



www.legalaiddc.org
1331 H Street, NW
Suite 350
Washington, DC 20005
(202) 628-1161

**Testimony of Rachel Rintelmann
Legal Director, Systemic Advocacy and Law Reform
and
Kaitlin Welborn, Staff Attorney, Impact Litigation
Legal Aid DC**

**Before the Committee on Transportation and the Environment
Council of the District of Columbia**

Public Hearing Regarding:

**Bill 25-0564
The Environmental Justice Amendment Act of 2023**

March 18, 2024

Legal Aid DC¹ submits this testimony in support of B25-0564, the Environmental Justice Amendment Act of 2023. For all too long, District policies and planning practices have resulted in the concentrated placement of facilities that produce air pollution, hazardous waste, water pollution, stormwater runoff, and urban heat island effects in low income and predominantly Black and brown neighborhoods. In the District (as in much of the rest of the country) centuries of racist and discriminatory housing laws and practices have led to the concentration of low-income residents and people of color in certain neighborhoods. Many of those neighborhoods – including many located in Wards 5, 7, and 8 - are also home to a disproportionately large number of pollution-generating industrial sites. None of this is coincidental. All of it is by design, and it can only be undone through thoughtful and proactive policymaking.

¹ Legal Aid DC is the oldest and largest general civil legal services program in the District of Columbia. The largest part of our work is comprised of individual representation in housing, domestic violence/family, public benefits, and consumer law. We also work on immigration law matters and help individuals with the collateral consequences of their involvement with the criminal legal system. From the experiences of our clients, we identify opportunities for court and law reform, public policy advocacy, and systemic litigation. For more information, visit www.LegalAidDC.org.

I. The Environmental Justice Amendment Act is an Important Step in Combatting Environmental Racism in our Community

The Environmental Justice Amendment Act contains a number of important provisions which Legal Aid strongly supports. These include efforts to define and identify communities that are overburdened by environmental hazards and to ensure they are better protected from harmful public and private development, with a focus on the cumulative impacts experienced by a neighborhood, rather than just the specific impacts created by a single facility. We also support the creation of an Energy and Environmental Justice Office within the Department of Energy and the Environment to ensure the effective implementation of this law.

The Act sets out rigorous criteria for the construction, expansion, and re-permitting of polluting facilities in overburdened neighborhoods. It will safeguard the health and safety of District residents enduring the combined or cumulative health effects of pollution. This is especially pertinent for overburdened neighborhoods like Ivy City and Brentwood, as well as others in Wards 5, 7, and 8, which have disproportionately endured the historical and ongoing impact of environmental harms. Residents of those wards are far more likely to be exposed to air, water and soil pollution, a lack of green spaces and urban heat island effect than residents of other wards.²

The National Oceanic and Atmospheric Administration (NOAA) developed and supports community-based scientific studies to map and understand how heat is distributed in communities.³ The results of that study are stark:

- Washington Highlands, a neighborhood in Ward 8, is composed of mostly low-income and public housing apartment complexes. The temperatures around Washington Highlands are higher than the rest of the district by around 1°C. This neighborhood has very little tree coverage and many heat-

² See, e.g. *Air Pollution Disproportionally Effects Washington, D.C. Neighborhoods*. Marissa Kunerth Feb. 2, 2023. Available at <https://appliedsciences.nasa.gov/our-impact/story/air-pollution-disproportionally-effects-washington-dc-neighborhoods>

³ *Urban Heat Islands in Washington DC: How citizen science, data, and science communication come together in NOAA to tell the story of our cities*. Tiffany Small, Juan Pablo Hurtado Padilla, and Rafael DeAmeller, Feb. 2, 2023. Available at <https://arcg.is/OfueXm0>.

absorbing surfaces such as roads, highways, and parking lots, which intensify the Urban Heat Island effect.⁴

- The Parkview neighborhood just north of Howard University has been shown to be the hottest neighborhood in the District, with temperatures around 4.7°C higher than the rest of the city. Park View is a historically predominately Black and brown community, though has seen shifting demographics in recent years as the area gentrifies. This area is covered with structures that greatly reduce air flow such as 3 story row homes stacked together tightly and low tree canopy coverage. While there is a neighborhood park, it contains very few trees and many heat-absorbing basketball and tennis courts, a parking lot and playground structures with dark surfaces beneath them.⁵
- Meanwhile, neighborhoods like Colonial Village in Northwest DC enjoy temperatures 4.4°C cooler than the average temperature for the city, due to a high tree canopy coverage (67%).⁶

This bill will enable the District to monitor and begin to ameliorate these cumulative and disparate impacts, including by denying permits, imposing penalties, and otherwise holding accountable polluting industries for the harms caused to communities. Importantly, the District must also hold itself accountable, as many of the pollution-causing facilities are District-owned and operated, including bus depots, trash and construction waste facilities, and surface parking lots.

II. The Bill must Include a Private Right of Action for District Residents Harmed by Environmental Injustice

To make the law as effective as possible, the Environmental Justice Amendment Act should be amended to include a private right of action for residents harmed by violations of the law. A private right of action gives a private person or entity the ability to file suit to enforce a statutory or regulatory scheme.

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

A. Why a Private Right of Action Matters

Private rights of action are crucial to ensuring the enforcement of environmental laws. A private right of action empowers individuals to hold violators of environmental laws accountable. Without a private right of action, the public must rely on the government to enforce a law. Should the government decline or lack the resources to prosecute violations, there is no remedy available to those who have been harmed.

