

Environmental [in]Justice: Why Executive Order 12898 Falls Short of Creating Environmental Equity for Vulnerable Communities

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“[I]t’s become achingly apparent that well before Trump, those who purported to champion environmental justice—primarily Democratic legislators and presidents—did little to codify the progress and programs related to it, even when they were best positioned politically to do so.”¹

Introduction

“It’s not if it breaks, it’s when it breaks.”² These words from Alex Howland, co-founder of the International Indigenous Youth Council, reflect the existential fear of a people whose ancestral lands are threatened by the decision to route an oil pipeline 1,500 feet from the Standing Rock Sioux Tribe reservation.³ The Dakota Access pipeline runs under a Missouri River reservoir named Lake Oahe,⁴ which was, until the pipeline was constructed beneath, the

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1. Talia Buford, *Has the Moment for Environmental Justice Been Lost?*, PROPUBLICA (July 24, 2017), <https://www.propublica.org/article/has-the-moment-for-environmental-justice-been-lost> [perma.cc/N8UG-FC4J].

2. Evan Simon, *Meet the Youths at the Heart of the Standing Rock Protests Against the Dakota Access Pipeline*, ABC NEWS (Feb. 25, 2017), <https://abcnews.go.com/US/meet-youth-heart-standing-rock-protests-dakota-access/story?id=45719115> [perma.cc/8RGQ-HC7W].

3. *Id.*

4. “The word Oahe, once the name of a Christian mission, is a Sioux Indian word meaning ‘a foundation,’ or ‘a place to stand on.’” *Lake Oahe*, S.D. MO. RIVER TOURISM, <http://sdmissouririver.com/follow-the-river/the-four-lakes-and-dams/lake-oahe/> [perma.cc/X2TL-WGLK].

primary water source for the Standing Rock reservation.⁵ Pleas to federal courts⁶ and numerous protests, one of which resulted in seventy-six people arrested in a day, were ultimately unsuccessful,⁷ as “the Dakota Access Pipeline now transports 570,000 barrels of oil per day” from North Dakota to Illinois.⁸ Despite claims that the “concerns about the pipeline’s impact on local water supply are unfounded,” reporting shows that Sunoco Logistics, the operator of the Dakota Access pipeline, has a track record of more than 200 crude oil leaks since 2010, more than any of its competitors.⁹ “It’s not if it breaks, it’s when it breaks.”¹⁰ The Dakota Access pipeline is just one example in a long history of environmental injustice in the United States.

The status quo of environmental protection in the United States is deep inequality. “71% of African Americans live in counties in violation of federal air pollution standards, as compared to 58% of non-Hispanic whites.”¹¹ Blacks and Puerto Ricans are three times more likely to die as a result of asthma than the broader Hispanic and White populations.¹² “[P]eople of color are twice as likely to live in proximity to hazardous-waste sites and industrial facilities” than non-Hispanic Whites.¹³ Redlined neighborhoods are, on average,

5. Rebecca Hersher, *Key Moments in the Dakota Access Pipeline Fight*, NPR (Feb. 22, 2017), <https://www.npr.org/sections/thetwo-way/2017/02/22/514988040/key-moments-in-the-dakota-access-pipeline-fight> [perma.cc/7PB8-W323].

6. *Standing Rock Sioux Tribe v. U.S. Army Corps of Eng’rs*, 255 F. Supp. 3d 101, 114 (D.D.C. 2017). The status of this litigation is uncertain. The D.C. Circuit Court of Appeals recently issued an order that allows the pipeline to continue operation while the merits of an appeal are adjudicated. *Standing Rock Sioux Tribe v. U.S. Army Corps of Eng’rs*, No. 20-5197 (D.C. Cir. Aug. 5, 2020) (order granting dissolution of stay entered on July 14, 2020).

7. Sam Levin, *Over 70 Arrested at Standing Rock as Dakota Access Aims to Finish Pipeline*, THE GUARDIAN (Feb. 1, 2017), <https://www.theguardian.com/us-news/2017/feb/01/standing-rock-arrests-dakota-access-pipeline-construction> [perma.cc/5SUU-BUMJ].

8. *Moving America’s Energy*, DAKOTA ACCESS PIPELINE, <https://dapipelinefacts.com/> [perma.cc/MH5T-SQVM].

9. Simon, *supra* note 2.

10. *Id.*

11. Saleem Chapman, Dir. of Pol’y & Strategy, Env’t Just. Program Manager, Clean Air Council, Environmental Justice, Climate Change, and Racial Justice, Presentation at the Climate Change Outreach Roundtable (July 24, 2015), https://www.epa.gov/sites/production/files/2015-10/documents/post_2_-_environmental_justice_climate_change.pdf [perma.cc/6ZJC-C7PQ].

12. *Asthma Disparities in America*, ASTHMA & ALLERGY FOUND. OF AM., <https://www.aafa.org/burden-of-asthma-on-minorities/> [perma.cc/23AX-WZDU].

13. MARQUES ARMSTRONG, SHARON BETCHER, BETHANY BRADLEY, DEWAYNE DAVIS, CHRISTOPHER ZUMSKI FINKE, SONJA HAGANDER, JAYLANI HUSSEIN, JIM BEAR JACOBS, NEKIMA LEVY-POUNDS, DEE MCINTOSH, KELLIE ROCK & JAVEN SWANSON, FAITH IN ACTION 131 (2017).

five degrees Fahrenheit hotter than other neighborhoods in major U.S. cities.¹⁴ Heat waves, a product of rapidly increasing global temperatures, have been shown to lead to disproportionate death tolls in Black and immigrant communities.¹⁵ The failure to achieve a safe and healthy environment for all people in the United States should cause all to reflect on their personal responsibility for this inequality, particularly those entrusted with representing its diverse fabric in elected office. Despite significant advancement in environmental protection in the last fifty years through a combination of public sentiment and far-reaching substantive regulatory law,¹⁶ the United States continues to grapple with identifying the proper mechanism to safeguard vulnerable and minority communities facing environmental degradation.

On February 11, 1994, President Bill Clinton signed Executive Order 12898 (E.O. 12898), named “Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations.”¹⁷ This action by President Clinton represented acknowledgment of the problem of environmental inequality and a broader movement to safeguard the health and well-being of all people in the United States. Section 1-101 of E.O. 12898 describes, in relevant part, that:

To the greatest extent practicable and permitted by law . . . each Federal agency shall make achieving environmental justice part of its mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minority populations and low-income

14. Marlene Cimons, *How Redlining Makes Communities of Color More at Risk of Deadly Heatwaves*, PBS (Jan. 23, 2020), <https://www.pbs.org/wnet/peril-and-promise/2020/01/redlined-neighborhoods/> [perma.cc/L9CD-YDUH]. The heat island effect refers to the reality that areas with more concrete and pavement (and less vegetation) trap heat, which disproportionately affects communities of color. See *Learn About Heat Islands*, U.S. ENV'T PROT. AGENCY, <https://www.epa.gov/heat-islands/learn-about-heat-islands> [perma.cc/8QZW-4C5A] (describing the heat island effect in urban areas).

15. Justine Calma, *CNN Ran a ‘Climate Justice’ Segment and This Is Progress*, GRIST (May 31, 2019), <https://grist.org/article/cnn-ran-a-climate-justice-segment-and-this-is-progress/> [perma.cc/63NY-4HAA].

16. See, e.g., RICHARD N.L. ANDREWS, *MANAGING THE ENVIRONMENT, MANAGING OURSELVES: A HISTORY OF AMERICAN ENVIRONMENTAL POLICY* 190–242 (3d ed. 2020) (outlining the history of the environmental movement and detailing specific federal policy actions since 1970).

17. Exec. Order No. 12,898, 3 C.F.R. 859 (1994).

populations in the United States and its territories¹⁸

Although twenty-five years have passed since President Clinton penned E.O. 12898, its goals are largely unrealized. In addressing whether E.O. 12898 has accomplished its goals of advancing environmental justice, scholarship has focused on how federal agencies have augmented their internal policies and decision-making processes as a result of the directive in E.O. 12898.¹⁹ Research has also attempted to discern effect from analyzing how environmental quality and equality metrics have improved over time since the announcement of E.O. 12898.²⁰ A third avenue of analysis, and the approach of this Note, attempts to understand to what extent E.O. 12898 creates an opportunity for judicial review when federal agencies fail to appropriately consider environmental justice. By allowing environmental plaintiffs the opportunity to challenge an agency rule or action via judicial review, such as the siting of a toxic landfill, individuals and groups might be offered the procedural safeguard that agencies appropriately consider the environmental justice effects of their decisions. This procedural safeguard may, in some cases, lead to a substantive benefit for environmental plaintiffs, who can force an agency to choose a less harmful alternative or abandon a project altogether.

Recent litigation between the Standing Rock Sioux Tribe and the United States Army Corps of Engineers provides a poignant example of how courts have attempted to address such concerns.²¹ This litigation was the result of a challenge to the controversial²² Dakota Access Pipeline, an oil pipeline designed to move approximately “half a million gallons of crude oil from North Dakota

18. *Id.*

19. See, e.g., Elizabeth Glass Geltman, Gunwant Gill & Miriam Jovanovic, *Beyond Baby Steps: An Empirical Study of the Impact of Environmental Justice Executive Order 12898*, 39 FAM. & CMTY. HEALTH 143 (2016).

