US Community Empowerment

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ABSTRACT

Health issues ranging from tobacco control to air pollution have all been affected by citizen groups who work with their elected officials and regulatory bodies to strengthen standards and ensure enforcement. Like other environmental pollutants, noise pollution also presents the public with several avenues for policy change. This paper explores select options for community response to noise, offers examples of how US citizens have chosen to take action to influence noise laws and policies, and explores next steps to facilitate community empowerment.

INTRODUCTION

Estimates indicate that 104 million Americans in 2013 had annual $L_{AEQ(24)}$ levels >70 dBA (equivalent to a continuous average exposure level of >70 dBA over 24 hr) (Hammer 2014). While these estimates need refinement, all evidence suggests that noise is harming the health of the US public (Goines 2007). Experts agree that efforts to reduce noise through source control are the most effective and efficient way to reduce exposure levels (Garcia 2001). Altering the built environment is also a popular approach to reduce ambient levels of community noise. And finally, altering the informational environment is also essential because it offers the opportunity to facilitate informed public dialogue and decision-making (Hammer 2014).

While interest in noise control is widespread and popular among the public, advocacy efforts are still in their infancy in the US. New York City, for example, receives tens of thousands of noise related complaints each year (Metcalf 2013). Because government guidance on exposure levels and health impacts of noise has not been updated or publicized since 1974, the citizens who complain about noise are rarely aware that what they define as an annoyance is also harming the health of the entire community (Network for Public Health Law 2013). Not surprisingly, government administrators often fail to understand that noise complaints reflect not only annoyance but also potentially serious public health risks such as heart disease. Fortunately, when this problem is identified, there are several options for influencing public policy.

The underpinnings of the US as a republic ensure that citizens can participate in and influence public policy through voting and by voicing their concerns to their elected officials in person and at public hearings. Beyond these basic forms of public participation, the federal, state, and local structure of the US government offers additional opportunities for citizens to influence public health policy related to noise.

This paper first explores options for citizens to advocate for source control through petitions for rule making, class action lawsuits, and nuisance torts before explaining citizen engagement strategies that alter the built environment through environmental impact statements and other health assessments. Finally, we explore citizen engagement strategies to alter the information environment through a citizen lawsuit and discuss how citizen engagement can be more effective in the future.

CITIZEN ENGAGEMENT TO INFLUENCE SOURCE CONTROL

Petition for rule making

Citizen have power to petition administrative agencies such as the Environmental Protection Agency (EPA) for rule making under the Administrative Procedures Act to update or create new rules on reducing emissions from noise sources (APA 1946). Administrative agencies such as the EPA issue regulations to limit noise emissions from certain products, such as air compressors and motorcycles. A refusal by an administrative agency to institute rule making upon petition by a citizen would require a public explanation for the refusal and provide a focus for judicial review.

The courts are deferential to agency decisions regarding the appropriate use of resources and determination of priorities. In MA v. EPA, 549 U.S. 497, 2007 the Supreme Court found that the EPA had not adequately articulated a reasonable basis to avoid the regulation of greenhouse gases. This decision prompted the EPA to revisit its regulations to reduce air pollution. An agency decision not to institute rule making would be overturned only in the rarest circumstances (Lubbers 2012). A successful petition for rule making should understand the extent to which an administrative agency has discretion to implement or update a rule.

Class Action lawsuits and worker compensation

Class action lawsuits originated in the US legal system and are a relatively well-known arena in which to pursue high dollar claims against manufacturers who cause injury to consumers. A class action lawsuit includes cases where a group of people sues an individual, such as a corporation, claiming injury due to an unsafe product. If successful, the lawsuit could result in monetary damages to the plaintiffs and potential modifications to the product to ensure safety.

A lawsuit against Apple for their ear buds is one example of how a group of citizens attempted a class action lawsuit (Birdsong v. Apple, 2009). The plaintiffs alleged that Apple ear buds damaged the plaintiffs' hearing and are known to be capable of producing sound levels that can cause noise-induced hearing loss. The lawsuit failed because the plaintiffs failed to prove causation; the plaintiffs could not show that it was the Apple ear buds, and not any other sound that the plaintiffs were exposed to, that caused the hearing loss.

Workers use class action lawsuits only in limited situations; in most US state jurisdictions, workers do not have a right to a jury trial or participation in class action lawsuits against their employer because legislators created a streamlined administrative process to manage claims of workplace injury. Through this administrative process, workers still must show they were injured in the workplace, but they have a relaxed burden of proof and receive a lower, fixed rate of monetary compensation defined by administrative rules (Dobie 2001). Workers compensation eases the administrative burden of claims, but can slow momentum towards wide-scale improvements in workplace safety that arise out of the potential for high profile, high dollar class action suits.

