COMMENT

NO ACCOUNTING FOR ACCOUNTABILITY? A COMMENT ON *ENVIRONMENTAL CITIZEN SUITS AND THE INEQUITIES OF RACES TO THE TOP*

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Citizen suits elicit strong opinions but the discourse around their relative merits and deficits is often woefully lacking in supporting data. In *Environmental Citizen Suits and the Inequities of Races to the Top*, David E. Adelman and Jori Reilly-Diakun step into this void and provide a cogent empirical analysis of citizen suits aimed at assessing whether these statutory causes of action are meeting the intent of the U.S. Congress to serve as a layer of protection against lax federal or state enforcement of environmental laws.[1] The authors argue the data shows citizen suits are largely not meeting this goal, but nor are they fulfilling the concerns of citizen suit critics. More specifically, Adelman and Reilly-Diakun contend that the data does not bear out the concern that citizen suits allow private actors to augment government enforcement schemes and priorities in a manner that lacks accountability, including to local community members that are most directly affected by how environmental laws are enforced. To arrive at these conclusions, Adelman and Reilly-Diakun "crunched" the available data, i.e., categorized, sorted, and made certain assumptions about the data—as is necessary in any empirical study.

This Comment offers practitioner observations on how citizen suits may resist some of this sorting and categorization, and what the data says or doesn't say about accountability to affected regulated and local communities. In particular, (1) the "wholesale" and "retail" litigation categories utilized by Adelman and Reilly-Daikun may obscure the broader impacts of retail citizen suit litigation on enforcement trends that have demonstrable bar-raising effects, and (2) the reliance on the number of environmental organizations in a state as a proxy for local preferences does not speak to whether there is alignment between the interests being vindicated by the actual citizen suit plaintiffs—often national environmental nongovernmental organizations (ENGOs)—and those of local residents.

I. Retail Litigation With Wholesale Impacts

Central to Adelman and Reilly-Diakun's analysis is the distinction drawn between "wholesale" and "retail" citizen suit litigation.[2] Wholesale litigation is roughly defined as those citizen suits targeting state or federal agencies for violating non-discretionary duties, resulting in broadly applicable outcomes. Retail litigation on the other hand is characterized as suits targeting private facilities, generally for permit violations, and resulting in facility-specific outcomes.[3] Adelman and Reilly-Diakun state that retail litigation has a "modest and geographically concentrated role," and suggest that retail litigation does not meaningfully impact inequities in enforcement.[4] However, this binary framing ignores the existence of retail suits that ask courts to interpret generic narrative requirements that are ubiquitous in permits, and which consequently result in broadly applicable outcomes. This is retail litigation that is, in effect, wholesale litigation. Citizens and ENGOs have long been aware of the way in which retail litigation can be used to create broad changes in enforcement. Citizen suit plaintiffs have limited resources and make use of "impact litigation" to maximize the effect of favorable outcomes. That is to say, citizens and ENGOs often make effective use of their funds by pursuing lawsuits that will have an impact beyond specific facilities. This approach has been used by

1. David E. Adelman & Jori Reilly-Diakun, *Environmental Citizen Suits and the Inequities of Races to the Top*, 92(2) U. Colo. L. Rev. 377, 379-80, 394-95 (2021).
2. *Id.* at 381.
3. *Id.* at 386, 407, 440-42.
4. *Id.* at 442.

ENGOs since the earliest days of citizen suit litigation[5] and through today.[6]

An apt recent example of the way in which citizen suit retail litigation can create broad changes in enforcement was seen in *San Antonio Bay Estuarine Waterkeeper v. Formosa Plastics Corp.*[7] In this 2019 case, an ENGO prevailed in a Clean Water Act (CWA) citizen suit against plastics manufacturer Formosa Plastics Corporation.[8] The allegations involved a narrative water quality standard in Texas-issued CWA permits that forbids discharges of floating solids "in other than trace amounts."[9] The plaintiffs introduced into evidence hundreds of bags of plastic waste collected from waters downstream of the facility.[10] The district court determined that "trace" meant a "very small" or "barely discernable" quantity, and concluded the plaintiffs' evidence demonstrated a violation of this threshold.[11] A consent decree was entered requiring injunctive relief and penalties costing approximately $50 million.

The impacts of *Formosa Plastics*—a retail suit—are being felt far beyond the single facility at issue in the litigation. The Texas Commission on Environmental Quality has adopted a zero discharge interpretation of "trace amount" that is consistent with the consent decree and will amend permits for over 150 dischargers to impose this interpretation and related new best management practices. This will almost certainly force new technologies and capital improvements at numerous facilities.

Adelman and Reilly-Diakun's characterization of retail litigation describes well those suits which seek to enforce a violation of a numerical standard at a specific facility, but *Formosa Plastics* and other suits like it do not sort neatly into the "wholesale" and "retail" buckets. These suits are also often at the leading edge of citizen suit law because they involve first impression questions of interpretation. Generic narrative standards in permits such as "trace,"[12] "unnatural,"[13] or "nuisance"[14] create opportunities for citizens and ENGOs to advocate for stricter interpretations of these commonplace terms, and outside the processes that build in accountability between permitter and permittee when standards change (e.g., notice-and-comment procedures). When successful, these retail suits can have far-reaching impacts: on the defendant facility; on other regulated entities in the state seeking to avoid noncompliance with a newly defined standard; and, given the relatively small universe of citizen suit decisions and their high precedential value, potentially on the programs of other states that utilize similar permit language.