20. See Sandra George O’Neil, *Superfund: Evaluating the Impact of Executive Order 12898*, 115 ENV’T HEALTH PERSP. 1087 (2007).

21. *Standing Rock Sioux Tribe v. U.S. Army Corps of Eng’rs*, 282 F. Supp. 3d 91, 100 (D.D.C. 2017).

22. See, e.g., Justin Worland, *What to Know About the Dakota Access Pipeline Protests*, TIME (Oct. 28, 2016), <https://time.com/4548566/dakota-access-pipeline-standing-rock-sioux/> [perma.cc/4DBR-NAS5] (“Opponents of the project have responded with both protests and litigation in an attempt to slow—and eventually stop—the pipeline Supporters of the pipeline—which include state and local government leaders—have showed little interest in accommodating the project’s critics, particularly the protesters on the ground.”).

to Illinois every day.”²³ The proposed construction of the pipeline was set to cross the Missouri River at Lake Oahe (0.55 miles north of the Standing Rock Reservation),²⁴ a reservoir that holds sacred religious value to the Standing Rock Sioux Tribe, supplying the Tribe water to service “homes, a hospital, clinics, schools, businesses and government buildings”²⁵ The prospect of an oil spill near Lake Oahe would severely jeopardize not only the Tribe’s source of drinking water, but also the Tribe’s fishing and hunting rights.²⁶ To safeguard the Tribe’s livelihood, the Standing Rock Sioux Tribe alleged that the Army Corps of Engineers had violated E.O. 12898, arguing that the Corps had failed to abide by the requirements set forth in the Order.²⁷

In a shocking turn of events, the D.C. District Court ordered an environmental impact statement in March of 2020 to allow the parties to argue for vacatur, a setting aside of a past judgment, reasoning that the Army Corps of Engineers did not sufficiently analyze the pipeline’s potential for “highly controversial” effects,²⁸ after initially ruling that the Army Corps of Engineers’ analysis of environmental justice considerations were not so flawed as to support vacatur.²⁹ Although the Court did recognize a private right of action for environmental justice plaintiffs under E.O. 12898,³⁰ the Court’s focus on “highly controversial” effects, namely the pipeline’s leak-detection system, operator safety record, winter conditions, and worst-case discharge, allowed the Court to avoid ruling on explicit E.O. 12898 grounds.³¹ Unfortunately, the pipeline

23. *Standing Rock Sioux Tribe v. U.S. Army Corps of Eng’rs*, 255 F. Supp. 3d 101, 114 (D.D.C. 2017).

24. *Id.*

25. *Id.*

26. *Id.* at 134 (“[A] pipeline leak would threaten to damage . . . the fish and wildlife on which many Tribal members depend for subsistence.”) (alterations in original).

27. *Id.* at 136; *see also* Exec. Order No. 12,898, 3 C.F.R. 859 (1994) (“To the greatest extent practicable and permitted by law . . . each Federal agency shall make achieving environmental justice part of its mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minority populations and low-income populations in the United States and its territories . . .”).

28. *Standing Rock Sioux Tribe v. U.S. Army Corps of Eng’rs*, 440 F. Supp. 3d 1, 8 (D.D.C. 2020).

29. *Standing Rock Sioux Tribe v. U.S. Army Corps of Eng’rs*, 282 F. Supp. 3d 91, 100 (D.D.C. 2017).

30. *Standing Rock Sioux Tribe*, 440 F. Supp. 3d at 9.

31. *Id.* at 17–26.

continues to flow, pending the result of an appeal brought by the Army Corps and Dakota Access, LLC.³²

This Note will explore the complete case law interpreting E.O. 12898 to better understand how courts have used President Clinton's ambitious order to effectuate environmental justice. In Part II, I outline the development of environmental justice in the United States, describe the origins of E.O. 12898, and survey the few empirical analyses that have been conducted on the Order's effects. In Part III, I argue that the noble aims of E.O. 12898 have resulted in negligible impacts for environmental justice. However, recent opinions by the D.C. District Court provide optimism for environmental justice moving forward. Some courts are sympathetic to the aims of environmental justice, which should provide confidence to the other branches of government that the moment is ripe for federal legislation codifying the goals of E.O. 12898. Federal legislation that explicitly provides a private right of action would create the impetus for successful environmental justice actions for groups like the Standing Rock Sioux Tribe. E.O. 12898 was not designed to bear primary responsibility for rectifying environmental injustice, and courts have reached a ceiling in their ability to remedy the negative consequences of ill-considered federal actions. Thus, Congress must enact legislation creating a definitive private right of action when policies or rules promulgated by the federal government adversely and disproportionately impact the environments of our minority or low-income communities.

I. Background

A. *The Broader Environmental Justice Movement Has Been, and Is, a Grassroots Effort*

The rise of the environmental justice movement has been characterized as “an internal criticism of ‘mainstream environmentalism’ for being too elite, too white, and too focused on beautiful scenery and charismatic species.”³³ “Environmental justice” may appear as an amorphous concept because so much of human existence is viewed as a product of the environment in which

32. *The Standing Rock Sioux Tribe's Litigation on the Dakota Access Pipeline*, EARTHJUSTICE, <https://earthjustice.org/features/faq-standing-rock-litigation> [perma.cc/H6TS-YBMN].

33. Jedediah Britton-Purdy, *Environmentalism Was Once a Social-Justice Movement*, THE ATLANTIC (Dec. 7, 2016), <https://www.theatlantic.com/science/archive/2016/12/how-the-environmental-movement-can-recover-its-soul/509831/> [perma.cc/6MW3-6LDP].

we live. Nevertheless, for the purposes of this Note, environmental justice encompasses the intersection between people and pollution. More specifically, environmental justice relates generally to the concept that all peoples should be treated equally in relation to their health, well-being, and livelihood, which may be affected by environmental issues such as toxic waste, air pollution, water pollution, and environmental degradation.³⁴ Inherent in this conversation is the idea that all Americans deserve to live in a healthy and non-discriminatory environment, giving all people an equal opportunity at prosperity.³⁵

Although recent proposals like the Green New Deal³⁶ signify a growing number of Americans are concerned with environmental justice, the movement is not a recent phenomenon. The origins of the modern environmental justice movement have been traced back to 1982.³⁷ Proposed siting of a toxic landfill in a predominately Black neighborhood in Warren County, North Carolina brought a

34. See *Presidential Executive Order 12898 – Environmental Justice*, NOISE POLLUTION CLEARINGHOUSE, <https://www.nonoise.org/library/execords/eo-12898.htm> [perma.cc/WBE4-NQYC] (“Environmental justice is a movement promoting the fair treatment of people of all races, income, and culture with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies.”); LaToria Whitehead, *Celebrating 20 Years of Executive Order 12898: How Far Have We Come and How Do We Create an Impact in the Next 20 Years?*, CTRS. FOR DISEASE CONTROL & PREVENTION: YOUR HEALTH—YOUR ENV’T BLOG (May 22, 2014), <https://blogs.cdc.gov/yourhealthyourenvironment/2014/05/22/celebrating-20-years-of-executive-order-12898-how-far-have-we-come-and-how-do-we-create-an-impact-in-the-next-20-years/> [perma.cc/F69Z-TMBJ] (“Today environmental justice addresses disparate social conditions holistically, working to bring justice for communities that experience food deserts, climate change, inaccessible transportation and health needs, economic deprivation, dilapidated housing, and other environmental hazards that directly impact human health and human life.”).

35. See, e.g., Robert Bullard, *New Report Tracks Environmental Justice Movement over Five Decades*, DR. ROBERT BULLARD: BLOG (Feb. 9, 2014), <https://drrobertbullard.com/new-report-tracks-environmental-justice-movement-over-five-decades/> [perma.cc/N2Y2-P8GJ] (“Even in 2014, the most potent predictor of health is zip code.”); see also Colin Provost & Brian J. Gerber, *In the U.S., Black, Brown and Poor People Suffer the Most from Environmental Contamination*, WASH. POST (Sept. 18, 2018), <https://www.washingtonpost.com/news/monkey-cage/wp/2018/09/18/in-the-u-s-black-brown-and-poor-people-suffer-the-most-from-environmental-contamination/> [perma.cc/2N3R-HPBH].

36. See, e.g., Lisa Friedman, *What Is the Green New Deal? A Climate Proposal, Explained*, N.Y. TIMES (Feb. 21, 2019), <https://www.nytimes.com/2019/02/21/climate/green-new-deal-questions-answers.html> [perma.cc/U8FD-KDSX].

