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Beyond Baby Steps

An Empirical Study of the Impact of Environmental Justice Executive Order 12898

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This study evaluated the impact of Executive Order (EO) 12898 to advance environmental justice. We conducted a review evaluating the frequency and effective use of EO 12898 since execution with particular focus following President Obama's Plan EJ 2014. We found that both EO 12898 and Plan EJ 2104 had little, if any, impact on federal regulatory decision making. 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. In the 21st year, with the exception of the Environmental Protection Agency, very little federal regulatory activity included references to EO 12898.

Key words: environmental justice, Executive Order 12898, legal epidemiology, Plan EJ 2014, public health law research

EXECUTIVE ORDERS are often heralded for swiftly bringing about much needed policy change. The issuance of Executive Order 12898 (EO 12898) by President Bill Clinton on February 11, 1994, was no different. Entitled "Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations," EO 12898 mandated consideration of environmental justice in federal agency actions. News headlines circa 1994 touted EO 12898 as the "new language of environmental justice"¹ one that will address "environmental racism."²

EO 12898's maturation and metamorphosis over the last 20 years, however, has far from addressed "environmental racism." Indeed, if EO 12898 was the new language of the environmental justice movement, it certainly was not one uniformly un-

derstood across federal agencies. Recognizing the order's shortcoming, President Barack Obama acknowledged, on EO 12898's 20th anniversary that, "much work remains."³

This study was designed to cut through the rhetoric associated with EO 12898 to evaluate and discuss the executive order's discernable impact. Using principles of legal epidemiology,⁴ we first conducted a systematic longitudinal empirical review that examines whether EO 12898 was used frequently and effectively by federal agencies over time to improve the environmental condition of minorities and disenfranchised communities. The project began by collecting data from Lexis/Nexis and from dockets on Regulations.gov to determine how many federal regulations over the past 21 years included statements of environmental justice evaluation compliance with EO 12898. The collected data were sorted using standardized coding. The data were finally compared with the results of a literature review.

Next, we conducted a cross-sectional review of the federal agency activities in 2014, the executive order's 20th anniversary year. The same coding and review procedures were utilized. The purpose of the cross-sectional examination was to evaluate the impact of President Barack Obama's renewed promise to "empower areas most strained by pollution."³

Both the longitudinal and cross-sectional data demonstrated that EO 12898 had little, if any, impact on federal regulatory decision making. Most federal agency actions discussed EO 12898 in boilerplate rhetoric that satisfied compliance with the mandates of EO 12898 but was devoid of detailed thought or analysis. Almost all regulatory actions determined there would be no environmental justice impact, and hence, no environmental justice compliance plan was required.

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Elizabeth Glass Geltman led the research and writing of this article. Gunwant Gill and Miriam Jovanovic acted as coders, conducted a background literature review, and made substantive contributions to the research and writing of this article.

The authors declare no conflict of interest.

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In the year following the Obama proclamation,³ very little federal regulatory activity included references to EO 12898. As expected, the United States Environmental Protection Agency (EPA) had the greatest environmental justice activity, but little to no analysis pursuant to EO 12898 was reflected in other agencies that clearly include environmental policy in their respective mandates. Although the EPA often included statements of compliance with EO 12898, almost all the sampled EPA actions also determined that a plan of environmental justice compliance was not needed because there would be no adverse impact.

METHODS

The purpose of this empirical study was to evaluate the impact of EO 12898, if any, on federal rulemaking. We began our study by conducting a comprehensive literature review of environmental justice.

Coding

After completing a detailed literature review, the details of which are discussed in the later section of this article, we developed a preliminary set of questions for coding the regulations on the basis of the literature review results. Three coders independently evaluated a sample set of regulations to ensure coding congruency. The coding questions were refined on the basis of the pilot. The final 3 coding questions were as follows:

1. Does the regulatory action contain a statement of compliance with EO 12898?
2. Does the regulatory action contain a determination that there will be no negative impact on minority or low-income populations in compliance with EO 12898?
3. Does the regulatory action contain a plan of how to comply with EO 12898?

