation.
 - 8) Environmental Justice affirms the right of all workers to a safe and healthy work environment without being forced to choose between an unsafe livelihood and unemployment. It also affirms the right of those who work at home to be free from environmental hazards.
 - 9) Environmental Justice protects the right of victims of environmental injustice to receive full compensation and reparations for damages as well as quality health care.²³
 - 10) Environmental Justice considers governmental acts of environmental injustice a violation of international law, the Universal Declaration On Human Rights, and the United Nations Convention on Genocide.
 - 11) Environmental Justice must recognize a special legal and natural relationship of Native Peoples to the U.S. government through treaties, agreements, compacts, and covenants affirming sovereignty and self- determination.
 - 12) Environmental Justice affirms the need for urban and rural ecological policies to clean up and rebuild our cities and rural areas in balance with nature, honoring the cultural integrity of all our communities, and provided fair access for all to the full range of resources.
 - 13) Environmental Justice calls for the strict enforcement of principles of informed consent, and a halt to the testing of experimental reproductive and medical procedures and vaccinations on people of color.
 - 14) Environmental Justice opposes the destructive operations of multinational corporations.
 - 15) Environmental Justice opposes military occupation, repression and exploitation of lands, peoples and cultures, and other life forms.
 - 16) Environmental Justice calls for the education of present and future generations which emphasizes social and environmental issues, based on our experience and an appreciation of our diverse cultural perspectives.
 - 17) Environmental Justice requires that we, as individuals, make personal and consumer choices to consume as little of Mother Earth's resources and to produce as little waste as possible; and make the conscious decision to challenge and reprioritize our lifestyles to ensure the health of the natural world for present and future generations.¹¹⁸

These principles provided a baseline for many scholars who used this list of principles as a starting point for discovering the best ways to integrate the theories and goals of the environmental justice movement into policy which could be applied to real world problems. Although some principles were more nuanced

118. *Id.* at 18-20.

and applied only to specific issues, principles such as Principles 5, 7, and 9 became necessities to environmental justice frameworks.

B. A TAXONOMY OF ENVIRONMENTAL JUSTICE

In an effort to encapsulate the many broad concerns captured under environmental justice by Ballard, the Principles, and other early environmental justice scholars, Professor Robert R. Kuehn,¹¹⁹ created the framework. This will be the framework used in this Note in order to recommend implementation of EPA funding mechanisms, grant requirements, and enforcement of actions in better capturing environmental justice concerns in addressing wastewater sanitation issues. The framework consists of a four-part categorization of environmental justice issues: (1) distributive justice (2) procedural justice (3) corrective justice and (4) social justice.¹²⁰

Distributive justice is “the right to equal treatment” provided through an equivalent distribution of goods and opportunities across varying communities.¹²¹ Specifically, it involves addressing inconsistencies between the burdens disproportionately borne by certain communities over others and the absence of amenities or benefits¹²² which are provided to some communities over others.¹²³ Distributive justice seeks to identify disparate impacts and seek resolution through equitable distribution.¹²⁴ In practice, distributive justice can be sought through funding opportunities, or in court under Title VI or 14th Amendment Equal Protection claims, both of which will be explored in this Note in addressing wastewater sanitation.¹²⁵

Procedural justice is “the right to treatment as an equal” established by providing communities with an equal opportunity to a voice in political decisions.¹²⁶ It involves the need for direct inclusion, representation, and communication between decision makers and a community on decisions which will impact that

119. Robert R. Kuehn’s Framework has been cited over 200 times in Environmental Justice scholarship.

120. Robert R. Kuehn, *Taxonomy of Environmental Justice* 10,681 (2006).

121. *Id.* at 10,686 (referencing Ronald Dworkin, *Taking Rights Seriously* 273 (1977)).

122. Benefits such as parks, water treatment and sanitation, street maintenance, or access to public transportation. For example, residents of Florida town sued their township under the Equal Protection Clause to obtain equality of municipal services including sewerage and stormwater drainage, a water distribution system, and paving and maintenance of streets which was disproportionately absent from minority communities. In another case in New York, plaintiffs sued for a lack of recreational amenities, citing 225 neighborhood parks in wealthy neighborhoods and white, and only two in communities of color. *Id.* at 10,687.

123. *Id.* See also *Environmental Justice: Bridging the Gap Between Environmental Laws and “Justice”*, 47 AM. U. L. REV. 221, 230-33 (1997).