37. Whitehead, *supra* note 34 (“The historic environmental justice movement started in 1982 in Warren County, North Carolina when a poor African-American community advocated against a toxic landfill being placed in their neighborhoods.”).

community together in opposition.³⁸ Despite the arrest of 500 protesters and involvement from the National Association for the Advancement of Colored People (NAACP), the group was ultimately unsuccessful in relocating the landfill.³⁹ The disappointing outcome of the Warren County protest demonstrated the need for stronger state and federal protection. Unfortunately, the need for grassroots efforts to oppose discriminatory agency actions would not go away over the course of the next four decades. Nevertheless, the Warren County protests were the first environmental justice efforts to receive widespread national attention in the United States and helped to elevate the national consciousness around environmental justice.⁴⁰

In 1990, several environmental justice leaders authored a letter to the “Big 10’ environmental groups,” including notable advocacy groups like the Sierra Club, the Natural Resources Defense Council, and the Environmental Defense Fund.⁴¹ This letter highlighted instances where leading environmental groups supported federal legislation that resulted in a discriminatory effect, and the letter criticized the lack of diversity within the leadership and staff of environmental groups.⁴² Thereafter, some leading environmental groups began to establish environmental justice initiatives and improved upon the diversity of their staff.⁴³ In 2020, many environmental advocacy organizations maintain detailed pages on their websites that provide information about environmental justice initiatives.⁴⁴ Despite these commitments by environmental advocacy organizations, there remained a lack of

38. *Id.*

39. *Environmental Justice History*, U.S. DEP’T OF ENERGY: OFF. OF LEGACY MGMT., <https://www.energy.gov/lm/services/environmental-justice/environmental-justice-history> [perma.cc/A3KP-85LP].

40. Brian Palmer, *The History of Environmental Justice in Five Minutes*, NAT. RES. DEF. COUNCIL (May 18, 2016), <https://www.nrdc.org/stories/history-environmental-justice-five-minutes> [perma.cc/CJ66-98WC].

41. Letter from Richard Moore, Co-director, Sw. Organizing Project, et al., to Jay D. Hair, President, Nat’l Wildlife Fed’n, et al. (Mar. 16, 1990), <http://www.ejnet.org/ej/swop.pdf> [perma.cc/XE5B-RNR9]; see also Katherine Bagley, *Infographic: A Field Guide to the U.S. Environmental Movement*, INSIDE CLIMATE NEWS (Apr. 7, 2014), <https://insideclimatenews.org/news/07042014/infographic-field-guide-us-environmental-movement/> [perma.cc/D5ZV-B7AB].

42. Palmer, *supra* note 40.

43. *Id.*

44. *Diversity, Equity, & Inclusion*, EARTHJUSTICE, <https://earthjustice.org/about/diversity> [perma.cc/JNF3-BC67]; *Environmental Justice*, ENV’T INTEGRITY PROJECT, <https://environmentalintegrity.org/what-we-do/environmental-justice/> [perma.cc/SWKV-P9UQ]; *People & Justice*, SIERRA CLUB ONLINE, <https://www.sierraclub.org/people-and-justice> [perma.cc/24SS-APNW].

federal legislation aimed at improving environmental equity. In February of 1994, a response came from President Bill Clinton.

B. Executive Order 12898: Federal Recognition of Environmental Justice

With the potential to fill the gap created by a lack of federal and state law aimed at curbing environmental injustice, E.O. 12898 envisioned the Environmental Protection Agency (EPA) assuming a prominent role in ensuring that all federal agency actions related to the environment appropriately addressed potential consequences on marginalized communities.⁴⁵ President Clinton's E.O. 12898 created promise and hope that the federal government was finally up to the task of effectuating environmental justice. E.O. 12898 was a pivotal acknowledgment by the federal government that it must do more to ensure vulnerable communities are adequately considered when agencies act.⁴⁶ According to the EPA, the purpose of E.O. 12898 is "to focus federal attention . . . on minority and low-income populations with the goal of achieving environmental protection for all communities."⁴⁷

When President Clinton signed E.O. 12898, only four states had substantively acted to create a governmental responsibility to consider environmental justice in state actions.⁴⁸ As previously mentioned, the aim of E.O. 12898, articulated in Section 1-101, was to impose a responsibility on federal agencies to "make achieving environmental justice part of [their] mission by identifying and addressing, as appropriate, disproportionately high and adverse health or environmental effects of [their] programs, policies, and activities on minority populations and low-income

45. Exec. Order No. 12,898, 3 C.F.R. 859 (1994).

46. Albert Huang, *The 20th Anniversary of President Clinton's Executive Order 12898 on Environmental Justice*, NAT. RES. DEF. COUNCIL (Feb. 10, 2014), <https://www.nrdc.org/experts/albert-huang/20th-anniversary-president-clintons-executive-order-12898-environmental-justice> [perma.cc/MZ5P-88BM] ("The landmark Order was the first major federal action on environmental justice (EJ) in the United States . . .").

47. *Summary of Executive Order 12898*, U.S. ENV'T PROT. AGENCY, <https://www.epa.gov/laws-regulations/summary-executive-order-12898-federal-actions-address-environmental-justice> [perma.cc/GU9A-9BPA].

48. Bullard, *supra* note 35 ("In 1994, only four states . . . had a law or an executive order on environmental justice. In 2014, all 50 states and the District of Columbia have instituted some type of environmental justice law, executive order, or policy, indicating that the area of environmental justice continues to grow and mature.").

populations . . .”⁴⁹ Here, the qualifying language “as appropriate” was undefined in the Order, leaving unresolved the question of under what circumstances an agency should consider environmental justice. However, the Presidential Memorandum that accompanied E.O. 12898 emphasized that “[e]ach Federal agency shall analyze the environmental effects, including human health, economic and social effects, of Federal actions, including effects on minority communities and low-income communities, when such analysis is required by the National Environmental Policy Act of 1969 . . .”⁵⁰ The meaning of President Clinton’s words in his Memorandum will be addressed in the following sections.

Other aspects of the Order provided for the development of an “Interagency Working Group on Environmental Justice,” comprised of the heads of seventeen federal agencies,⁵¹ to serve as the clearinghouse for each agency’s environmental justice strategy.⁵² While there is some guidance within E.O. 12898 as to what an agency must consider in developing its environmental justice strategy,⁵³ the framework of the Order suggests that the intended results were to provide reporting to the President⁵⁴ and generate enhanced consideration of environmental justice within federal agencies.⁵⁵

To comply with E.O. 12898, federal agencies attempt to showcase, in varying detail, their analysis of environmental justice

49. Exec. Order No. 12,898, 3 C.F.R. 859 § 1-101 (1994).

50. Memorandum on Environmental Justice, 30 WEEKLY COMP. PRES. DOC. 279, 280 (Feb. 11, 1994).

51. Exec. Order No. 12,898, 3 C.F.R. 859 § 1-102 (1994).

52. *See id.* § 1-103 (“The environmental justice strategy shall list programs, policies, planning and public participation processes, enforcement, and/or rulemakings related to human health or the environment that should be revised . . .”).

53. *Id.* (requiring that agencies at least: “(1) promote enforcement of all health and environmental statutes in areas with minority populations and low-income populations; (2) ensure greater public participation; (3) improve research and data collection relating to the health of and environment of minority populations and low-income populations; and (4) identify differential patterns of consumption of natural resources among minority populations and low-income populations.”).

54. *Id.* § 1-104 (“[T]he Working Group shall submit to the President . . . a report that describes the implementation of this order, and includes the final environmental justice strategies described in section 1-103(e) of this order.”).

55. *See id.* § 6-609 (“This order is intended only to improve the internal management of the executive branch . . .”); *see also* Huang, *supra* note 46 (“From a substantive perspective, the Order lacked requirements that [environmental justice] play a determining factor in siting, rulemaking, and permitting decisions. Instead, the Order directed agencies to adopt an [environmental justice] strategy and then implement it.”).

issues that may be affected by their proposed actions.⁵⁶ The broad language of the Order and the overarching question of whether individuals can bring lawsuits when agencies act inappropriately only begins to describe the challenges of realizing President Clinton's ambitions. The text of the Order leaves agencies wondering how to effectively comply, along with what the ramifications are for non-compliance. This ambiguity creates a recipe for agency inaction, particularly when the potential costs associated with considering environmental justice may serve as a deterrent.⁵⁷ Further, the Order states that the cost of compliance is not a factor in the equation when contemplating whether environmental justice analysis should occur: "Unless otherwise provided by law, Federal agencies shall assume the financial costs of complying with this order."⁵⁸ Agencies with tight budgets and questions about whether there are any consequences for not conducting an environmental justice analysis often choose to ignore E.O. 12898, even when their actions implicate serious environmental justice issues.⁵⁹

Twenty years later, President Obama signed Proclamation 9082, commemorating the "20th Anniversary of Executive Order 12898 on Environmental Justice."⁶⁰ This commemoration evoked a sense that there was more to do on the environmental justice front, with President Obama remarking, "Executive Order 12898 affirmed every American's right to breathe freely, drink clean water, and live on uncontaminated land. Today, as America marks 20 years of action, we renew our commitment to environmental justice for all."⁶¹ Implicit in this renewed commitment to environmental justice is an acknowledgment that the federal government has room to grow when it comes to environmental equality. Unfortunately, the Trump Administration expressed disinterest in the pursuit of environmental justice.⁶² This abdication of leadership further

56. Provost & Gerber, *supra* note 35 ("To comply with Clinton's EO 12898, federal agencies typically state that a new rule will either have a positive effect on environmental inequities or no effect—both of which suggest that the agency actively investigated the issue.").

