

Why The EPA Has Made Little Progress On EJ Litigation

By **Jeffrey Corey** (December 1, 2022)

Although the U.S. Environmental Protection Agency has taken numerous steps to promote environmental justice goals, recent court cases show little progress in achieving those goals through judicial enforcement.[1]

Nearly two years after the Biden administration announced in one of its first executive orders that environmental justice would be a top priority, the EPA's track record in filed civil and criminal enforcement cases suggests the agency is having difficulty achieving environmental justice through litigation.[2]



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Consistent with the administration's prioritization of environmental justice, the EPA has pursued numerous nonlitigation EJ initiatives. For example, on Sept. 24, the agency announced it was establishing an office with a Senate-confirmed assistant administrator to focus on environmental justice and lead its effort to engage with EJ communities.[3]

This announcement came on the heels of the EPA sending a 56-page "letter of concern" to the Louisiana Department of Environmental Quality, stating in part that "Louisiana residents who identify as Black and are living and/or attending school near [a LDEQ-permitted] facility have been subjected to adverse and disparate health impacts as a result of LDEQ's decisions." [4]

The letter cites the EPA's authority under federal civil rights laws, and recommends that the LDEQ take numerous specific actions — such as conducting certain analyses related to the facility's permit renewals — "[t]o comply with federal nondiscrimination obligations."

The EPA also recently finalized a broad definition of "cumulative impacts" — a term of art important to a wide range of regulatory decisions — that, consistent with environmental justice goals, allows consideration of "non-chemical stressors and their effects on health, well-being, and quality of life outcomes." [5]

Despite the agency's efforts, it is difficult to determine whether environmental justice concerns are having a real impact on when and how the EPA enforces environmental laws in court. Although it has had more than 22 months to file enforcement cases focused on environmental justice goals, there appear to be very few examples of court cases brought by the agency where EJ concerns were a primary — if not the primary — motivation behind the decision to pursue enforcement.

Reported Cases Suggest Limited Progress Through Enforcement

A review of the EPA's public statements regarding recent civil and criminal enforcement cases suggests it may be difficult for the agency to use litigation to achieve environmental justice goals.

According to its website, in the past year, the EPA has resolved six significant civil cases, consisting of five civil actions filed in federal court and one administrative settlement.[6] Of the five cases the agency has filed in court, only one — its March settlement with Chevron Phillips Chemical Co. LP — contains any mention of environmental justice considerations.

The case, filed in the U.S. District Court for the Southern District of Texas and captioned U.S. v. Chevron Phillips Chemical Co. LP, involved allegations that Chevron Phillips was violating the Clean Air Act by emitting excess hazardous air pollutants, including benzene, at facilities in Cedar Bayou, Port Arthur and Sweeney, Texas.

In announcing the settlement, the agency's press release made clear environmental justice concerns were important factors in the case. It specifically noted that the Chevron Phillips facilities were located "close to residential neighborhoods," that local residents had "been demanding assistance for years," and affirmed the EPA's commitment to "overburdened communities." [7]

All other significant EPA civil case resolutions in the last year, however, contain no mention of environmental justice concerns. For example, in July 2020, the agency filed a civil action against PCS Nitrogen Fertilizer LP for mismanagement of hazardous waste in violation of the Resource Conservation and Recovery Act — but nothing about the case appears to address EJ concerns.

The case, filed in the U.S. District Court for the Middle District of Louisiana and captioned U.S. v. PCS Nitrogen Fertilizer LP, resulted in a settlement requiring PCS Nitrogen to improve treatment and management of hazardous waste at the company's facility in Gesimar, Louisiana. [8]

The settlement addresses dangers related to hazardous waste and wetlands contamination. But neither the agency's press release nor the consent decree entered in the case provide any suggestion that the EPA pursued claims against PCS Nitrogen due to environmental justice concerns. [9]

Other significant civil enforcement actions filed by the EPA in the past year include U.S. v. the City of Elyra, Ohio, in the U.S. District Court for the Northern District of Ohio, and U.S. v. Cleveland-Cliffs Burns Harbor LLC, in the U.S. District Court for the Northern District of Indiana — Clean Water Act cases addressing unpermitted discharges. [10] The agency's press releases regarding these cases detail the public benefits obtained by the settlements entered into between the agency and the violators, but contain no reference to environmental justice issues. [11]

The EPA's public statements regarding these cases are understandably silent on environmental justice, because the harm these cases address — illegal discharges into waterways — do not appear to relate to disadvantaged communities.