The District's primary existing environmental law – the D.C. Environmental Policy Act (DC EPA) – illustrates how the absence of a private right of action may allow a law to go unenforced. Under the DC EPA, whenever the government or a private person “proposes or approves a major action that is likely to have substantial negative impact on the environment,” they must prepare a detailed Environmental Impact Statement (EIS). DC Code § 8-109.03(a). The promise of this law, however, goes unfulfilled. As of January 2024, researchers at the George Washington University School of Law found that not a single “EIS prepared in accordance with the DC EPA has been found or made publicly available” since the law’s passage in 1989.⁷ In 2013, the D.C. Department of the Environment reported that no EIS had ever been prepared. The researchers were not able to identify any other recorded EIS or supplemental EIS prepared pursuant to the EPA.⁸ The D.C. Department of the Environment explained that it planned to amend the EPA and implementing regulations to “close loopholes since no EIS has ever been triggered under the Act.”⁹ Although this item was on a “to do” list, it remains unresolved over a decade later.

Because the DC EPA lacks a private right of action, private citizens cannot sue private defendants over violations of the law. Private individuals are left with the sole recourse of

⁷ Dylan Basescu, James Crisafulli, Patrick Seroogy, & Georgia Spies, *White Paper on the Lack of Enforcement and Public Participation in the D.C. Environmental Policy Act 3* (Jan. 2024), <https://bpb-us-e1.wpmucdn.com/blogs.gwu.edu/dist/9/5033/files/2024/02/FINAL-Whitepaper-on-DC-EPA-8f9a03d9a67ee460.pdf>.

⁸ *Id.* at 5.

⁹ See District Dep’t of the Env’t, *Performance Oversight Responses: Questions 2013, Attachment 29*, at 114, https://dccouncil.gov/wp-content/uploads/2018/budget_responses/Performance_Oversight_Questions_2013_-_All_Attachments_-_final.pdf.

suing the government over its decision-making process regarding an EIS (including the decision not to issue an EIS). As a result, “[t]he D.C. EPA has rarely been litigated in court” and “there is little judicial guidance on the statute.”¹⁰

As currently drafted, this proposed bill risks having the same fate at the DC EPA. Importantly, the “judicial review” portion of the Environmental Justice Act, Section 9, does not replace a private right of action. Like the corresponding provision in the DC EPA, the judicial review provision only permits administrative or judicial review of the government’s action – not the action of a private entity.

We have heard pushback in response to Legal Aid’s prior attempts to argue for a private right of action in other pieces of legislation designed to protect the rights of low income Black and brown District residents. The main complaint is that lawsuits could clog the court or be too numerous. As an initial matter, folks filing more lawsuits is not a bad thing. In an ideal world, there should be as many lawsuits as there are violations of the law, otherwise rights are going unenforced. Additionally, however, a private right of action does not necessarily result in a deluge of unnecessary lawsuits. For example, the DC Water Pollution Control Act contains a private right of action. DC Code § 8-103.19. But that law “has only been litigated once in a case that provides no substantive statutory interpretation.”¹¹

Adding a private right of action to the Environmental Justice Amendment Act could be easily done. Modeled on federal environmental statutes, under Section 9, the Act could be amended to add a new subsection (c) to read as follows:

“(c) Notwithstanding subsections (a) or (b), any person may bring a civil action on his or her own behalf against any person (including any governmental instrumentality or agency) who is alleged to have violated this Section. Such civil action shall be subject to review by the District of Columbia Court of Appeals under section 11 of the District of Columbia Administrative Procedure Act, approved October 21, 1968 (82 Stat. 1203; D.C. Official Code § 2-510).”

Laws are only meaningful if they are enforced, and adding a private right of action is critical to ensure that those who are impacted by environmental racism have both a right and a remedy.

¹⁰ Basescu et al. at 9.

¹¹ Basescu et al. at 10.

B. A Private Right of Action Could Complement, not Replace, the Role of the People's Counsel

Currently, the bill tasks the People's Counsel with enforcement of the law. However, as Deputy People's Counsel Karen Sistrunk testified at the hearing on this bill, environmental justice enforcement is well outside of the current mandate of the People's Counsel, which is focused on utilities. While the Office of the People's Counsel (OPC) certainly has expertise in the areas it is currently charged with enforcing, it would need significant funding to hire adequate staff and build expertise in an entirely new area.

The OPC testimony also highlighted a different, but critical, potential role for OPC to play, specifically as a bridge between affected communities and the government offices tasked with enforcement of the law. OPC would ideally become involved early in the permitting process, which would helpfully avoid the need for enforcement litigation, rather than becoming involved only after things have gone wrong. Legal Aid supports this recommendation and believes that OPC is well-situated to engage with the community and to play this critical role, as long as it is properly resourced to do so.

However, positioning OPC as the bridge between the community and regulatory bodies while also expecting it to act as the sole enforcement body may result in tensions that could be avoided if affected communities had authority to enforce the law on their own behalf. A private right of action would also protect communities even if OPC were overtaxed and unable to pursue enforcement for resource reasons. Unfortunately, we have seen meritorious cases go unpursued due to lack of agency resources, and fear that – even with a highly competent agency – the same may happen here.

An intermediate step to creating a private right of action would be to create a structure akin to the Tenant Receivership Act (DC Code § 42–3651.03) which provides that private citizens may enforce the law if the entity charged with enforcement (there, the Office the Attorney General) declines to bring a case after a set period of days. This would ensure that community members have the right to enforce the law on their own behalf in the event that the People's Counsel would or could not do so.

III. Conclusion

For the foregoing reasons, Legal Aid strongly supports the Environmental Justice Amendment Act, and urges the Council to add a private right of action.