57. *Id.* ("But measuring those costs and benefits can be difficult, as policymakers may use incomplete data or different yardsticks from one another.").

58. Exec. Order No. 12,898, 3 C.F.R. 859 § 6-607 (1994).

59. *See infra* note 73.

60. Proclamation No. 9082, 3 C.F.R. 8 (2014).

61. *Id.*

62. Lisa Garcia, *Environmental Justice Office Could Be Shuttered by Proposed*

complicates the ability of those affected by environmental injustice to alleviate their burden.

*C. Existing Empirical Analysis of Executive Order 12898
Demonstrates Limited Achievement of
Environmental Justice Goals*

At its inception, E.O. 12898 stopped short of creating specific mechanisms requiring environmental justice to be at the forefront of agency decision-making.⁶³ Some have argued that the Order was merely an attempt to pay lip service to vulnerable communities and environmental groups, and failed to implement more effective and further-reaching legislation.⁶⁴ Regardless of whether President Clinton's motivations were ulterior, some scholars have attempted to empirically analyze the effect of E.O. 12898.⁶⁵ As previously mentioned, the effectiveness of the Order might be measured by improved agency decision making and/or improved environmental metrics on the ground.⁶⁶ While this Note seeks to produce analysis from a third lens—the ability of environmental plaintiffs to seek judicial review under E.O. 12898—it is helpful to provide a survey of the current empirical analysis aimed at understanding the effects of E.O. 12898 because it provides an appreciation of the ways some have sought to measure the success of the Order.

EPA Cuts, EARTHJUSTICE (Sept. 20, 2017), <https://earthjustice.org/blog/2017-september/environmental-justice-office-could-be-shuttered-by-proposed-epa-cuts> [perma.cc/7KYL-LHAH] (highlighting the potential effects of a proposed 2018 spending bill, which would completely defund the EPA's Office of Environmental Justice).

63. Huang, *supra* note 46 (“From a substantive perspective, the Order lacked requirements that [environmental justice] play a determining factor in siting, rulemaking, and permitting decisions. Instead, the Order directed agencies to adopt an [environmental justice] strategy and then implement it. To date, not every federal agency has fulfilled the Order’s [environmental justice] mandates.”).

64. See, e.g., U.S. COMM’N ON CIVIL RIGHTS, NOT IN MY BACKYARD: EXECUTIVE ORDER 12,898 AND TITLE VI AS TOOLS FOR ACHIEVING ENVIRONMENTAL JUSTICE, at iii (2003), <http://www2.law.umaryland.edu/marshall/usccr/documents/cr2003X100.pdf> [perma.cc/8KM4-LBKJ] (“Federal agencies still have neither fully incorporated environmental justice into their core missions nor established accountability and performance outcomes for programs and activities.”); Huang, *supra* note 46 (“The Executive Order on [environmental justice] is a sham. The only thing the EO has produced is jobs for the people at these federal agencies tasked to create the illusion that they are working to achieve environmental justice.”).

65. See O’Neil, *supra* note 20 (using Superfund sites and census data to determine that the equitable placement of Superfund sites has worsened since implementation of E.O. 12898).

66. See Provost & Gerber, *supra* note 35.

These efforts include a case study on farm workers in South Florida,⁶⁷ event history analysis to evaluate the equitability of the Superfund program,⁶⁸ analysis of federal agency citations to E.O. 12898,⁶⁹ and a study of the spatial concentration of manufacturing facilities.⁷⁰ Efforts to peer into agency decision making⁷¹ are particularly beneficial and provide insight into the operating procedures of federal agencies, illuminating the circumstances when they find it prudent and/or necessary to investigate the environmental justice effects of their actions. What these studies do not discuss is the direct causal connection between E.O. 12898 and agency actions. The limited causal connection is demonstrated by some of the analyses looking at a simple temporal relationship between E.O. 12898 and environmental metrics.⁷² Ultimately, these studies do show that E.O. 12898 had little impact on environmental justice and has led to underwhelming results, characterized by consistent agency inaction and no environmental metric improvement.⁷³ Until recently the courts have taken a very limited approach toward environmental justice and there is an absence of scholarship analyzing E.O. 12898's opportunity for judicial review. Given the inability of agencies to effectively and consistently engage in environmental justice analysis, perhaps courts, rather than internal agency practices, can provide more of a benefit to environmental justice.

67. Celeste Murphy-Greene & Leslie A. Leip, *Assessing the Effectiveness of Executive Order 12898: Environmental Justice for All?*, 62 PUB. ADMIN. REV. 679 (2002).

68. See, e.g., O'Neil, *supra* note 20. "Event history analyzes the risk of an event or hazard, given a set of influencing variables." *Id.* at 1089.

69. Provost & Gerber, *supra* note 35; see also Geltman et al., *supra* note 19.

70. Andrea L. Moore, *An Examination of the Influence of Environmental Justice Policy, Executive Order 12898, on the Spatial Concentration of Manufacturing Facilities in EPA Region 6 1988–2009*, 7 J. ENV'T STUD. & SCI. 377 (2017).

71. See Provost & Gerber, *supra* note 35.

72. See, e.g., Murphy-Greene & Leip, *supra* note 67, at 685 ("The findings of this study reveal that protective laws aimed at reducing environmental hazards for farm workers in South Florida are not being effectively implemented in the State of Florida. As a result, the goals of Executive Order 12898 are not being achieved by the U.S. Environmental Protection Agency.").

73. Geltman et al., *supra* note 19, at 143 ("To the extent federal agencies discussed EO 12898, most did so in boilerplate rhetoric that satisfied compliance but was devoid of detailed thought or analysis."); Moore, *supra* note 70, at 377 ("Overall, it appeared that EO 12898 did not influence facility location uniformly and that county and local level factors may be of importance."); see O'Neil, *supra* note 20, at 1087 ("[D]espite environmental justice legislation, Superfund site listings in minority and poor areas are even less likely for sites discovered since the 1994 Executive Order.").

*D. Judicial Review of Executive Order 12898: A New
Opportunity for Environmental Justice?*

The twenty-five-year history of E.O. 12898 evidences sharp disagreement in the United States about the role of the courts in effectuating environmental justice. The degree to which E.O. 12898 creates an opportunity for judicial review is unclear. While the D.C. Circuit has interpreted the Order to permit challenges to environmental justice analyses under the National Environmental Policy Act (NEPA) and the Administrative Procedure Act (APA), other circuits have argued that the Order forecloses such an opportunity.⁷⁴

The plain language of the Order itself appears to preclude the opportunity for judicial review.⁷⁵ In certain terms, President Clinton's Order states: "This order shall not be construed to create any right to judicial review involving the compliance or noncompliance of the United States, its agencies, its officers, or any other person with this order."⁷⁶

The Presidential Memorandum that accompanied the Order iterated this point, reaffirming the intent of President Clinton to focus on "improv[ing] the internal management of the Executive Branch."⁷⁷ More generally, executive orders are rarely reviewable, and federal courts have said that executive orders are not enforceable in private civil suits unless the Order "was 'intended' by the President to be 'a legal framework enforceable by private civil action,' as opposed to a 'managerial tool for implementing the President's personal . . . policies."⁷⁸

74. *Compare* *Cmtys. Against Runway Expansion, Inc. v. Fed. Aviation Admin.*, 355 F.3d 678, 689 (D.C. Cir. 2004) ("The [agency] exercised its discretion to include the environmental justice analysis in its NEPA evaluation, and that analysis therefore is properly subject to 'arbitrary and capricious' review under the APA."), with *Bullwinkel v. U.S. Dep't of Energy*, 2013 WL 4774766, at *5 (W.D. Tenn. Sept. 4, 2013) (dismissing claims relying either directly or indirectly on E.O. 12898).

75. Exec. Order No. 12,898, 3 C.F.R. 859 § 6-609 (1994) ("This order is intended only to improve the internal management of the executive branch and is not intended to, nor does it create any right, benefit, or trust responsibility, substantive or procedural, enforceable at law or equity by a party against the United States, its agencies, its officers, or any person.").

76. *Id.*

77. Memorandum on Environmental Justice, 30 WEEKLY COMP. PRES. DOC. 279, 280 (Feb. 11, 1994) ("This memorandum is intended only to improve the internal management of the Executive Branch and is not intended to nor does it create, any right, benefit, or trust responsibility, substantive or procedural, enforceable at law or equity by a party against the United States, its agencies, its officers, or any person.").

78. *Richland/Wilkin Joint Powers Auth. v. U.S. Army Corps of Engr's*, 176 F.