The agency's resolutions in criminal matters in the past year appear to also show little connection between criminal cases filed and the Biden administration's environmental justice goals. Based on reports issued by the EPA's Office of Criminal Enforcement, Forensics and Training, between July 2021 and June 2022, federal grand juries handed down 10 indictments alleging criminal violations of environmental laws. [12]

The fact patterns of these cases include acute oil spills, catastrophic events causing physical harm to employees, and contractors violating lead paint standards. While the factual circumstances of these cases often involve serious environmental impacts and intentional misconduct deserving of criminal sanction, none of them have clear connection to the Biden administration's environmental justice goals.

Practical and Legal Limits on Enforcement of Environmental Justice

Although the EPA's recent civil and criminal cases appear to show little progress on achieving environmental justice goals through litigation, the lack of such cases may not be the agency's fault.

There is no federal environmental justice law statute. So to pursue EJ goals, the EPA has to use existing authorities — some of which may not be a good fit for those goals.

For example, even in cases where it appears state or local governments have made regulatory decisions to the obvious detriment of certain disadvantaged communities, it likely would be very difficult to prove regulators acted with the requisite discriminatory intent to support a claim of intentional discrimination under Title VI of the Civil Rights Act of 1964.[13]

Another factor is that environmental enforcement actions are often complex, and take a long time to develop. In many cases, enforcement actions cannot be filed until the EPA has established a record of violations and engaged in extensive prefiling negotiations.

Although the agency has had nearly two years to file cases designed to further the Biden administration's environmental justice agenda, it may be the lack of obvious litigation outcomes is due in part to the often slow-moving nature of environmental enforcement.

The EPA also has finite enforcement resources. Although the agency's management — including the yet-to-be-nominated assistant administrator tasked with overseeing environmental justice — may want to prioritize EJ concerns, its enforcement staff must continue to pursue the full range of its enforcement obligations.

For example, illegal discharges into waterways justifiably require the attention of the EPA's enforcement attorneys, even if the impacts of those incidents do not relate to disadvantaged communities. Given finite resources, attention devoted to non-environmental justice cases necessarily limits the agency's ability to file cases targeting EJ concerns.

Finally, another explanation for the EPA's lack of success thus far may be due to discretion exercised by the U.S. Department of Justice. When the EPA determines court action is warranted, it cannot take action on its own, and instead must work through the DOJ. The DOJ effectively serves as the EPA's litigation counsel in federal court, and may be reluctant to file cases on the agency's behalf based on novel or untested environmental justice theories.

Even in matters where the EPA believes the impact on disadvantaged communities is obvious, the DOJ may prefer to pursue more run-of-the mill environmental cases where violations are easier to prove.

Ultimately, the EPA will have to work through these practical and legal barriers if it wants to achieve environmental justice through litigation. At the midway point of the Biden administration, it is unclear when, if ever, court action will provide a productive means of achieving environmental justice goals.

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[1] The EPA defines its environmental justice goals in part as achieving "fair treatment" so that no group bears "a disproportionate share of the negative environmental consequences resulting from industrial, governmental and commercial operations." EPA, Learn About Environmental Justice, available at <https://www.epa.gov/environmentaljustice/learn-about-environmental-justice>.

[2] The Biden administration has made environmental justice a priority from the start, as a mere seven days after President Joe Biden's inauguration, the White House issued an executive order directing the EPA to engage in actions — including enforcement — to address "adverse human health, environmental, climate-related and other cumulative impacts on disadvantaged communities." Executive Order on Tackling the Climate Crisis at Home and Abroad (Jan. 27, 2021), available at <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/27/executive-order-on-tackling-the-climate-crisis-at-home-and-abroad/>.