Once the coding questions were finalized, the 3 coders evaluated the regulations found in the data collection described below and recorded the results using *LawAtlas Workbench*. Coders cross-checked and verified results to ensure consistent coding. Coders met on a regular basis to discuss and resolve coding discrepancies.

Data collection

Longitudinal analysis

We used established procedures of legal epidemiology⁴ to examine the effectiveness of EO 12898 as a rulemaking measure in promoting public health and the environment of minority and disenfranchised communities. To gather data, we used the Lexis/Nexis, FederalRegister.gov, and Regulations.gov databases to conduct a series of searches. We used Lexis/Nexis to conduct a longitudinal re-

view. Three coders worked together to develop standard search terms that were finalized following a pilot phase of regulation review. Final search terms used to identify regulations that considered the impact of EO 12898 included “Executive Order 12898,” “EO129898,” and “EO 129898.”

For the longitudinal study, we selected the Federal Statutes and Regulations database of Lexis/Nexis, refined the search using “advanced options” to include only materials published in the Federal Register, and used the search term “Executive Order 12898” without date restriction. The search retrieved published agency materials that invoked EO 12898 in a proposed or final rulemaking from the order’s promulgation to the research start date (February 1, 2015). The search was repeated and consistently yielded 999 records. We selected a random sample by evaluating every 10th record. The coders evaluated the records for any duplicative material and secondary documents and found none. A total of 99 items were then coded using *LawAtlas Workbench*.⁵

Cross-sectional analysis

We next evaluated the environmental justice activities of the federal government for the past calendar year, which was of particular significance since the time frame for the cross-sectional analysis followed the 20th anniversary of EO 12898. For the cross-sectional study, the advanced search option of Regulations.gov⁶ was utilized to limit the search to each of the federal agencies specified in EO 12898. The agencies named as targets of environmental justice consideration in the express language of EO 12898 are as follows:

- the Department of Agriculture,
- Department of Commerce,
- Department of Defense,
- Department of Energy,
- Department of Health and Human Services,
- Department of Housing and Urban Development,
- Department of the Interior,
- Department of Justice,
- Department of Labor,
- Department of Transportation, and
- Environmental Protection Agency.

Using the advanced search option of Regulations.gov, we entered the search “Executive Order 12898,” limited the search parameter to notice, rule, or proposed rule, restricted the search period from February 1, 2014, to February 1, 2015, and then conducted a series of searches each time limiting the search to the rulemakings of 1 of the 11 agencies specified in Executive Order 12898.

TABLE 1. Number of Citations of EO 12898 by Target Federal Agency from 2014-2015

Federal Agency	February 1, 2014, to February 1, 2015	February 1, 2014, to February 1, 2015
	Regulations.gov	Federal Register
USDA	1	4
DOC	0	3
DOD	0	4
DOE	0	1
HHS	0	0
HUD	0	0
DOI	0	0
DOJ	0	0
DOL	0	0
DOT	0	57
EPA	366	656

To ensure the data set was complete, we ran a parallel search in the Federal Register using FederalRegister.gov. We again entered the search “Executive Order 12898” and restricted the search period from February 1, 2014 to February 1, 2015. Table 1 indicates the numbers of items collected. The search on FederalRegister.gov did not allow limiting the search to only notices, rulemakings, and proposed rulemakings. Hence, the FederalRegister.gov search included items excluded from the first search on Regulations.gov.

Coders reviewed the documents on both Regulations.gov and FederalRegister.gov to eliminate items that did not involve rulemaking or soliciting notice and comment. For instance, the Federal Register search of the Department of Transportation (DOT) retrieved 57 items not reflected in the corresponding Regulations.gov search. These 57 items involved DOT publication notices of pending final agency action or an Environmental Impact Statement on proposed road or bridge projects. As final federal agency actions, the 57 DOT notices reflected on FederalRegister.gov did not seek public comment.

We next surveyed a random selection of each of the 366 EPA proceedings seeking public comment

on Regulations.gov during the last year by collecting every 10th EPA action listed on Regulations.gov. The result was a sample set of 37 federal actions by the EPA in the calendar year preceding our research study.