Perhaps surprisingly then, the D.C. District Court recently interpreted the Order to allow for judicial review when agencies voluntarily undertake an analysis of environmental justice.⁷⁹ In *Standing Rock Sioux Tribe*, the Standing Rock Sioux Tribe alleged that the Army Corps of Engineers had violated E.O. 12898. While the District Court entertained the idea of judicial review, ultimately, the Court concluded that the Army Corps of Engineers' analysis of environmental justice considerations were not so flawed as to support vacatur.⁸⁰ The court acknowledged that the Army Corps had failed to conduct a proper consideration of the impact of the Dakota Access Pipeline but sided with the agency: "Although the Corps must provide a more robust analysis on remand, there is reason to think that, in doing so, it has a substantial possibility of validating its prior conclusion."⁸¹

This decision by the D.C. District Court to review environmental justice analysis is not an anomaly, as various other courts have determined that there are circumstances where analysis of a federal agency's consideration of E.O. 12898 is reviewable.⁸² However, none of the courts that have reviewed E.O. 12898 have determined that an agency's actions were worthy of vacating the agency rule. Other courts have differed in their opinions as to whether E.O. 12898 creates the opportunity for

Supp. 3d 839, 847 (D. Minn. 2016) (quoting *Indep. Meat Packers Ass'n v. Butz*, 526 F.2d 228, 235–36 (8th Cir. 1975)).

79. *See, e.g., Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs*, 440 F. Supp. 3d 1, 10 (D.D.C. 2020).

80. *Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs*, 282 F. Supp. 3d 91, 100 (D.D.C. 2017).

81. *Id.* at 101.

82. *See, e.g., Cmtys. Against Runway Expansion, Inc. v. Fed. Aviation Admin.*, 355 F.3d 678, 689 (D.C. Cir. 2004) ("The [agency] exercised its discretion to include the environmental justice analysis in its NEPA evaluation, and that analysis therefore is properly subject to 'arbitrary and capricious' review under the APA."); *Coliseum Square Ass'n, Inc. v. Jackson*, 465 F.3d 215, 232–33 (5th Cir. 2006) (explaining that a HUD environmental justice study, reviewed as part of administrative record, is subject to arbitrary and capricious review); *cf. Latin Ams. for Soc. & Econ. Dev. v. Adm'r of the Fed. Highway Admin.*, 756 F.3d 447, 465 (6th Cir. 2014) ("Although the Executive Order does not create a right to judicial review, some courts have reviewed environmental justice claims under the APA's arbitrary and capricious standard."). *But see City of Dallas v. Hall*, 2007 WL 3125311, at *6 (N.D. Tex. Oct. 24, 2007) (explaining that if mandates of executive orders are not part of NEPA analysis, then an agency's compliance with executive orders is not subject to review under the APA's arbitrary and capricious standard); *Alaska v. Lubchenco*, 2012 WL 12918286, at *22 (D. Alaska Jan. 19, 2012) (citing *Morongo Band of Mission Indians v. Fed. Aviation Admin.*, 161 F.3d 569, 575 (9th Cir. 1998)) ("Defendants correctly note, however, that the Ninth Circuit has held that [E.O. 12898] is not judicially actionable.").

judicial review. These courts have aligned themselves with the direct language of E.O. 12898 and determined that there is no opportunity for judicial review of alleged violations of E.O. 12898.⁸³ Further, some courts have avoided the question of reviewability. For example, the District Court for the Southern District of California chose to avoid the question of reviewability of E.O. 12898 and decided the case on other grounds.⁸⁴

Varying degrees of willingness on behalf of courts to infuse environmental justice analysis into their NEPA and APA jurisprudence appear to explain the differences in opinion among the district courts and circuit courts that have addressed the question of reviewability.⁸⁵ Underlying the determination that environmental justice analysis is reviewable is the theory that consideration of environmental justice is a result of discretionary action on the part of an agency, which can be reviewed under NEPA and the APA.⁸⁶ In essence, an agency's discretionary decision to analyze environmental justice impacts during the process of formulating an agency rule and the analysis itself appears in the administrative record, which provides a court an opportunity to analyze whether the agency engaged in reasoned decision-making.⁸⁷ For example, the District Court for the Northern District of Texas in *City of Dallas v. Hall* stated that when an agency considers environmental justice as a portion of its NEPA analysis

83. See, e.g., *Cleveland v. Hunton*, 2017 WL 1153011, at *6 (E.D. Cal. Mar. 27, 2017) (holding that a claim alleging a violation of E.O. 12898 is not justiciable); *Crenshaw Subway Coal. v. L.A. Cnty. Metro. Transp. Auth.*, 2015 WL 6150847, at *30–31 (C.D. Cal. Sept. 23, 2015); *ACORN v. U.S. Army Corps of Eng'rs*, 2000 WL 433332, at *8 (E.D. La. Apr. 20, 2000) (rejecting claims seeking review of an environmental impact statement based on deficient environmental justice analysis).

84. *Protect Our Cmty's Found. v. Salazar*, 2013 WL 5947137, at *15 (S.D. Cal. Nov. 6, 2013) (“However, even if judicial review of Executive Order 12898 were available under NEPA and the APA, the Court finds that the [Bureau of Land Management] reasonably concluded that the minority population and low income populations would not be disproportionately affected by the Project.”).

85. See, e.g., *Cmty's Against Runway Expansion, Inc.*, 355 F.3d at 689 (“Boston’s claim is properly before this court because it arises under NEPA and the APA, rather than [E.O. 12898 and a Department of Transportation Order to Address Minority Populations and Low-Income Populations].”).

86. See *Coliseum Square Ass’n, Inc.*, 465 F.3d at 232 (“The Order does not . . . create a private right of action. Thus, we review the agency’s consideration of environmental justice issues under the APA’s deferential ‘arbitrary and capricious’ standard.”).

87. See, e.g., *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 41–43 (1983) (describing the role of courts in assessing an agency’s reasoned decision-making as a component of APA analysis).

and the consideration appears in the administrative record, the consideration then becomes reviewable under the APA.⁸⁸

On one hand, courts have told agencies that their environmental justice analysis becomes reviewable because the decision to conduct environmental justice analysis is a discretionary agency action. On the other, the language of E.O. 12898 appears to create a mandatory agency responsibility to conduct environmental justice analysis when there is a potential for effects “that substantially affect human health or the environment.”⁸⁹ The result of the current E.O. 12898 jurisprudence creates a perverse incentive to reward an agency who chooses to spurn the commands of E.O. 12898 and not engage in any environmental justice analysis, because their decision to do nothing will presumably escape judicial review. As previously discussed, the courts’ rationale of review hinges on the discretionary agency decision to conduct environmental justice analysis, at which point the adequacy of the analysis can be challenged to see if the agency engaged in “reasoned decision-making.”⁹⁰ However, if there is no analysis to challenge, there is no decision-making to be reviewed and, importantly, there is no mechanism to force an agency to consider environmental justice in their actions. In thinking through the individual agency decision of whether to engage in environmental justice analysis, the potential for lengthy litigation may caution an agency to say nothing of the potential disproportionate impacts of their actions. The line of reasoning by courts that have held E.O. 12898 reviewable may have the effect of incentivizing agencies to abandon environmental justice consideration altogether.

While these decisions do not conclusively establish an answer to the question of whether E.O. 12898 is reviewable, they do illuminate a growing trend of courts willing to acknowledge the potential for environmental justice litigation. Given the uncertainty

88. *City of Dallas v. Hall*, 2007 WL 3125311, at *12 (N.D. Tex. Oct. 24, 2007) (“Because [Fish and Wildlife Service]’s consideration of the executive order . . . does not appear to have been part of its NEPA analysis, it is not subject to the Court’s review under the APA.”).

89. Exec. Order No. 12,898, 3 C.F.R. 859 § 2-2 (1994) (“Each Federal agency shall conduct its programs, policies, and activities that substantially affect human health or the environment, in a manner that ensures that such programs, policies, and activities do not have the effect of . . . subjecting persons (including populations) to discrimination under, such programs, policies, and activities, because of their race, color, or national origin.”).

90. *See, e.g., Motor Vehicle Mfrs. Ass’n*, 463 U.S. at 41–43 (discussing agencies’ reasoned decision-making as a component of APA analysis).

of judicial review under E.O. 12898 and the limited case law addressing the question of review, there is an opportunity for Congress to create an explicit private right of action. This growing appetite of the courts to engage in environmental justice analysis may be helpful to legislators considering enacting a law that would seek to codify the ambitions of E.O. 12898. Further, the courts that have entertained reviewing environmental justice considerations demonstrate workability around the standards articulated by E.O. 12898. The time is ripe for Congress to act and give judges clearer authority to consider unjust impacts on groups like the Standing Rock Sioux Tribe.

II. Analysis

A. Executive Order 12898 Was Not Designed to Bear Primary Responsibility for Motivating Federal Agencies to Adequately Consider Environmental Justice Impacts

More than a quarter of a century has passed since President Clinton penned E.O. 12898, providing ample history to consider the impacts of President Clinton's efforts. While some have lauded the ability of the federal government to legitimize the environmental justice concerns of many via E.O. 12898,⁹¹ reality reflects a situation where vulnerable communities across the United States need better and more concrete help. What twenty-five years of history also provides is an opportunity to reflect on the aims and intentions of E.O. 12898, while simultaneously assessing whether it makes sense for E.O. 12898 to serve as the vehicle to carry the United States toward a more equitable and just environment. E.O. 12898 created a mechanism intended to force agencies to "make achieving environmental justice part of [their] mission,"⁹² but the structure of the Order makes clear that President Clinton's intent was to utilize agencies, rather than the courts, as the means to advance environmental justice:

This order is intended only to improve the internal management of the executive branch and is not intended to, nor does it create any right, benefit, or trust responsibility,

91. Bullard, *supra* note 35 ("From the 1982 Warren County . . . protests [to E.O. 12898], a high water mark was achieved within a twelve-year span and has endured as the foundation of Environmental Justice Policy in America under three Presidential Administrations.").