[3] EPA Press Release, EPA Launches New National Office Dedicated to Advancing Environmental Justice and Civil Rights (Sept. 24, 2022).

[4] Letter from Lilian S. Dorka, EPA Deputy Assistant Administrator for External Civil Rights, to Dr. Chuck Carr Brown, Secretary, Louisiana Department of Environmental Quality (Oct. 12, 2022), available at <https://www.epa.gov/system/files/documents/2022-10/2022%2010%2012%20Final%20Letter%20LDEQ%20LDH%2001R-22-R6%2C%2002R-22-R6%2C%2004R-22-R6.pdf>.

[5] The EPA published the cumulative impacts definition on Sept. 30, 2022, in a report titled "Cumulative Impacts Research: Recommendations for EPA's Office of Research and Development," available at <https://www.epa.gov/healthresearch/cumulative-impacts-research>.

[6] The EPA's list of civil cases and settlements is available at <https://cfpub.epa.gov/enforcement/cases/>. On its main "Data and Results" page, the agency describes this page as a "listing of significant civil and cleanup cases and settlements from 1998." See <https://www.epa.gov/enforcement/enforcement-data-and-results>. The following are the five court cases in the last year that EPA describes as significant: (1) U.S. v. City of Elyria, Ohio, Case No. 1:22-cv-02026 (N.D. Ohio); (2) U.S. v. PCS Nitrogen Fertilizer LP, Case No. 3:22-cv-00468 (M.D. La.); (3) U.S. v. Chevron Phillips Chemical Co. LP, 4:22-cv-737 (S.D. Tx.); (4) U.S. v. Power Performance Enterprises Inc., Case No. 2:22-cv-00693 (W.D. La.); and (5) U.S. v. Cleveland-Cliffs Burns Harbor LLC, Case No. 2:22-cv-26 (N.D. Indiana).

[7] EPA Press Release, Chevron Phillips Chemical Company Agrees to Reduce Harmful Air Pollution at Three U.S. Chemical Plants (March 9, 2022), available at <https://www.epa.gov/newsreleases/chevron-phillips-chemical-company-agrees-reduce-harmful-air-pollution-three-us>.

[8] See Consent Decree, Dkt. 2-1, U.S. v. PCS Nitrogen Fertilizer LP, Case No. 3:22-cv-468 (M.D. La.). The consent decree does not include supplemental environmental projects or other requirements designed to address impacts on disadvantaged communities.

[9] See *id.*; see also EPA Press Release, Settlement with PCS Nitrogen Fertilizer to Require Treatment of More than a Billion Pounds of Hazardous Waste and Closure of Huge Phosphogypsum Waste Stacks and Impoundments (July 14, 2022), available at <https://www.epa.gov/newsreleases/settlement-pcs-nitrogen-fertilizer-require-treatment-more-billion-pounds-hazardous>.

[10] See *U.S. v. City of Elyria, Ohio*, Case No. 1:22-cv-02026 (N.D. Ohio); *U.S. v. Cleveland-Cliffs Burns Harbor LLC*, Case No. 2:22-cv-26 (N.D. Indiana).

[11] See EPA, The Elyria, Ohio Clean Water Act Settlement, available at <https://www.epa.gov/enforcement/elyria-ohio-clean-water-act-settlement-information-sheet>; see also EPA Press Release, Cleveland-Cliffs Agrees to Improve Environmental Compliance at Indiana Facility and Pay \$3 Million Civil Penalty for Ammonia and Cyanide Violations, available at <https://www.epa.gov/newsreleases/cleveland-cliffs-agrees-improve-environmental-compliance-indiana-facility-and-pay-3>.

[12] OCEFT's monthly environmental crimes bulletins are available at <https://www.epa.gov/enforcement/environmental-crimes-case-bulletin>.

[13] See e.g., *Erie CPR v. PA Dep't of Transportation*, 343 F. Supp. 3d 531, 550 (W.D. Pa. 2018) (plaintiffs failed to properly allege local government acted with the discriminatory intent required to support claim of intentional discrimination under Title VI).