RESULTS

In the longitudinal study, we reviewed a random selection of regulatory actions across federal agencies from the time of enactment until the date of investigation to evaluate compliance with and impact of EO 12892. In the search evaluating a random selection of federal agencies from the promulgation of the executive order until February 1, 2015, we found no instance in which a federal agency created a plan of compliance with EO 12898. The results are depicted in Table 2 and Figure 1.

Most agencies included a statement acknowledging the applicability of EO 12898 and stating that the agency had considered environmental justice impacts before publishing the notice. Having considered the impacts, most federal agencies stated that the action by the federal government would not have any impact, positive or negative, on environmental justice. Because no agency action was found

TABLE 2. Random Sample of Federal Agency Compliance with EO 12898 from 1994 to 2015

	Federal Agency Statement of Compliance	Federal Agency Determination of No Impact	Federal Agency Plan of Compliance
Yes	88	89	0
No	11	10	99

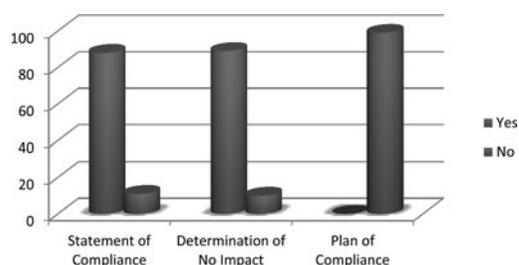


Figure 1. Longitudinal study of federal agency compliance with EO 12892.

to have a negative environmental justice impact, all federal agency actions in the sample set concluded that the federal agency did not need to draft an EO 12898 compliance plan.

In the cross-sectional study, we found very little activity on EO 12898 for any federal agency except the EPA. In fact, on Regulations.gov, the federal database created under the Open Government Initiative, the United States Department of Agriculture (USDA) was the only federal agency action among the agencies to cite EO 12898 during the year after the Obama proclamation other than the EPA. The USDA did so in only one instance during the 2014 to 2015 survey period.

In contrast, there were 366 EPA rulemakings posted on Regulations.gov inviting public comment that evaluated environmental justice pursuant to EO 12898 in the year preceding the study: February 1, 2014, to February 1, 2015. In the random sample of the 366 EPA actions in the cross-sectional study, we found a majority of rulemaking activities involved regulatory action of the Clean Air Act. In fact, 29 of the 37 EPA regulatory actions in our sample set involved implementation and regulation of the Clean Air Act. In contrast, only 4 other regulatory actions involved other EPA-administered statutes. Two actions involved federal pesticide regulations under the Federal Insecticide, Fungicide, and Rodenticide Act. One action involved hazardous waste regulation under the Resource Conservation and Recovery Act (RCRA). One EPA action involved the cleanup of abandoned hazardous substance sites under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). Figure 2 depicts the statutory authority under which the EPA action was authorized for the actions in our cross-sectional sample set.

Of the 37 EPA actions, the EPA included a statement of compliance in all actions. The agency determined either there would be no negative impact or there would be a positive change in environmental conditions as a result of the action in 36 of the 37 regulatory actions. In the exception, the EPA sought

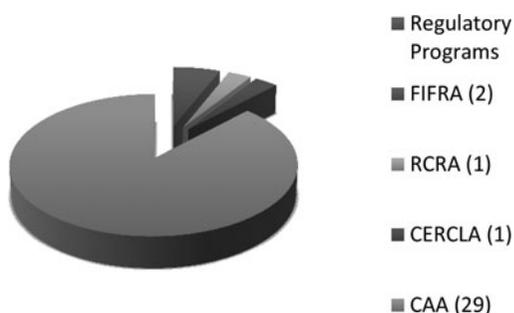


Figure 2. Statutory authority of programs in the EPA cross-sectional study (2014-2015).

comment on a proposed rule regarding “Managing Emissions: Oil and Gas Production in Indian Country.”⁷ In announcing the proposal, the EPA explained:

Because this document does not impose or propose any requirements, and instead seeks comments and suggestions for the Agency to consider in possibly developing a subsequent proposed rule, the various other review requirements that apply when an agency imposes requirements do not apply to this action.³

Although the EPA found EO 12898 inapplicable at that stage of the proposed rulemaking process, it did open the door for environmental justice considerations and actively sought comments on all aspects of the proposal, including comments considering human health or environmental effects on minority or low-income populations pursuant to EO 12898.