92. Exec. Order No. 12,898, 3 C.F.R. 859 § 1-101 (1994).

substantive or procedural, enforceable at law or equity by a party against the United States, its agencies, its officers, or any person.⁹³

E.O. 12898 is laudable for its recognition of an issue long ignored by the federal government, but the Order's language shows that President Clinton was explicitly opposed to allowing plaintiffs to seek environmental justice relief in federal courts. While this Note may seem unfairly critical of an Executive Order signed twenty-five years ago, it is intended to offer an analysis of what existing legal options disadvantaged groups and individuals have for safeguarding their environment. The lack of executive and congressional action to advance and expand on President Clinton's efforts simplifies this analysis.⁹⁴ Nevertheless, it is worthwhile to attempt to understand what E.O. 12898 provides to environmental justice advocates.

As an initial point of analysis, it is helpful to understand how agencies have striven to realize the objectives of E.O. 12898. To comply with E.O. 12898, federal agencies consider how their rules or regulations will affect "minority populations and low-income populations,"⁹⁵ with "the ultimate goal" of "significantly reduc[ing] environmental injustice."⁹⁶ After attempted implementation by four different presidential administrations, some claim that "not every federal agency has fulfilled the Order's [environmental justice] mandates."⁹⁷ One failed implementation of the Order came out of the George W. Bush Administration, under which the EPA—the agency designed to lead⁹⁸ in implementing E.O. 12898—attempted to abandon considering race as a component in considering federal agency effects on the population.⁹⁹ This decision drew the ire of the EPA's Office of Inspector General, who concluded that the "EPA

93. Exec. Order No. 12,898, 3 C.F.R. 859 § 6-609 (1994).

94. *Cf.* Bullard, *supra* note 35 ("[T]he Executive Order is a necessary ingredient but in-and-of-itself insufficient for achieving true environmental justice.").

95. Exec. Order No. 12,898, 3 C.F.R. 859 § 1-101 (1994).

96. Provost & Gerber, *supra* note 35.

97. Huang, *supra* note 46.

98. Exec. Order No. 12,898, 3 C.F.R. 859 § 1-102 (1994) ("[T]he Administrator of the Environmental Protection Agency . . . shall convene an interagency Federal Working Group on Environmental Justice . . .").

99. Huang, *supra* note 46 ("In 2005, under Administrator Stephen Johnson the Environmental Protection Agency . . . attempted to redefine the purpose of the Order by dropping race as a factor in identifying and prioritizing populations that may be disadvantaged by a federal agency's policies, asserting that all communities should be treated equally regardless of their race or socioeconomic status.").

ha[d] not fully implemented Executive Order 12898 nor consistently integrated environmental justice into its day-to-day operations.”¹⁰⁰ The Office of Inspector General went on to characterize the EPA’s actions as not taking account of minority and low-income populations, which is what E.O.12898 requires at a minimum.¹⁰¹ Again in 2006, the EPA Office of Inspector General reported that the EPA was not upholding its end of the bargain: “Our survey results showed that EPA senior management has not sufficiently directed program and regional offices to conduct environment justice reviews in accordance with Executive Order 12898.”¹⁰² These frustrated reports by the EPA’s internal watchdog illustrate how E.O. 12898 is susceptible to decisions from the proposed leaders of federal environmental justice, to say nothing of E.O. 12898’s shortcomings when fully implemented.

Despite some efforts by federal agencies to reference and analyze the potential effects on vulnerable communities when developing rules or regulations, the agencies’ implementation of these rules demonstrates a track record of E.O. 12898’s insignificance. In a study of 2,000 final agency rules from the Clinton, Bush, and Obama Administrations, researchers found that agencies under President Obama referenced E.O. 12898 the most, but environmental justice was largely irrelevant to the agency actions.¹⁰³

President Clinton may have seen his attempt to recognize pervasive environmental injustice as an initial step to catapult a broader conversation on environmental justice into the national consciousness. While it is doubtful that President Clinton would have foreseen his Executive Order would still be the primary federal protection for environmental justice in 2020, activists and disadvantaged communities have been left to wait for the day when E.O. 12898 becomes fully implemented. Twenty-five years of middling success, combined with the inability of federal agencies

100. U.S. ENV’T PROT. AGENCY, OFF. OF INSPECTOR GEN., REPORT NO. 2004-P-0007, EPA NEEDS TO CONSISTENTLY IMPLEMENT THE INTENT OF THE EXECUTIVE ORDER ON ENVIRONMENTAL JUSTICE, at i (2004).

101. *Id.* (“The Agency does not take into account the inclusion of the minority and low-income populations, and indicated it is attempting to provide environmental justice for everyone. While providing adequate environmental justice to the entire population is commendable, doing so had already been EPA’s mission prior to implementation of the Executive Order; we do not believe the intent of the Executive Order was simply to reiterate that mission.”).

102. U.S. ENV’T PROT. AGENCY, OFF. OF INSPECTOR GEN., REPORT NO. 2006-P-00034, EPA NEEDS TO CONDUCT ENVIRONMENTAL JUSTICE REVIEWS OF ITS PROGRAMS, POLICIES, AND ACTIVITIES (2006).

103. Provost & Gerber, *supra* note 35.

and the EPA to utilize the strong language of E.O. 12898, leads to the conclusion that E.O. 12898 is ill-equipped to propel the federal government toward action in mitigating widespread environmental injustice in the United States.¹⁰⁴ Whether by its own devices or due to a lack of additional presidential and congressional action, E.O. 12898 has not led to measurable success when it comes to motivating federal agencies to increased consideration of environmental justice.

B. Courts Have Reached a Ceiling in Their Ability to Use Order 12898 to Remedy Negative Consequences of Federal Actions

Only recently have the courts entered the arena to offer a solution to failed implementation of E.O. 12898 by federal agencies. While courts have considered ways in which E.O. 12898 may create an opportunity for review, the plain language of E.O. 12898 leaves much to be desired and, in fact, appears to support the notion that judicial review is unavailable when a federal agency fails to abide by the commands of the Order. Ultimately, the closest a court has come to enforcing the Order against an agency's rulemaking comes by way of a holding by the D.C. District Court that determined the Army Corps of Engineers' analysis of environmental justice considerations was not so flawed as to support vacatur.¹⁰⁵

As previously mentioned, one of the ways the courts might help in realizing E.O. 12898's goals is to offer judicial review. By providing the potential for a court to conclude that an agency's proposed action would violate E.O. 12898, environmental activists may succeed in preventing or halting an unfavorable and unjust agency action by court order. Alternatively, environmental plaintiffs may generate enough of a threat of litigation that it forces an agency to reconsider their actions to prevent a potential violation of E.O. 12898. The question then becomes: To what extent does E.O. 12898 present an opportunity for judicial review of federal agency action?

The jurisprudence on this question is messy and complicated. However, the existing case law provides a decent framework from which to draw a conclusion about how the courts might remedy

104. See Huang, *supra* note 46 ("From a substantive perspective, the Order lacked requirements that [environmental justice] play a determining factor in siting, rulemaking, and permitting decisions.")

105. *Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs*, 282 F. Supp. 3d 91, 100 (D.D.C. 2017).

environmental injustice. There is currently a circuit split on the reviewability of E.O. 12898, with the 5th Circuit and D.C. Circuit concluding review is available, the 6th Circuit and the 9th Circuit answering that E.O. 12898 is unreviewable, while the remaining circuits having yet to answer the question (1st, 2nd, 3rd, 4th, 7th, 8th, 10th, and 11th Circuits). See the chart below for a visual of the existing circuit split.

Does Executive Order 12898 Create an Opportunity for Judicial Review?	
Circuit	Holding
D.C. Circuit	Agencies' E.O. 12898-based reasoning is reviewable under NEPA and the APA ¹⁰⁶
1st Circuit	N/A
2nd Circuit	N/A
3rd Circuit	N/A
4th Circuit	N/A
5th Circuit	Agencies' E.O. 12898-based reasoning is reviewable under NEPA and the APA ¹⁰⁷
6th Circuit	E.O. 12898 considerations are not reviewable because of the plain text ¹⁰⁸
7th Circuit	N/A
8th Circuit	N/A
9th Circuit	E.O. 12898 considerations are not reviewable because of the plain text ¹⁰⁹
10th Circuit	N/A
11th Circuit	N/A

106. See *Cmtys. Against Runway Expansion, Inc. v. Fed. Aviation Admin.*, 355 F.3d 678, 689 (D.C. Cir. 2004) (“Boston’s claim is properly before this court because it arises under NEPA and the APA, rather than [E.O. 12898 and a Department of Transportation Order to Address Minority Populations and Low-Income Populations].”); see also *Standing Rock Sioux Tribe v. U.S. Army Corps of Eng’rs*, 255 F. Supp. 3d 101, 112 (D.D.C. 2017) (“Although the Corps substantially complied with NEPA in many areas, the Court agrees that it did not adequately consider the impacts of an oil spill on fishing rights, hunting rights, or *environmental justice*, or the degree to which the pipeline’s effects are likely to be highly controversial.” (emphasis added)).