II. Limits on Assessing Accountability to Local Preferences Through Numerical Data

Adelman and Reilly-Diakun also considered whether the data shed light on the persistent criticism of citizen suits as lacking in accountability to local preferences. This is an enormously complex question—even the most basic citizen suits involve the intersection of numerous interests (e.g., plaintiff organization interests, specific legally recognized plaintiff interests giving rise to standing, local and state (and sometimes federal) interests, non-plaintiff "fenceline" community interests, etc.). Adelman and Reilly-Diakun conclude that this criticism is likely unfounded because the significant majority of citizen suits are filed in states where there are also higher numbers of ENGOs, reasoning that the number of environmental organizations in a state can serve as a proxy for public support of environmental programs.[15] Adelman and Reilly-Diakun explain that the number of ENGOs in a state was chosen "because it is an indicator of regional political, social, and donor support for the organizations' missions."[16] These assumptions may be correct, but arguably this metric is too attenuated to speak to the accountability of the actual plaintiffs filing citizen suits to local (non-plaintiff) preferences.

Adelman and Reilly-Diakun show that it is overwhelmingly ENGOs that are the plaintiffs in citizen suits.[17] These groups are driven by defined programmatic objectives, grants, and other funding considerations, and are answerable to their members. It is also known that the membership and leadership of ENGOs (including those that command the largest litigation budgets), are overwhelm-

5. *See, e.g.*, Thomas B. Stoel Jr., *Environmental Litigation From the Viewpoint of the Environmentalist*, 7 Nat. Resources L., 547, 549 (1974) ("How do we actually decide which particular cases to become involved in? . . . [A] case should involve an important legal issue, with national or at least regional significance, and with precedential value. . . the case should, if successful, have the consequence of altering agency decisionmaking patterns . . . ."); Karl S. Coplan, *Citizen Litigants Citizen Regulators: Four Cases Where Citizen Suits Drove Development of Clean Water Law*, 25 Colo. Nat. Resources, Energy & Env't L. Rev. 61, 63 (2014) ("In a radical shift from the classic administrative law model . . . the citizen suit provided nongovernmental organizations the opportunity to develop their own interpretations of the environmental norms and test these interpretations in enforcement actions in the courts as a matter of first impression.").
6. NRDC, *Litigation at NRDC*, 4 (describing targeting cases "with a big impact"), https://www.nrdc.org/sites/default/files/litigation-at-nrdc.pdf.
7. No. 6:17-CV-0047, 2019 WL 2716544 (S.D. Tex. June 27, 2019). *See also* Karen M. Hansen & Bina R. Reddy, *Citizen Suits Lead the Way for Agencies on Plastics Enforcement*, Bloomberg L. (Oct. 16, 2020).
8. *Formosa Plastics*, *supra* note 7, at **8-9.
9. *Id.* at *3.
10. *Id.* at *4.
11. *Id.* at *3.
12. *See generally Formosa Plastics*, *supra* note 7.
13. Nat. Resources Defense Council v. Metro. Water Reclamation Dist. of Greater Chicago, 175 F. Supp. 3d 1041, 1058 (N.D. Ill. 2016) (interpreting meaning of "unnatural" in context of narrative water quality standard for phosphorus requiring that applicable waters be free from either "plant or algal growth . . . of other than natural origin" or "unnatural plant or algal growth.").
14. Graff v. Haverhill N. Coke Co., No. 1:09-CV-670, 2015 WL 3755986, at *1 (S.D. Ohio June 16, 2015) (Clean Air Act citizen suit alleging violation of nuisance provision in Ohio state implementation plan).
15. Adelman & Reilly-Diakun, *supra* note 1, at 428.
16. *Id.* at 430, n.183.
17. *Id.* at 417-18.

ingly white, and are led primarily by men.[18] ENGOs deserve credit for recognizing these issues and working in recent years to make progress on diversity, but nonetheless, in light of these facts, it is worth testing the assumption that the number of environmental groups in a state can serve as a proxy for local alignment with ENGO citizen suit litigants. Notably, in the retail context, the relief sought in a citizen suit (or settlement of a citizen suit) will often include injunctive measures that reflect the specific wishes of the plaintiffs. These wishes are sometimes, but certainly not always, consistent with those of the local community.[19] The number of environmental groups in a state is likely a useful proxy for statewide support for wholesale litigation. But it may be too crude a tool for the intensively local nature of retail litigation. Finally, as environmental justice concerns take on a larger role in citizen suits, additional data (e.g., the results of groundtruthing with local stakeholders on environmental priorities) may be needed to fully grapple with questions of accountability in citizen suit litigation.

18. *See generally* Erik Ortiz, *"The Numbers Don't Lie": The Green Movement Remains Overwhelmingly White, Report Finds*, NBC NEWS (Jan. 13, 2021); Dorceta E. Taylor, *The State of Diversity in Environmental Organizations*, Green 2.0 (July 2014).

19. *See* Rachel Jones, *The Environmental Movement Is Very White. These Leaders Want to Change That*, Nat'l Geographic (July 29, 2020) ("Many solutions to natural resource concerns are often experienced as environmental gentrification for communities of color. . . .Take bike lanes, which are often carved through communities where parking space is scarce and public transportation is minimal."). Questions of accountability to local preferences are especially acute in the context of citizen suits against governmental entities because the costs of relief will be assessed against local residents via taxes. *See, e.g.*, Newark Education Workers Caucus et al. v. City of Newark et al., No. 2:18-cv-11025 (D.N.J. 2018) (citizen suit brought by NRDC under the Safe Drinking Water Act against elected officials seeking preliminary injunctive relief costing $80+ million, which if granted, would have been paid for by non-party local residents).