

## **It don't mean a thing if it ain't got that [rulemaking] swing: The lack of enforceable environmental justice at EPA**

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### **The need for formal regulations to implement environmental justice**

To paraphrase Duke Ellington, all of U.S. Environmental Protection Agency's (EPA's) talk, discussion and special program offices on environmental justice don't mean a thing until it has a formal "rulemaking" swing. Duke Ellington, *It don't mean a thing (if it ain't got that swing)* (1932). If EPA leaves its environmental justice programs without a firm legal framework, then it risks potential reversal of its efforts if a future administration is elected, particularly one that is significantly less devoted to environmental justice. Moreover, EPA has already informed the world in a recent brief that President Clinton's Executive Order 12898, directing consideration of environmental justice issues, cannot be enforced by any outside party suing EPA.

This same observation applies to federal energy regulators, such as the Federal Energy Regulatory Commission (FERC). In April 2022, FERC announced its two-year [Equity Action Plan](#) in response to President Biden's [Executive Order 13985](#). FERC expressly noted, however, that as an independent agency, it does not have to comply with executive orders such as 13985.

### **Executive orders on environmental justice "don't mean a thing"**

[Executive Order 12898](#) is the only executive order dedicated to environmental justice. President Clinton issued the order more than two decades ago in 1994, which applies to "federal agencies" (i.e., not independent agencies such as FERC) and directed those agencies, led by EPA, to set up a working group to both provide guidance on actions that might have a disproportionately high and adverse impact on minority or low-income populations, and to serve as a clearinghouse for each federal agency on implementing environmental justice strategies within the scope of that agency. President Biden's more recent [Executive Order 13990](#), which is focused on climate change, also references the need to "prioritize environmental justice." But, neither executive order has any legal force outside of internal agency policies—policies that are as unpredictable and variable as a Sirocco wind emerging from the Sahara.

It may come as a surprise, then, that some 28 years later EPA expressly disavowed any formal legal obligation under Executive Order 12898. EPA's disavowal came in the course of a lawsuit brought by the State of California and other petitioning states and several environmental nongovernmental organizations seeking to impose stricter greenhouse gas (GHG) emissions controls on commercial aircraft. Both groups petitioned for review of an EPA rule on aircraft emissions issued in the waning hours of the Trump administration. The [Aircraft Rule](#) set a

regulatory standard that accomplished nothing—it achieved *no* benefits to the public because it adopted an international standard that was already being achieved. The State of California (and other state petitioners) in their opening brief before the D.C. Circuit challenging this Aircraft Rule argued in part that it was incompatible in part with principles of environmental justice set forth in Executive Order 12898. The state petitioners noted that many airports are located in areas that are disproportionately occupied by minority or low-income individuals. State Petitioners Opening Brief in *California v. EPA*, Case No. 21-1018, at 41–42. The state petitioners noted that EPA itself had come to the same conclusion in its 2016 Endangerment Finding as to GHG emissions from aircraft. *Id.*

EPA’s response was that Executive Order 12898 does not create a right to judicial review of the agency’s compliance (or lack thereof) with environmental justice concerns. As EPA (through its legal counsel at the Department of Justice) put it: “But EPA’s obligation to report environmental justice and federalism impacts under those Executive Orders does not create any right to judicial review. Both Orders state unequivocally that they do not create any such right.” EPA’s Initial Respondent’s Brief in *California v. EPA*, Case No. 21-1018 at 68. EPA cited a D.C. Circuit opinion rejecting a similar effort to apply the environmental justice standards based on the executive order in another case, *Air Transport Association of America v. Federal Aviation Administration*, 169 F.3d 1, 8–9 (D.C. Cir. 1999).

The D.C. Circuit now has the *California v. EPA* case under submission. No matter how the Court of Appeals rules, EPA’s public position on the lack of significance of the long-standing executive order on environmental justice is stunning. “It’s only for internal management, and you have no right based on that order to force us to comply.”

EPA’s public position on the lack of enforceability of executive orders mirrors its own internal proclamations related to environmental justice. Many of these documents were released with accompanying press and praise for advancing environmental justice. For example, in 2015 the EPA under the Obama administration issued a final [Guidance for Considering Environmental Justice During the Development of Regulatory Actions](#). Notwithstanding a prefatory statement by then Administrator McCarthy hailing this new effort, this guidance has the standard disclaimer as any other EPA guidance: “This document is not a rule or regulation and it may not apply to a particular situation based upon the circumstances. This Guide does not change or substitute for any law, regulation, or any other legally binding requirement and is not legally enforceable.” In sum, do not try claiming that EPA is failing to meet its own final Guidance on Environmental Justice—it’s mere “guidance” and is not legally enforceable. A second example is found in the May 2022 EPA Office of General Counsel publication, “[Legal Tools to Advance Environmental Justice](#),” which contains references to possible statutory sources of support for the agency’s determination to invoke environmental justice in a particular case. EPA expressly qualified its obligations in this tool kit, stating in part: “It does not expressly or implicitly create, expand, or limit any legal rights, obligations, responsibilities, expectations or benefits to any person.”

## Time waits for no one

Lauren Godshall and Devin Lowell noted in their recent *Trends* article on [Environmental justice in judicial opinions](#), EPA cannot simply rely upon the federal judiciary to enforce environmental justice. As they explained, the judicial branch is “without sufficient legal mechanisms or remedies” to address environmental justice concerns.

Author and international citizen Elif Shafak wrote that we have tools to build our societies and fix inequalities and discrimination, “yet we don’t have much time or room for error while we are losing our planet, our only home.” Elif Shafak, *How to Stay Sane in an Age of Division* 90 (2020). If EPA issues no formal rule by early 2024 and a new administration comes to power and determines that environmental justice is no longer a priority, then the lack of any binding EPA authority will cost humanity yet more time that it cannot afford to lose.