124. Kuehn, *supra* note 115, at 10,686.

125. *Id.* at 10,686-87 (citing Robert D. Bullard, *Conclusion: Environmentalism With Justice, In Confronting Environmental Racism: Voices From The Grassroots* 195, 199 (Robert D. Bullard ed., 1993)).

126. *Id.* at 10,688.

community.¹²⁷ To achieve procedural justice, environmental justice advocates seek more “deliberative models of decision-making,” better accessibility for disadvantaged groups of legal and technical resources, and more accessibility generally to the decision-making process.¹²⁸ In practice, procedural justice is sought through establishing procedural requirements or through the formal complaint process claiming ex-ante¹²⁹ and ex-post¹³⁰ violations of procedural fairness.¹³¹ This Note will explore community participation in wastewater sanitation funding processes, grant requirements, and Title VI complaints.

Corrective justice is the right to remedy.¹³² Corrective Justice seeks fairness through being made whole and punishing bad actors through the law.¹³³ Corrective justice is sought through agency collection of information for minority and low-income populations and through the enforcement of health and environmental measures in areas where information determines failures.¹³⁴ This Note will explore how corrective justice can be sought for waste sanitation issues through identifying failures through data collection and engaging in enforcement measures through Title VI and grant requirements.

Social justice is the right to systemic equality and true political equality through the consideration and acknowledgement of other systemic factors in environmental issues.¹³⁵ It involves consideration of sociological factors such as race, ethnicity, class, culture, lifestyles, and political power in environmental decision-making.¹³⁶ Social justice requires acknowledging how these factors may impact environmental burdens to the community as well as how environmental burdens may exacerbate other burdens such as inadequate housing, lack of employment opportunities, and poor schooling.¹³⁷ These impacts cumulatively lead directly to negative influences on the quality of life, lessen development potential, and cause negative perceptions of a community, leading to further social and economic degradation.⁴² In practice, social justice is sought through administrative requirements and increased commitment to hearing complaints made by communities seeking government involvement to address environmental issues, coupled

127. *Id.* (citing Robert D. Bullard, *Dumping in Dixie* 116 (2d ed. 1994)).

128. *Id.* at 10,689.

129. An ex-ante complaint is one raised concerning the fairness of public participation procedures and whether one group or side was favored over another. *Id.* at 10,688.

130. An ex-post complaint is one raised concerning whether the completed decision-making process treated all with equal concern and respect. *Id.*

131. *Id.*

132. *Id.* at 10,693.

133. *Id.*

134. *Id.*

135. *Id.* at 10,688-89.

136. Flowers, *supra* note 8, at 168. (“It’s about how these areas have historically been overlooked because of who lives there. It’s about who is and has been considered worthy —by politicians, bureaucrats, even society at large. And even though rural bias is real, rural communities aren’t the only places where infrastructure is lacking. Just look at Flint, Michigan.”)

137. Robert R. Kuehn, *Taxonomy of Environmental Justice* at 10,699.

with a myriad of sociological factors, such as is the case with wastewater sanitation problems to be discussed in this Note.

C. CRITIQUES OF UTOPIAN ENVIRONMENTAL JUSTICE PRINCIPLES IN THE REAL WORLD

Environmental justice frameworks have been critiqued as idealistic and difficult to apply. Critiques regarding the realistic workability of these frameworks should not be overlooked, as they offer valuable considerations as to how these ideals might look in the reality of regulatory efforts. It is important to evaluate these critiques in this Note, as this Note seeks further progress by applying environmental justice to real-world problems in wastewater sanitation and real agency policy.

In her article, *The Challenge of Environmental Justice*, Professor Sheila Foster discusses the natural tension between regulatory regimes and environmental justice goals. On one hand, many environmental decisions enacted via regulatory tools trend naturally towards seeking “the greatest good to the greatest number” of people, as well as towards administrative efficiency.¹³⁸ On the other hand, environmental justice efforts seek equitable distribution and meaningful participation.¹³⁹ Foster describes environmental justice as a tool to synthesize “aspirations for community empowerment, participatory democracy, distributional equity, and social justice” into conceptual framework for consideration.¹⁴⁰ It is not a demand for perfect policy, but a framework to make better policy to supplement more administrative structures of regulatory decision-making.¹⁴¹

Similarly, many scholars see difficulty in promoting bottom-up ideas in a top-down government approach.¹⁴² The policies considered in this Note come from the federal government with the goal of serving an individual community. The environmental justice movement, especially its procedural justice goals, emphasizes giving a voice to communities. However, EPA’s authority in grant allocation and enforcement ensures it has the final say. Some question whether this type of ‘paternalistic’ regulatory action can truly provide environmental justice.¹⁴³ Although this Note will make recommendations to improve community involvement, it acknowledges the inherent authority EPA has in the process and does not argue for complete decentralization of environmental justice efforts.