EPA’s decision not to review environmental justice considerations in the Oil and Gas Emissions in Indian Country⁸ regulation is consistent with the Obama administration’s statements on the 20th anniversary of EO 12898. In proclaiming the importance of the 20th anniversary, President Obama said:

And recognizing these same communities may suffer disproportionately due to climate change, we must cut carbon emissions, develop more home-grown clean energy, and prepare for the impacts of a changing climate that we are already feeling across our country.³

Table 3 depicts the findings in EPA compliance with EO 12898 from February 1, 2014, to February 1, 2015. Figure 3 records the result of our cross-sectional sample set of EPA’s actions from February 1, 2014, to February 1, 2015.

DISCUSSION

EO 12898 was created as a response to the environmental justice movement,^{1,2} which arose out of

TABLE 3. EPA Compliance with EO 12898 from February 1, 2014 to February 1, 2015

	Statement of Compliance	Determination of No Impact	Plan of Compliance
Yes	37	36	0
No	0	1	0

grassroots efforts after high-profile environmental disasters such as Three Mile Island, Love Canal, and the contamination in Woburn, Massachusetts.⁹ Environmental studies in the 1980s showed a statistical correlation between low-income minority communities and higher risks of environmental hazards.¹⁰ For example, in 1983, Professor Robert D. Bullard¹⁰ published findings that low-income communities surrounded landfills and waste sites in Houston. In fact, Bullard pointed out that all of Houston’s city-owned municipal landfills and 6 of the eight of the city’s garbage incinerators were located in predominantly African American neighborhoods, at a time when African Americans comprised only 28% of the city’s population.¹⁰

A 1987 study by the United Church of Christ Commission for Racial Justice also found a strong correlation between race and hazardous waste facility siting.¹¹ Alarmed about disparate siting of landfills and hazardous waste sites, in 1990 the bipartisan Congressional Black Caucus met with the EPA to discuss environmental risk facing minorities and low-income populations across the nation.

President Clinton issued EO 12898 in 1994 as a blueprint to codify principles of environmental justice into federal agency decision making and rule-making. The key objectives of EO 12898 were

to (1) foster federal agency responsibility for environmental justice by requiring environmental justice evaluation in federal actions, (2) foster nondiscrimination in federal programs, and (3) facilitate public participation of minority and low-income communities.^{12,13} Following the blueprint, the EPA created the Environmental Equity Workgroup and released a report entitled “Reducing Risk in All Communities”¹² that led to creation of a permanent office to address environmental justice.^{12,13}

The Clinton Administration also issued the “Memorandum of Understanding (MOU) on Environmental Justice and Executive Order 12898”¹⁴ contemporaneously with EO 12898. The MOU’s stated purpose was to “underscore certain provisions of existing law that can help ensure all communities and persons across this Nation live in a safe and healthful environment.”¹⁴ The MOU outlined a potential enforcement mechanism for the EO 12898 that encompassed use of the National Environmental Policy Act 1969 (NEPA) and Title VI of the Civil Rights Act 1964 (Title VI).¹⁴ Pursuant to the MOU, NEPA-mandated analysis of any federal action’s environmental effects was required to include assessment of the impact on minority and low-income communities. Furthermore, NEPA analysis of mitigation measures outlined in an Environmental Assessment or Environmental