Nuisance and other torts

A legal remedy available to individuals who wish to reduce community noise is through a tort suit, which is a legally defined wrong that invades or violates a right, resulting in harm. A neighbor's invasion of a property right through noise is the basis of lawsuits traditionally brought as a nuisance tort. Whether a nuisance case can be successful is highly contingent upon jurisdiction. A Texas court, for example, ordered an apartment complex to stop running an air conditioner because the noise interfered with the use and enjoyment of their neighbor's land (Estancias 1973). Some local jurisdictions define nuisance by statute and regulation, while others rely on a common law history of cases and treatises (Restatements 1979).

Another kind of nuisance is a public nuisance claim, which may be brought forward by a government entity suffering from a harmful noise source, or in some instances by an individual on behalf of a community. A landlord in Michigan was unsuccessful in suing a nightclub for creating noise that decreased his property values and harmed the physical and emotional health of his tenants (Capitol 2009). Michigan case law indicates that a decrease in property values alone is insufficient to constitute a public nuisance, and that the plaintiff failed to demonstrate harm to the general public.

CITIZEN ENGAGEMENT TO ALTER THE BUILT ENVIRONMENT

Environmental Impact Statements and other health assessments

An environmental impact statement is an exercise to document an environmental impact when there is a federal action that affects the quality of the human environment. Environmental impact statements are designed to inform and facilitate congressional dialogue and provide a forum for public participation (NEPA 1969). Environmental impact statements that calculate changes in noise levels do not necessarily provide information about adverse health impacts resulting from these changes (USDOT 2008).

Some states adopt legislation with similar requirements to federal environmental impact statements for state projects, or require health assessments and health improvement plans. The Health Impacts Project (HIP) is a national sample of health impact assessments (HIP 2013), with dozens of recent health impact statements that incorporate noise. None appear to assess changes in sleep disturbance, learning, hypertension or heart disease, which suggest that citizens and decision makers lack the information they need about noise-related health effects in their communities.

CITIZEN ENGAGEMENT TO ALTER THE INFORMATIONAL ENVIRONMENT

Citizen lawsuit

A citizen lawsuit asserts that an administrator failed to implement a non-discretionary obligation specified by Congress. The Noise Control Act (NCA), for example, contains provisions that grant authority to the EPA to develop a report with scientific criteria related to the differing quantities and qualities of noise and the levels of environmental noise that can protect the public health and welfare with an adequate margin of safety. The EPA is required to update the report "from time to time". This report has not been updated since the original was published in 1974 (EPA 1974).

In a citizen lawsuit, a plaintiff could assert that the EPA administrator failed to implement a non-discretionary obligation specified by Congress, and not just a power granted, under the NCA (QCA 1978). In order to be successful, a plaintiff must assert

a failure to perform a discrete and required agency function. While a court may compel an agency to perform an action that has been unlawfully withheld or unreasonably delayed, it is unclear whether a court would find on behalf of a plaintiff if they filed suit under the NCA because the NCA has not been allocated Congressional funding since 1981 (Nauen 1989). The EPA has a discretionary budget, and Congress has the authority to allocate additional funds or take funding away.

DISCUSSION

The examples of US citizens pursuing remedies to lower noise level exposures reveal some trends. US citizens are aware of the noise in their environment and participate in public debate on community infrastructure projects that influence their built environment. But it appears that historical efforts to lower noise exposures through administrative procedures and the courts are not always successful.

Pursuing a lawsuit, whether it be a class action, nuisance claims and citizen suits, are a classic, politically acceptable US remedy. But regulatory approaches to reducing noise are advantageous to tort law (Shapiro 1991). The technological and scientific complexity of noise and noise reducing technology gives comparative advantage to a specialized agency over courts in assessing and reducing risk of harm from noise. Regulation does not depend on whether plaintiffs have sufficient wealth to sue. Regulatory decision makers have access to relevant scientific and economic expertise, and regulations have the power to reduce noise at a population level by clearly delineating expectations and responsibilities consistently to similarly situated parties.

Another reason to favor regulatory approaches above lawsuits is that regulatory approaches favor prevention. Judges are often generalists and must wait for a case – and an injury – to occur. Even when litigation is successful, compensation awarded to plaintiffs does not necessarily reflect the true costs borne by the individual. Further, it may do nothing to impact the community that has suffered or prevent further harm to public health. The difficulty in measuring costs associated with injury and estimating causal responsibility also points to the limited attractiveness of litigation and the benefits of regulation of environmental noise.

On the other hand, prompting regulatory action and rule making through litigation may become a useful and a necessary tool in creating a health protection policy in the US. Litigation is a tool that can be used to pursue a variety of remedies, ranging from noise reduction on a specific piece of property, to widespread government action. Because the first step to a more robust health protection policy entails the collection and monitoring of noise in the US, and there is currently little regulatory movement in this arena, litigation may be way to obtain foundational knowledge about how noise impacts health across the country.

CONCLUSION

US citizens are taking notice of their noise in their environment. There are a number of tools available to citizens that promote noise reduction through source control, altering the built environment, and altering the informational environment. The tools discussed here suggest that US citizens may be more successful in working together on a long-term solution to lower noise level exposures at the population level when

they have information on the health effects of noise become better understood and more widely disseminated.

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