107. See *Coliseum Square Ass’n, Inc. v. Jackson*, 465 F.3d 215, 232 (5th Cir. 2006) (“[Executive] Order [12898] does not . . . create a private right of action. Thus, we review the agency’s consideration of environmental justice issues under the APA’s deferential ‘arbitrary and capricious’ standard.”). *But see ACORN v. U.S. Army Corps of Eng’rs*, 2000 WL 433332, at *6–9 (E.D. La. Apr. 20, 2000) (declining to review claims seeking review of an environmental impact statement based on

With respect to those circuits that have held that E.O. 12898 *does* create an opportunity for judicial review (the D.C. Circuit and the 5th Circuit), the logic has been supported by reference to the voluntary decision to include environmental justice analysis in a NEPA evaluation.¹¹⁰ Complicating this rationale is the mandatory language in E.O. 12898 regarding agency responsibilities for federal programs:

Each Federal agency shall conduct its programs, policies, and activities that substantially affect human health or the environment, in a manner that ensures that such programs, policies, and activities do not have the effect of excluding persons (including populations) from participation in, denying persons (including populations) the benefits of, or subjecting persons (including populations) to discrimination . . . because of their race, color, or national origin.¹¹¹

According to E.O. 12898, federal agencies should be conducting environmental justice analyses anytime a proposed rule or regulation has the potential for disproportionately high and adverse human health or environmental effects on minority and low-income populations.¹¹² Theoretically, the compulsory language of E.O. 12898 would lead to a substantially greater number of environmental justice reviews.

Since the D.C. Circuit and 5th Circuit have only found judicial review appropriate when an agency undertakes a “voluntary” decision to conduct environmental justice analysis,¹¹³ there is no

deficient environmental justice analysis).

108. *See Latin Ams. for Soc. & Econ. Dev. v. Adm’r of the Fed. Highway Admin.*, 756 F.3d 447, 465 (6th Cir. 2014) (“Although the Executive Order does not create a right to judicial review, some courts have reviewed environmental justice claims under the APA’s arbitrary and capricious standard.”).

109. *See, e.g., Morongo Band of Mission Indians v. Fed. Aviation Admin.*, 161 F.3d 569, 575 (9th Cir. 1998) (stating that E.O. 12898 does not create any right to judicial review). *But see Protect Our Cmty. Found. v. Salazar*, 2013 WL 5947137, at *12 (S.D. Cal. Nov. 6, 2013) (“However, even if judicial review of Executive Order 12898 were available under NEPA and the APA, the Court finds that the [Bureau of Land Management] reasonably concluded that the minority population and low income populations would not be disproportionately affected by the Project.”).

110. *See, e.g., Cmty. Against Runway Expansion*, 355 F.3d at 689 (“The FAA exercised its discretion to include the environmental justice analysis in its NEPA evaluation, and that analysis therefore is properly subject to ‘arbitrary and capricious’ review under the APA.”).

111. Exec. Order No. 12,898, 3 C.F.R. 859 § 2-2 (1994).

112. Exec. Order No. 12,898, 3 C.F.R. 859 (1994).

113. *See Coliseum Square Ass’n, Inc. v. Jackson*, 465 F.3d 215 (5th Cir. 2006); *Cmty. Against Runway Expansion, Inc.*, 355 F.3d at 678; *Standing Rock Sioux Tribe v. U.S. Army Corps of Engr’s*, 255 F. Supp. 3d 101 (D.D.C. 2017).

mechanism by which a court has determined that an agency *must* conduct an environmental justice analysis. Therein lies a fatal flaw of the ability of the courts to enforce the language of E.O. 12898. Without the ability to motivate a federal agency to conduct an environmental justice analysis, courts are resigned to analyzing a voluntary environmental justice analysis under NEPA and the APA. These judicial interpretations, paired with the lack of additional presidential and congressional action, create several issues. For one, the potential of a costly and time-intensive judicial review might caution federal agencies against analyzing environmental justice in the first place.¹¹⁴ Perhaps federal agencies have already learned from the decisions in the D.C. and 5th Circuits and chosen to disregard the potential need to analyze environmental justice considerations going forward.

Second, with the unrestricted ability to opt out of surveying potential environmental justice impacts, perhaps agencies only engage in such analysis when they feel their case is strong enough to pass judicial review under NEPA and the APA. This rationale may explain why the E.O. 12898 cases decided in the 5th Circuit and D.C. Circuit have not led to “wins” for environmental activists. For example, *Communities Against Runway Expansion, Inc. v. Federal Aviation Administration* involved a challenge to a final order by the Federal Aviation Administration (FAA) expanding the runway at Boston’s Logan International Airport.¹¹⁵ The City of Boston intervened and argued, inter alia, that the FAA’s environmental justice analysis was arbitrary and capricious because of the demographics selected for potential effect.¹¹⁶ The FAA analysis tilted the scales to conclude that the final order would not have a disproportionately high and adverse human health or environmental effect on low-income or minority populations, by selecting a narrow background demographic: “Minorities constitute 34% of the population expected to be exposed to significant noise impacts as a result of the project, whereas they constitute 48% of the population of the potentially affected area.”¹¹⁷ This selection had

114. *Cf. Standing Rock Sioux Tribe v. U.S. Army Corps of Eng’rs*, 471 F. Supp. 3d 71 (D.D.C. 2020) (providing the latest chapter in a nearly four-year battle between the Tribe and the Army Corps).

115. *Cmtys. Against Runway Expansion*, 355 F.3d at 681.

116. *Id.* at 688 (“Boston argues that using Suffolk County as the basis for comparison improperly biased the analysis, and that the FAA should instead have used the greater Boston metropolitan area—Logan’s ‘core service area.’”).

117. *Id.*

the effect of narrowing the comparison between the expected impact area and the potentially impacted area, where using the greater Boston metropolitan area as a basis for comparison would have yielded a more disparate impact, as the City of Boston argued.¹¹⁸ In essence, the FAA engaged in environmental justice analysis when developing the runway expansion at Boston's Logan International Airport, but chose to limit the analysis to survey the effects on a narrow, less-diverse population than the more diverse Boston metropolitan area.¹¹⁹ Nevertheless, the D.C. Circuit found the FAA's environmental justice analysis reasonable and adequately explained.¹²⁰

The case of *Communities Against Runway Expansion* showcases the D.C. Circuit bucking its sister circuits to find it appropriate to consider an agency's analysis of environmental justice impacts. However, judicial review did not prove to be an insurmountable obstacle for the FAA, which was aided by agency-friendly review under the arbitrary and capricious standard.¹²¹ In a different matter, the D.C. District Court in *Standing Rock Sioux Tribe* originally held that the Army Corps' analysis of environmental justice was arbitrary and capricious,¹²² but later held that the Corps had sufficiently remedied their dubious exclusion of impacts on the Standing Rock Sioux Tribe.¹²³ In making this determination, the D.C. District Court noted that its earlier

118. *Id.*

119. *Id.*

120. *Id.* at 689 (“The FAA’s methodology was reasonable and adequately explained: The [final environmental impact statement] sought to compare the demographics of the population predicted to be affected by any increased noise resulting from the project to the demographics of the population that otherwise might conceivably be affected by noise from the airport.”).

121. *Id.* at 685–86 (“The scope of review under the ‘arbitrary and capricious’ standard is narrow and a court is not to substitute its judgment for that of the agency. . . . [T]he agency must examine the relevant data and articulate a satisfactory explanation for its action including ‘a rational connection between the facts found and the decision made.’ In reviewing that explanation, we must ‘consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error in judgment.’” (quoting *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983))). The standard is highly deferential to agencies, since an agency only needs to show that a reasonable relationship exists between the underlying data and the agency’s action.

122. *Standing Rock Sioux Tribe v. U.S. Army Corps of Eng’rs*, 255 F. Supp. 3d 101, 140 (D.D.C. 2017) (“The Corps need not necessarily have addressed that particular issue, but it needed to offer more than a bare-bones conclusion that Standing Rock would not be disproportionately harmed by a spill.”).