138. *Id.* (referencing Sheila Foster, *Justice from the Ground Up: Distributive Inequities, Grassroots Resistance, and the Transformative Politics of the Environmental Justice Movement*, 86 CAL. L. REV. 786 (1998)); Sheila R. Foster, *The Challenge of Environmental Justice*, 1 RUTGERS J. L. & URB. POL’Y 1, 9 (2004).

139. Foster, *supra* note 133, at 9.

140. *Id.* at 11-12.

141. *Id.*; see also, Sheila R. Foster, *Environmental Justice in an Era of Devolved Collaboration*, 26 HARV. ENVTL. L. REV. 459, 465-69 (2002).

142. VILLA *supra* note 105 at 32.

143. *Id.* at 28, 32.

In addition, Eric Yamamoto and Jen-L Lyman critique environmental justice frameworks which group environmental justice issues as one, all arising from the same concerns.¹⁴⁴ They argue that the environmental justice movement forgets to consider cultural and power differences among communities of color and their different relationships with and meanings of “the environment.”¹⁴⁵ For example, although health is the priority in Lowndes for waste disposal treatment, this may not be the main concern for all communities experiencing wastewater sanitation issues. For instance, Yamamoto and Lyman note that although some might describe the siting of a waste disposal plan near an Indigenous American community as environmental racism, that community considers it a denial of the cultural and spiritual well-being of their people.¹⁴⁶ It is important in considering this analysis to remember that no communities should have descriptions thrust upon them, and one should not to change the meaning of the community’s voice in well-intentioned attempts to integrate needs.

Distinctly from Yamamoto and Lyman, Christopher H. Foreman criticizes the environmental justice movement for lacking focus, claiming that procedural priorities come at the cost of efficiency and public health.¹⁴⁷ Foreman claims that, in attempting to make sure communities are heard and in avoiding labels, environmental justice scholars are breeding chaos which prevents risks from being addressed.¹⁴⁸ This Note will consider both points through the environmental justice framework and determine whether a balance may be struck in addressing wastewater sanitation.

In addition, in her article, *the Current State of Environmental Law: Part II*, Alice Kaswan raised concern over the environmental justice movement’s ability to influence if given the chance to be heard.¹⁴⁹ The environmental justice movement’s “decentralized, grassroots character” and general lack of “technical and financial resources” impedes its capacity to be influential in decision-making.¹⁵⁰ For now, EPA has committed to making progress in incorporating environmental justice efforts into policy. However, history has shown that environmental justice efforts are subject to changes in executive power, so it is important to ensure that while the framework is being integrated, the integration does not slow progress in demanding perfection. This Note will consider impediments to the environmental justice movement’s influence when analyzing policies surrounding wastewater

144. Eric K. Yamamoto & Jen-L W. Lyman, *Racializing Environmental Justice*, 72 U. COLO. L. REV. 311, 311 (2001).

145. *Id.* at 311.

146. *Id.* at 312.

147. VILLA *supra* note 105 at 35-37 (excerpting Christopher H. Foreman, Jr., *The Promise and Peril of Environmental Justice*).

148. *Id.*

149. Alice Kaswan, *Environmental Justice and Environmental Law*, 24 FORDHAM ENVTL L. REV. 149, 157-58 (2013).

150. *Id.*

sanitation, especially because significant wastewater sanitation funding comes from new legislation that could be stunted with a shift in political power.

It is important to consider the environmental justice framework when integrating environmental justice into issues such as wastewater sanitation. As EPA expands its efforts through new environmental justice funding opportunities, increased requirements, and enforcement efforts, considering how these policies can better integrate the ideals of environmental justice while also considering real-world feasibility remains an important step. As stated by prominent environmental justice scholar Dr. Robert Bullard, “unlike the EPA, communities of color did not discover environmental inequities in 1990.”¹⁵¹ Rather, communities “have known about and have been living with lower environmental quality for decades” before the EPA acknowledged this concept.¹⁵² Using the ideas of scholars, this Note attempts to acknowledge this deep-seeded knowledge and utilize it to recommend viable solutions to improve application of EPA’s newly funded opportunities for assisting communities suffering environmental and public health atrocities due to lack of proper wastewater sanitation.