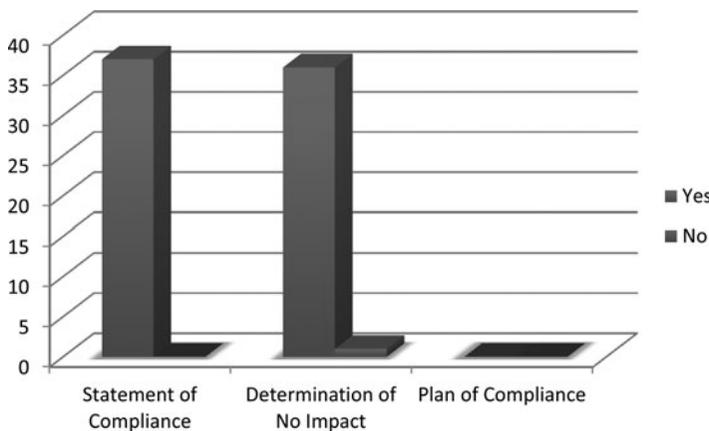


Figure 3. Cross-sectional study of EPA compliance with EO 12892 (February 1, 2014, to February 1, 2015).

Impact Statement was also mandated to discuss the significant environmental effects borne by minority and low-income communities.¹⁴ With respect to Title VI of the Civil Rights Act, the MOU required federal agencies to ensure that all health and environmental programs receiving federal financial assistance did not discriminate on the basis of race, color, or national origin.¹⁴⁻¹⁷

Together, EO 12898² and the MOU¹⁴ required federal agency analysis of disparate impact theory. The executive order,² along with accompanying guidance,¹⁵⁻¹⁷ signaled a paradigm shift in federal regulatory evaluation and established the importance of environmental justice analysis in federal policy considerations without imposing new substantive obligations on agencies.¹⁶ EO 12898 directed federal agencies to give greater weight to environmental justice concerns using the existing legal framework.¹⁸

Critical studies

Implementation of EO 12898 was neither smooth nor its success linear. To the contrary, the limitations and failures of EO 12898 were well documented in both anecdotal press accounts and in several important evaluative reports.¹⁹⁻²¹ A 2004 Office of the Inspector General's (OIG) report admonished the EPA for its unclear environmental justice implementation strategy.¹⁹ The US Commission on Civil Rights Report²⁰ and the Lawyers' Committee for Civil Rights Under Law²¹ echoed OIG concerns¹⁹; the latter argued that the letter and spirit of EO 12898 were not being fulfilled because of EPA's lack of environmental justice enforcement under Title VI of the Civil Rights Act.²¹

Courts deferred to Clinton administration Department of Justice (DOJ) policy¹⁶ and determined that there was no private cause of action granted to citizens pursuant to EO 12898²²⁻³¹ despite the earlier Clinton administration MOU.¹⁴ Citizens raised environmental justice complaints under Title VI through EPA's External Compliance and Complaints Program,²¹ which was tasked with ensuring that recipients of EPA financial assistance comply with relevant federal nondiscrimination requirements. EPA's inability to truly address Title VI complaints was, however, well documented. Between 1993 and 2007, the EPA processed a total of only 211 Title VI complaints.²¹ In 2007, 171 (81%) complaints were closed and 40 (19%) were still pending. Of the closed cases, 127 (60%) had been rejected and 44 (21%) dismissed.²¹ Thus, OIG's report,¹⁹ the US Commission on Civil Rights Report²⁰ and the Lawyers' Committee for Civil Rights Under Law²¹ all noted a significant lack of

environmental justice enforcement mechanisms as an impediment to the success of EO 12898.

Lack of enforcement was not the only problem that plagued EO 12898. Studies indicated that the federal government was not consistent across agencies in undertaking environmental justice reviews. A 2001 study by Professor Denis Binder³² found a great deal of variance across federal agencies in EO 12898's implementation. Relying on survey data, Binder³² concluded that the EPA, Housing and Urban Development (HUD), and DOT consistently performed at a higher level among federal agencies in implementing EO 12898. The environmental justice record at DOJ and DOI was characterized in the Binder study as sporadic. DOE was said to fall somewhere in between the efforts of the Department of the Interior (DOI) and those of HUD and DOT. In short, Binder found the federal government was ineffective in maintaining cross-agency environmental justice evaluations. Binder³² concluded that despite EO 12898, the federal government had enormous built-in limitations and systemic implementation hurdles when trying to promote environmental parity.