123. *Standing Rock Sioux Tribe v. U.S. Army Corps of Eng’rs*, 282 F. Supp. 3d 91, 100 (D.D.C. 2017) (finding the agency’s action in issuing an environmental assessment rather than a more involved environmental impact statement was not “so lacking as to cast serious doubt on its decision”).

opinion stated that the Corps need only provide “more than a bare-bones conclusion that Standing Rock would not be disproportionately harmed by a[n] [oil] spill.”¹²⁴ The Corps had initially surveyed environmental justice impacts within a 0.5 mile radius¹²⁵ of the Dakota Access Pipeline’s crossing of Lake Oahe, which conveniently excluded analysis of impact on the Standing Rock Sioux Tribe, which was located 0.55 miles away from the crossing.¹²⁶ More concretely, the opposition and involvement from the D.C. District Court did nothing to alter the trajectory of the Dakota Access Pipeline route.¹²⁷

It is important to note that the *Communities Against Runway Expansion* and *Standing Rock Sioux Tribe* cases were instances where a court determined that E.O. 12898 was reviewable. Other circuits that have addressed the question have quickly dismissed any challenges brought under E.O. 12898.¹²⁸ With the present jurisprudence on E.O. 12898, it is difficult to imagine a case where a federal court would order an agency to take concrete steps to mitigate environmental justice. Therefore, courts have reached a ceiling in their actual or perceived ability to offer more of a benefit to environmental plaintiffs. If the aspirations of E.O. 12898 are ever to be fully implemented, it is neither the agencies nor the courts who will take the mantle.

C. *The Moment Is Ripe for Congress to Act on Behalf of Vulnerable Communities*

With agencies and courts demonstrating a rocky history of attempts to implement E.O. 12898, Congress must take action to remedy the unacceptable status quo. With some researchers acknowledging that zip code is the most important predictor of

124. *Id.* at 100–01 (internal quotations omitted) (quoting *Standing Rock Sioux Tribe*, 255 F. Supp. 3d at 140).

125. *Standing Rock Sioux Tribe*, 255 F. Supp. 3d at 137.

126. *Id.* (“The Standing Rock Reservation is 0.55 miles—or 80 yards beyond the 0.5-mile limit—downstream of the [horizontal directional drilling] site, and the Tribe contends that there was no principled basis on which to narrowly exclude it from the bounds of the Corps’ analysis.”).

127. Phil McKenna, *Standing Rock Asks Court to Shut Down Dakota Access Pipeline as Company Plans to Double Capacity*, INSIDE CLIMATE NEWS (Aug. 20, 2019), <https://insideclimatenews.org/news/20082019/standing-rock-dakota-access-pipeline-impact-assessment-court-double-capacity/> [perma.cc/8PNZ-WFJX] (“The Dakota Access pipeline (DAPL) passes under the Missouri River, the tribe’s water supply, just upstream from the Standing Rock Reservation.”).

128. *See, e.g.,* *Morongo Band of Mission Indians v. Fed. Aviation Admin.*, 161 F.3d 569, 575 (9th Cir. 1998).

health,¹²⁹ continued reliance on an ineffective Executive Order is not a solution. Congress is the better-situated entity to establish the effective means to remedy various environmental justice issues, given the inability of the courts to do more than glance at an agency's reasoning and the turbulence of executive orders more generally.¹³⁰ At least one scholar has argued a similar conclusion with respect to the failed implementation of E.O. 12898.¹³¹ Amanda Franzen's analysis in 2009 focused on agency decision-making and the plain text of E.O. 12898, without discussing the recent development of courts interacting with the question of judicial review.¹³² The existing case law interpreting E.O. 12898 provides further support to Franzen's argument that Congress must act and emphasizes that, although courts have begun to analyze judicial review of E.O. 12898, the Order itself will be insufficient in achieving environmental justice.

Senator Cory Booker (D-NJ) recently introduced to the U.S. Senate the "Environmental Justice Act of 2019."¹³³ The Environmental Justice Act (the Act) or similar legislation would be a significant improvement to the United States' twenty-five-year history of trial and error at combatting environmental injustice via E.O. 12898. While the political dynamics of such a piece of legislation are uncertain, Congress should strive to advance similar legislation. The Act announces key reforms that will provide low-income and minority communities a seat at the table when it comes to federal agency action. Namely, the Act would codify E.O. 12898 into law and would provide an explicit opportunity for judicial review by allowing litigants to bring lawsuits under Title VI of the 1964 Civil Rights Act.¹³⁴

129. Bullard, *supra* note 35.

130. See, e.g., Carolyn Fortuna, *Do You Think the Trump Administration Should Have Dismantled These 10 Environmental Regulations?*, CLEANTECHNICA (Jan. 9, 2020), <https://cleantechnica.com/2020/01/09/do-you-think-the-trump-administration-should-have-dismantled-these-10-environmental-regulations/> [perma.cc/4AHU-2NS8] (detailing President Trump's revocation of Executive Order 13693, which set a goal of cutting the federal government's greenhouse gas emissions by 40% over ten years).

131. Amanda K. Franzen, *The Time Is Now for Environmental Justice: Congress Must Take Action by Codifying Executive Order 12898*, 17 PENN. ST. ENV'T L. REV. 379, 389 (2009) (criticizing E.O. 12898 for relying on internal enforcement and not establishing a right to judicial review).

132. *Id.*

133. S. RES. 2236, 116th Cong. (2019).

134. Rob Friedman, *New Bill Centers Environmental Justice & Cumulative Impacts*, NAT. RES. DEF. COUNCIL (July 24, 2019), <https://www.nrdc.org/experts/rob-friedman/new-bill-centers-environmental-justice-cumulative-impacts> [perma.cc/SMHW-YVYY].

Section 10 of the Act provides: “Any person aggrieved by the failure of a covered entity to comply with this title, including any regulation promulgated pursuant to this title, may bring a civil action in any Federal or State court of competent jurisdiction to enforce such person’s rights under this title.”¹³⁵ This language provides a sharp contrast with the current language in E.O. 12898 and improves the likelihood that groups like the Standing Rock Sioux Tribe may have better access to the environmental justice that they deserve in the future. Unfortunately, the Act has since made little to no progress in being passed.¹³⁶ This lack of movement on the Act should not serve as a deterrent to Congress. During a CNN climate forum in September 2019, nine out of ten participating candidates—“all except former Vice President Joseph R. Biden, Jr.,—named or clearly alluded to environmental justice”¹³⁷ Recent polling also demonstrates that “[n]onwhites . . . and low-income . . . Americans are more worried about drinking water pollution” and “[n]on-whites are more likely to think global warming should be a top priority for the government.”¹³⁸ These indicators may demonstrate a growing appetite among the general public for environmental justice.

Congress should be encouraged by the recent ability of the courts to consider environmental justice actions.¹³⁹ Moreover, Congress should recognize the obligation it has to act in the interests of its constituents, especially when we know that 71% of Black individuals live in counties in violation of federal air pollution

135. S. RES. 2236 § 10, 116th Cong. (2019).

136. See S. RES. 2236, 116th Cong. (2019) (showing that the bill was referred to the Committee on Environment and Public Works when introduced); see also Kristoffer Tigue, *Will 2021 Be the Year for Environmental Justice Legislation? States Are Already Leading the Way*, INSIDE CLIMATE NEWS (Jan. 15, 2021), <https://insideclimatenews.org/news/15012021/environmental-justice-in-2021-legislation/> [perma.cc/ZR62-5GMU] (noting that, under the Biden Administration, “[a]ctivists are also hoping the new Congress will be able to pass the Environmental Justice Act”).

137. Maggie Astor, *Environmental Justice Was a Climate Forum Theme. Here’s Why*, N.Y. TIMES (Sept. 5, 2019), <https://www.nytimes.com/2019/09/05/us/politics/environmental-justice-climate-town-hall.html> [perma.cc/QEA5-XJ5J].

138. *Public Opinion*, NAT’L CAUCUS OF ENV’T LEGISLATORS, <https://www.ncel.net/polling/> [perma.cc/5MYQ-ABH8].

139. See, e.g., *Standing Rock Sioux Tribe v. U.S. Army Corps of Eng’rs*, 255 F. Supp. 3d 101, 112 (D.D.C. 2017) (“Although the Corps substantially complied with NEPA in many areas, the Court agrees that it did not adequately consider the impacts of an oil spill on fishing rights, hunting rights, or *environmental justice*, or the degree to which the pipeline’s effects are likely to be highly controversial.” (emphasis added)).

standards, in contrast to 58% of non-Hispanic Whites,¹⁴⁰ and that Blacks and Puerto Ricans are three times more likely to die as a result of asthma than either Whites or the broader Hispanic population.¹⁴¹ Only then will the United States be able to gain traction on this fundamentally unjust state of affairs.

Conclusion

This Note addresses E.O. 12898 and its failed implementation by both federal agencies and the courts. While once seen as a promise of brighter environmental futures for low-income and minority Americans, E.O. 12898 was not designed to bear primary responsibility for motivating agencies to effectively consider their environmental justice impacts. Moreover, the federal courts have reached a ceiling in their ability to provide relief to environmental advocates, with no court forcing an agency to change course from an agency decision that ignored the concerns of affected groups. Congress must act to pass the Environmental Justice Act of 2019 or similar legislation, and decidedly legitimize the United States' need to enhance the environmental wellbeing of its most vulnerable individuals. In the meantime, groups like the Standing Rock Sioux Tribe will be forced to engage in uncertain civil litigation and civil disobedience to safeguard their ability to live in a healthy environment.

140. Chapman, *supra* note 11.

141. *Asthma Disparities in America*, *supra* note 12.