IV. THE TREATMENT: RECOMMENDATIONS FOR IMPROVING EPA’S OPPORTUNITIES TO BETTER SERVE COMMUNITIES

The new opportunities presented by the Bipartisan Infrastructure Law funding and potential enforcement from EPA’s new office bring hope to environmental justice in wastewater sanitation. These programs may also reveal how useful environmental justice can be, which will depend on how EPA chooses to implement them. This part is committed to analyzing the programs outlined above and, how through the utilization of environmental justice scholarship, they may be improved to better fit with community needs. This part will make recommendations based on Kuehn’s Environmental Framework of distributional, procedural, corrective, and social justice on how to improve funding opportunities and Title VI enforcement to better serve communities experiencing wastewater sanitation challenges.

A. NEW POWER FOR COMMUNITIES THROUGH GRANT REQUIREMENTS AND PROCEDURES

Funding opportunities, such as those highlighted in the previous part of this Note, bring technical expertise to communities to provide a real opportunity for progress. In so doing, EPA should focus energy on highlighting the community’s needs, values, and expertise through utilizing the environmental justice framework. Below, this section considers how the framework can improve these

151. Robert D. Bullard, *Environmental Justice in the 21st Century: Race Still Matters*, 49 CLARK ATLANTA UNIV. 151 (2001).

152. Robert D. Bullard, *Leveling the Playing Field through Environmental Justice*, 23 VT. L. REV. 453 (1999); see also Robert D. Bullard & Beverly Hendrix Wright, *The Politics of Pollution: Implications for the Black Community*, 47 PHYLON 71, 75 (1986).

funding opportunities to avoid mistakes of the past and to better serve community interest.

1. Distributive Justice

Funding opportunities present EPA with a direct means of redistributing burdens and benefits to make a more balanced system: they must fix undue burdens.¹⁵³ However, one concern is whether distributive justice could be stifled through grant application restrictions.¹⁵⁴ Rather than addressing the system which has led to certain communities being overburdened, grant applications focus on solutions within the regulatory and industry scheme which in turn stifle further progress in regulatory change by incentivizing projects that 'fit in the box' rather than ones that pursue regulatory and policy reforms and challenge industry traditions.¹⁵⁵ For example, New York's past programs for disadvantaged communities required that funded projects "align with the strategic priorities of the Regional Economic Development Council," therefore incentivizing projects consistent with the current regulatory scheme.¹⁵⁶ In formulating application requirements for grants such as SEJCA, EPA should work with states to ensure that restrictions placed on applicants do not stifle distributive justice. This concern highlights the friction between bottom-up ideas and a top-down approach. The government must focus grants and application processes on serving the community, promoting creative ideas that are specific to the community's needs. In seeking solutions, EPA should offer guidance to applicants but permit applications which speak to specific solutions tailored to these problems and resist falling into requirements that stifle creativity.¹⁵⁷

2. Procedural Justice

EPA's funding application processes and fulfillment of the opportunities should promote direct inclusion, representation, and communication with the community as much as possible. As Foster mentioned, regulatory tools trend towards efficiency while environmental justice emphasizes meaningful participation.¹⁵⁸ With pressure to get money out, true procedural justice may not be

153. Kuehn, *supra* note 115, at 10,686-87.

154. See J.L. Harrison, *Coopted Environmental Justice? Activists' Roles in Shaping EJ Policy Implementation*, 1 ENVTL. SOCIO. 241, 246 (2015). ("Where the San Francisco and New York RFAs list examples of eligible projects, most entail individual behavior modification ("teach local residents and school children about the nutritional and public health benefits of growing and eating fresh produce") and market-based change ("promote purchase of environmentally preferred products and the use of less toxic consumer goods"); none include policy reform, regulatory enforcement, or increasing public participation in regulatory decision-making processes. U.S. EPA's program documents encourage industry-friendly collaborations.").