President George W. Bush and Obama

When George W. Bush was elected, environmental justice faded from the federal government's list of priorities. EO 12898 detractors criticized the environmental justice order for being counterintuitive and an unnecessary thorn in the sides of economic development.²⁰ By focusing on disparate impact instead of market forces, detractors argued EO 12898 failed to address the real cause of environmental justice: poor economic growth in low-income minority communities.³³

With the effectiveness of EO 12898 itself in question,^{20,21,32,33} the environmental justice movement stagnated until 2008 when President Obama revitalized environmental justice discussion during his presidential campaign.³⁴ In 2010, President Obama reinstated the Interagency Working Group on Environmental Justice and included representatives of 17 federal agencies and the White House¹⁹ that would, in August 2011, sign the "Memorandum of Understanding (MOU) on Environmental Justice and Executive Order 12898."⁷ The purpose of the Obama MOU was to identify and address environmental justice considerations in agency programs, policies, and initiatives.⁷

The Obama administration also drafted a roadmap for environmental justice called "Plan EJ 2014"³⁵ that was designed to advance environmental justice. Plan EJ 2014 sought to create a systemic, cross-agency approach to incorporating environmental justice into federal activities.³⁵ In

February 2014, in commemoration of the 20th anniversary of EO 12898, President Obama issued a proclamation reiterating his commitment to environmental justice efforts by the federal government.³ The Obama proclamation shifted the historic environmental justice rhetoric and spoke of “overburdened communities” instead of low-income and minority populations. Obama’s environmental justice proclamation, however, counterbalanced the President’s statements included in the same document emphasizing the importance of developing homegrown energy plans.³

CONCLUSION

In 1992, Professor Robert Bullard characterized government efforts to address environmental justice as “baby steps” and, warned that, “imperiled communities can’t wait twenty years for the EPA to take small steps.”^{10,35} Our longitudinal analysis indicates that federal agencies have not heeded Bullard’s precautionary call. More than two decades after President Clinton signed EO 12898, environmental justice concerns are simply not well reflected in federal agency rulemaking as reflected in the notice and comment process published on Regulations.gov.

Like Binder,³² we found that the EPA performed at a consistently higher level than other federal agencies when taking environmental justice matters into consideration. Our findings confirmed the Binder findings that DOT did a better job than most other federal agencies (other than the EPA) in documenting environmental justice concerns. Unlike Binder, we found the environmental justice efforts of the DOE, HUD, DOJ and DOI very disappointing; as all had no documentation following Obama’s 2014 proclamation of any consideration of environmental justice in any of rulemaking proceedings.

In fact, in the year following President Obama’s 20th anniversary environmental justice proclamation, very few federal agencies other than the EPA included discussion of EO 12898 in rulemaking proceedings invoking public comment. Those federal agencies that did include reference to EO 12898 did so only infrequently. In the rare cases where federal rulemakings invoked EO 12898, the agencies used boilerplate rhetoric devoid of any environmental justice analysis of commentary.

We found 366 instances on Regulations.gov where the EPA discussed EO 12898 mandates in the rulemaking proceeding in the year following President Obama’s Plan EJ. There were no agency actions published on Regulations.gov from the DOD, DOE, HHS, HUD, DOI, DOJ, DOL or DOT during the study year following the Obama proclamation that included environmental justice evaluations pur-

suant to EO 12898. The USDA had one notice stating that EO 12898 was applicable but making no statement of compliance or other EO 12898 evaluation in that notice.

Overall, although progress toward environmental justice has undoubtedly occurred, the lack of consistent interagency environmental justice policy discussion, implementation, enforcement, and judicial review has stymied progress in remedying environmental parity and brought EO 12898’s glaring shortcomings into plain view. Moreover, although only a year old, President Obama’s Plan EJ 2014 shows no greater promise than its 21-year-old predecessor. Although the language of both EO 12898 and Plan EJ 2014 provides great promise, our study demonstrates that if the United States wants to improve environmental justice, society still needs to move beyond baby steps.

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