155. Kuehn, *supra* note 115, at 10,686-87.

156. *Id.*

157. VILLA *supra* note 105 at 28, 32.

158. Foster, *supra* note 133, at 9.

possible at all points. EPA must work quickly to review grants and award them. Under the Bipartisan Infrastructure Law, \$50 million in grants must be awarded by September of 2023 or the money “will go back to the Treasury” and will “disappear.”¹⁵⁹ In addition, a lag in funding dispersal can greatly delay progress. The CWSRF program is already experiencing this issue. One of its most successful state programs, the Ohio program, is still not utilizing all of the funding available to it. According to the program’s website, although \$71.2 million is available in funding, only \$48.3 million has actually been disbursed due in part to a slow regulatory process, meaning that progress could more easily be achieved if efficiency were increased.¹⁶⁰ In addition, regulatory ‘red tape’ causes delay in awarded funding from actually of \$571,000 in 2002 for Lowndes, the funding was not received for eight years.¹⁶¹ This cannot be the case under these environmental justice grants because these communities need assistance now. Although it is important to ensure the community is included as much as possible in the process, it must be balanced with a need for efficiency.

Here, it may be more important to expedite the process than to ensure proper procedure, but that does not mean that procedural justice should be ignored. Wherever possible, EPA should incentivize its own administrators and States to include the community. The community is the eyes and ears on the ground and its voice should not be lost for the sake of efficiency for risk that without community participation, funding may not serve its intended purpose. EPA can ensure community participation through attaching procedural requirements to funding which incentivize and require community involvement.

3. Corrective Justice

It is also important to seek corrective justice when possible. Although this may not mean punishing bad actors through the law, funding could also be used to make communities ‘whole.’¹⁶² To do this, EPA needs to collect information and determine failures.¹⁶³ However, in order to do this efficiently and in the best interest of the community, EPA should not repeat information collection where a community has already done the leg work. Lowndes has been chosen as one of the pilot programs for *Closing America’s Wastewater Access Gap Community*

159. Jon A. Mueller & Taylor Lilley, *Forty Years of Environmental Justice: Where is the Justice?*, 25 RICH. PUB. INT. L. REV. 75 (2022).

160. Ohio EPA provides a table entitled “HSTS Funding through the WPCLF”, which provides the following data: Total funding to date: \$82.3million available - \$60.7 million disbursed. 2016: (\$13.2 million available - \$10,105,987 disbursed); 2017: (\$13.2 million available - \$9,655,473 disbursed); 2018: (\$13.2 million available - \$10,941,307 disbursed); 2019: (\$10.3 million available - \$8,409,486 disbursed); 2020: (\$10.8 million available \$8,110,417- disbursed); 2021: (\$10.5 million available - \$9,114,703 disbursed). Ohio EPA, *Home Sewage Treatment Systems (HSTS)*, (Sept. 2, 2023, 11:05 PM), <https://perma.cc/UU6T-PPBQ>.

161. Flowers, *supra note* 8 at 116-17, 130.

162. *Id.*

163. *Id.*

Initiative that will receive technical assistance. However, although there is much to do in Lowndes, some of the technical research that would be expected in the assessment stage of the Initiative has already been accomplished by activists like Catherine Coleman Flowers.¹⁶⁴ Previously, Lowndes has received \$571,000 to determine the scale of the public health concerns related to wastewater.¹⁶⁵ In order to serve the community and make the most of the available funding, EPA should ensure they do not repeat work already accomplished. Instead, EPA should utilize funds in the other stages and target funding to the extent possible towards the remedy which the community seeks. In the case of Lowndes, this may mean redistributing funding that typically would be used to support public health surveys towards getting community members closer to functioning septic tanks, whether it be through tool kits on septic tank care and installation, training individuals to be septic tank installers and mechanics, or creating mechanisms to fund the infrastructure itself. Additional funding should provide steppingstones towards making a community whole and EPA should ensure that funding and time is not wasted in repeating progress the community has already made.

4. Social Justice

Through funding, EPA must ensure that social justice is considered. This includes an active effort by EPA to consider systemic inequality and acknowledge its presence in application processes.¹⁶⁶ As Kaswan mentions, the extent to which a community's movement is "decentralized" and "grassroots," coupled with a general lack of "technical and financial resources" can be an impediment to communities.¹⁶⁷ EPA should consider availability of resources in reviewing applications, as well as sociological factors such as "race, ethnicity, class, culture, lifestyles," and "political power," which may impact a specific application compared to another.¹⁶⁸

For example, EPA should make efforts to recognize professionalization, a factor that has been favored for grant recipients in the past, and how such a practice may marginalize grassroots efforts and many of the communities which these grants seek to serve due to lack of political and economic capital and experience.¹⁶⁹ In addition, EPA should consider how it considers professional grant writers in the process. Concerns have been raised by the Texas Center for Environmental Quality ("TCEQ") in comments on the FY 2023-2024 National

164. *Id.* at 130, EPA, *supra* note 3.

165. WASTE at 130.

166. See Kuehn, *supra* note 115, at 10,702.

167. Kaswan, *supra* note 144, at 158.

168. KUEHN, *supra* note 115, at 10,699 ("It's about how these areas have historically been overlooked because of who lives there. It's about who is and has been considered worthy-by politicians, bureaucrats, even society at large. And even though rural bias is real, rural communities aren't the only places where infrastructure is lacking. Just look at Flint, Michigan.").

169. JILL LINDSEY HARRISON, FROM THE INSIDE OUT, 48 (2019).

Program Guidance that when federal funding is provided indirectly through intermediate intuitions such as professional grant writers, the funding can become diluted in order to cover administrative costs.¹⁷⁰ If intermediary organizations are utilized, the percentage of funding that goes directly to the community may not provide exactly what is needed. EPA should require applications in which an intermediary is used to include the actual amount of funding needed to address the community's needs and separately account for what may be needed in supportive costs.

In addition to professionalization concerns, there are also access concerns implicated in social justice efforts. These programs would benefit from federal and state commitments to providing access to a wider range of applicants through widening their applicant base and by increasing outreach and education programs to increase knowledge of these opportunities, including efforts to ensure that signage and programming are available in different languages to ensure accessibility to non-English speaking minority populations.¹⁷¹ Specifically, loan programs could be developed to better address accessibility problems bred from lack of political and financial resources to better serve a wider group of communities. For example, the CWSRF is extremely varied state-to-state. Some states are more accessible to rural communities than others. Unlike Ohio CWSRF, the Alabama CWSRF funding is currently only available for public bodies,¹⁷² not individual homeowners.¹⁷³ This prevents communities in need of small-scale septic from getting aid through the CWSRF. In Lowndes, this means the CWSRF is not usable. However, even if they did permit individuals, similarly to Ohio, there would still be accessibility issues because Alabama's CWSRF does not offer full loan forgiveness and requires proof of an ability to repay within 20 years.¹⁷⁴ EPA's new funds from the Bipartisan Infrastructure Law provide new opportunities for EPA to target states whose CWSRF program have not succeeded, to increase educational outreach, offerings of full forgiveness, and to add requirements for certain percentages to reach rural communities in order widen the consideration of

170. Comment by TCEQ claims these costs can be over 50% of funding. *Comments on FY 2023-2024 National Program Guidance*, Office of Environmental Justice and External Civil Rights Compliance Office, EPA (Aug. 2022).

171. This is consistent with CWA § 101(e) which provides EPA discretionary authority to encourage states (and tribes with TAS for WQS and EPA-approved WQS) to improve public participation processes in the development of state water quality standards through greater outreach, including to communities with environmental justice concerns, and by translating crucial public documents and notices for limited English-speaking communities consistent with Section 5-5(b) of EO 12898 on environmental justice. EPA, EPA LEGAL TOOLS TO ADVANCE ENVIRONMENTAL JUSTICE 67 (2022), <https://perma.cc/TS5D-TQ5W>.

172. Public bodies include counties, state agencies, incorporated cities and towns, boards, and authorities. State Revolving Fund (SRF), AL DEPT. OF ENV. MGMT., <https://perma.cc/WJ64-8A5Q> (last visited Nov. 18, 2022).

173. *Id.*

174. *Id.*

other types of applicants, especially those who lack political to apply through governmental bodies.

All in all, the use of the environmental justice framework could greatly increase the result of these funding opportunities. Through considerations of different types of justice, EPA will better reach communities of need and reach the needs which they aim to address. Applying the environmental justice framework to wastewater sanitation will result in a better use of resources and more success for communities in need of assistance.

B. RENEWED POWER TO COMMUNITIES UNDER TITLE VI ENFORCEMENT

Through EPA's Final National Program Guidance, EPA has expressed interest in pushing for improvements to address environmental justice through Title VI. With more manpower, EPA may be able to do so. However, in making improvement EPA should focus energy on better integrating the environmental justice framework to serve communities' needs and values. Below, this section considers how the framework can improve Title VI to better serve as a means of remedy for these communities.

1. Distributive Justice

To seek justice, solution providers must fix undue burdens through seeking burden and benefit redistribution to make a more balanced system.¹⁷⁵ In the past, EPA's Title VI's recommended solutions have fallen short. For example, after two decades of inaction, the offered solution to a complaint in Flint, Michigan was nonbinding recommendations.¹⁷⁶ This case has yet to be pursued further and the recommendation has not been enough to unburden this community.¹⁷⁷ In Lowndes, it is unclear what DOJ's investigation may find or what recommendations may be made.¹⁷⁸ For Title VI to truly yield its power, it needs to make a difference in unburdening communities. In the issue of wastewater sanitation, the 'distribution of burdens and benefits' is not as clear cut as with Flint, where pollution was caused by facilities that were being utilized to serve other communities. With wastewater in rural communities, it is not necessarily that others are benefitting directly from these communities' burdens but may be benefitting indirectly. For example, communities may be benefitting from how past funding has been allocated, or where wastewater infrastructure sites have been chosen. The attenuation of this distributional injustice may prove difficult for EPA to distinguish from poverty, and it may take more bandwidth from EPA to utilize Title VI and

175. See Kuehn, *supra* note 115, at 10,686.

176. HARRISON, *supra* note 163, at 46.

177. *Id.*

178. DOJ Office of Public Affairs, *Justice Department Announces Environmental Justice Investigation into Alabama Department of Public Health and Lowndes County Health Department*, DOJ (Nov. 9, 2021), <https://perma.cc/QF9W-CX83>.

to determine how to truly unburden the community. As Bullard states, environmental justice cannot be taken out of context, and neither can the evaluation of distributional injustice.¹⁷⁹ Environmental injustice is inherently linked to “discrimination in housing, land use, industrial planning, health care, and sanitation services” and should not be overlooked in considering these layers.¹⁸⁰ EPA should look to agencies like the department of Education and Housing to see how these agencies have considered use of this statute because these agencies have been successful in utilizing its power. By looking to these agencies, EPA may discover better ways to integrate the context in which environmental injustice occurs and how it impacts how claims should be considered.

2. Procedural Justice

In addition, as much as possible, EPA’s administrative complaint process should promote direct inclusion, representation, and communication with the community in all aspects of the process. Although complainants are involved in the initial complaint process, they are not always included in EPA’s next investigatory and deliberation steps. For example, in the pesticides case where EPA found California pesticide laws allowed disproportionate exposure of soil fumigants to Latino children, EPA reached a settlement agreement with California’s Department of Pesticide Regulation without including feedback from the complainants of the community.¹⁸¹ Members of the community subsequently claimed that the settlements included nothing which they actually sought, including no direct remedies or protections for the community’s schoolchildren.¹⁸² In order to seek procedural justice, there is a need for direct inclusion and for the opportunity for communication between decision makers and a community.¹⁸³ In an important step towards procedural justice, DOJ has orchestrated community meetings as a part of their Lowndes investigation to discuss wastewater issues directly with residents.¹⁸⁴ There is hope that these communications will guide DOJ in its investigation and that they will continue to involve the community in decision-making.

True procedural justice may be difficult to fully achieve because it may need to be balanced with the interest of administrative efficiency. As Foster mentioned, regulatory tools trend towards efficiency, while environmental justice requests meaningful participation.¹⁸⁵ At times, these motivations can be in direct conflict

179. See Bullard, *supra* note 146, at 454.

180. *Id.*

181. *Id.*

182. HARRISON, *supra* note 163, at 46.

183. Kuehn, *supra* note 115, at 10,688 (citing Robert D. Bullard, *Dumping in Dixie* 116 (2d ed. 1994)).

184. WSFA 12 News Staff, *DOJ To Hold Community Meetings into Lowndes County Wastewater Problems*, WSFA 12, Mar. 31, 2022, <https://perma.cc/5NHV-5B6B>.

185. Foster, *supra* note 133, at 9.

where meaningful participation comes at the cost of efficiency. As discussed in the previous section of this Note, EPA is already struggling with efficiency in a way that is making Title VI lose its power. Furthermore, as mentioned by Kaswan the “decentralized, grassroots, character” of communities could impede its capacity to be influential in decision-making.¹⁸⁶ One member of the community does not represent an entire community’s interest and ensuring that the voice of the community is heard means that one does not equal all. EPA must promote participation by ensuring that the loudest and strongest interest groups are not commandeering the conversation and that other members of the community will have a chance to be heard in order to truly promote procedural justice.

3. Corrective Justice

In addition, in reviewing a complaint and receiving community input, it is important to seek the remedy sought. As mentioned previously, in EPA’s settlement with California’s Department of Pesticide Regulation, the community claimed that the settlements did not satisfy their aims.¹⁸⁷ This is not corrective justice.¹⁸⁸ EPA failed to make the community whole through its remedy.¹⁸⁹ With the reality of where *Sandoval* leaves many communities, EPA serves as the sword for which they can seek justice. In doing so, EPA must avoid ‘paternalistic’ regulatory action and focus on remedies which the communities seek.¹⁹⁰ In doing so, it is important to keep in mind the critique made by Eric Yamamoto and Jen-L Lyman that not all communities seek the same thing. EPA must focus on seeking remedies which communities are asking for in their investigations and recommendations, so long, of course, as the ‘punishments fit the crimes.’

4. Social Justice

Through the EPA’s administrative complaint process, a complainant must submit supporting information for their claim. Many of the communities experiencing this issue lack the resources, political and economic capital to do so. Social justice calls for an acknowledgement of systemic inequality and acknowledgement of these shortcomings which the communities cannot control.¹⁹¹ As Kaswan mentions, the “decentralized, grassroots, character” of communities and general lack of “technical and financial resources” can greatly impede its capacity to be influential in decision-making.¹⁹² In order to consider this framework adequately, EPA should consider where these resources may be lacking and include this

186. Kaswan, *supra* note 144, at 158.

187. Harrison, *supra* note 163, at 78.

188. See Kuehn, *supra* note 115, at 10,693.

189. *Id.* at 10,694.

190. VILLA *supra* note 105 at 28, 32.

191. Kuehn, *supra* note 115, at 10,702.

192. Kaswan, *supra* note 144, at 158.

consideration in their review of complaints. Sociological factors such as “race, ethnicity, class, culture, lifestyles”, and “political power” should be considered.¹⁹³

Lowndes, unlike many other communities, has benefitted from activists and interest from public health professionals like Flowers and Dr. Peter Hotez taking initiative; thus, information is available to the community to make a valid complaint regarding public health concerns and providing supporting data to demonstrate it. However, Lowndes is the exception.

Many other rural communities experiencing wastewater sanitation issues do not have these same resources. Communities may be aware that they are experiencing health problems related to wastewater exposure but may not know what the true extent of their harms are or the exact cause.¹⁹⁴

CONCLUSION

As EPA explores how to approach wastewater sanitation issues, it is pivotal, in order to best utilize newfound funding and manpower, to integrate environmental justice. Integration cannot just be in theory but must be in practice. For communities like Lowndes, these policies have the opportunity to really make a difference for the community and for its individuals. To avoid pitfalls, it is important to ensure that these policies are not seen as a paternalistic federal government coming into these communities without hearing the needs, values, and voices of those who live there. To address environmental justice, top-down and bottom-up must merge through applying the theoretical considerations of distributive, procedural, corrective, and social justice to real-life policy.

For the people of these communities, wastewater sanitation alone could bring an end to disease and suffering. However, through integration of environmental justice frameworks in implementation, these efforts could also push for an end to the invisibility they feel. In order to meet the goals set forth by E.O. 14,008, Justice40, Title VI and each of these individual funding policies, addressing environmental justice is more than a sanitation system; it is visibility, it is communication, and it is acknowledgement. Environmental justice is the framework, waste sanitation is the infrastructure, and these policies are the apparatus which provide the opportunity to make change. All must be connected to provide the sanitation treatment these rural communities need.

193. *Id.* (“It’s about how these areas have historically been overlooked because of who lives there. It’s about who is and has been considered worthy-by politicians, bureaucrats, even society at large. And even though rural bias is real, rural communities aren’t the only places where infrastructure is lacking. Just look at Flint, Michigan.”).

194. Michael Gerrard ET AL., *The Past, Present and Future of Title VI of the Civil Rights Act as a Tool of Environmental Justice*, 10 *FORDHAM ENVTL. L. J.* 393, 411 (1999).