

CONTAMINATED CONFINEMENT: CORRECTIONAL FACILITY NONCOMPLIANCE WITH EPA REGULATIONS

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ENVIRONMENTAL JUSTICE BEGINS with the observed fact that certain groups of people bear a disproportionate burden of environmental problems. That is, polluting factories, lead in water pipes, filthy air, polluted water, toxic soil, and similar issues are more likely to be found in places where people have less control over decision making – typically, in areas inhabited by minorities and the poor.¹

INTRODUCTION	139
I. BACKGROUND.....	141
A. IMPACTED POPULATION	141
B. RELEVANT LAWS AND ENFORCEMENT	143
1. <i>Constitutional Provisions</i>	143
2. <i>Environmental Statutes</i>	144
3. <i>Environmental Regulations</i>	145
4. <i>Environmental Enforcement Procedures and Tools</i>	146
C. CURRENT LEGAL SOLUTIONS	148
1. <i>Incarcerated Individuals’ Rights to Law and Courts</i>	148
2. <i>Constitutional Actions</i>	149
3. <i>Environmental Statute Citizen Suits</i>	149
II. LEGAL ARGUMENT	150
A. CURRENT ENVIRONMENTAL LAW ENFORCEMENT IS INADEQUATE.	150

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1. LOUIS P. POJMAN, PAUL POJMAN & KATIE MCSHANE, ENVIRONMENTAL ETHICS: READINGS IN THEORY AND APPLICATION, 306 (7th ed. 2015).

2022]	<i>Contaminated Confinement: Correctional Facility Non-Compliance with EPA Regulations</i>	139
	1. <i>Environmental Law Enforcement Generally</i>	150
	2. <i>Correctional Facility Environmental Law Compliance</i>	153
	B. INADEQUATE ENFORCEMENT VIOLATES ENVIRONMENTAL JUSTICE PRINCIPLES	157
	C. INCARCERATED INDIVIDUALS DESERVE BASIC HUMAN RIGHTS.....	160
	D. ENVIRONMENTAL LAW VIOLATIONS COINCIDE WITH EIGHTH AMENDMENT VIOLATIONS	161
	E. INCARCERATED COMMUNITIES DESERVE ENVIRONMENTAL JUSTICE STATUS AND PROTECTIONS	163
	III. PROPOSED SOLUTIONS.....	165
	A. EPA SHOULD INCLUDE “INCARCERATION STATUS” IN ENVIRONMENTAL JUSTICE DEFINITION	165
	B. CONGRESS SHOULD APPROPRIATE SPECIFIC FUNDS TO EPA FOR CORRECTIONAL FACILITY INSPECTIONS.....	167
	C. EPA SHOULD UTILIZE CRIMINAL ENFORCEMENT MECHANISMS	167
	D. CONGRESS SHOULD ESTABLISH A NEW EPA POSITION FOR CORRECTIONAL FACILITY COMPLIANCE.	169
	CONCLUSION	170

INTRODUCTION

The United States has 1,566 state prisons, 102 federal prisons, 1,510 juvenile correctional facilities, 2,850 local jails, 186 immigration detention facilities, and 82 Indian Country jails, among other carceral facilities.² Approximately two million individuals are incarcerated in these facilities.³ The incarcerated community is amongst the most affected and neglected communities facing environmental harms.⁴ However, research regarding

2. Wendy Sawyer & Peter Wagner, *Report: Mass Incarceration: The Whole Pie 2022*, PRISON POLICY INITIATIVE (March 14, 2022), <https://www.prisonpolicy.org/reports/pie2022.html>.

3. *Fact Sheet: Trends in U.S. Corrections*, SENTENCING PROJECT, 2 (last updated May 2021), <https://www.sentencingproject.org/wp-content/uploads/2021/07/Trends-in-US-Corrections.pdf>.

4. Madeline Verniero, *The Truth About Toxic Prisons*, REGUL. REV.: SYNOPSIS: ENV'T (Oct. 5, 2021), <https://www.thereview.org/2021/10/05/verniero-truth-toxic-prisons/>.

environmental injustice and environmental health impacts on incarcerated communities is sparse.⁵

The Eighth Amendment to the United States Constitution protects against cruel and unusual punishment.⁶ A correctional officer violates the Eighth Amendment by acting with “deliberate indifference” to an incarcerated individual’s welfare.⁷ Many correctional facilities across the United States do not comply with environmental laws and regulations.⁸ As a result, these facilities knowingly expose confined individuals to environmental hazards that environmental laws and regulations aim to protect individuals from.⁹ Facility officials’ noncompliance with regulations is a deliberate indifference to incarcerated individuals’ welfare because facilities are knowingly exposing these individuals to environmental hazards.

This article will examine current correctional facilities’ noncompliance with Environmental Protection Agency (EPA) regulations and how the EPA recognizing these facilities as environmental justice communities and implementing environmental justice assistance programs can mitigate the issue. Part I examines: (1) incarcerated individuals’ rights; (2) environmental justice and injustice; and (3) applicable laws related to incarcerated individuals’ constitutional rights and environmental protections. Part II demonstrates that correctional facilities are violating the Eighth Amendment and causing environmental injustices by failing to comply with environmental laws and regulations. Factors included in this analysis are: (1) facility compliance status with EPA regulations under the Safe Drinking Water Act (SDWA), Clean Water Act (CWA), and Clean Air Act (CAA); (2) EPA regulation enforcement on correctional facilities; and (3) facility compliance with EPA settlement terms.

Part III proposes four solutions to address environmental injustices at these facilities. Proposed solutions include: (1) recognizing incarcerated communities as environmental justice communities; (2) shifting enforcement actions from settlements and fines to criminal sanctions (mirroring Eighth Amendment violation sanctions); (3) increasing EPA funding to provide for frequent facility inspections; and (4) creating an EPA committee or task force specifically devoted to correctional facility compliance with regulations.

5. Kimberly M. S. Cartier, *An Unfought Geoscience Battle in U.S. Prisons*, EOS.ORG: FEATURES (Nov. 10, 2020), <https://eos.org/features/an-unfought-geoscience-battle-in-u-s-prisons>.

6. U.S. CONST. amend. VIII.

7. See Daniel Yves Hall, *The Eighth Amendment, Prison Conditions and Social Context*, 58 MO. L. REV. 207, 208 (1993) (citing *Wilson v. Seiter*, 501 U.S. 294, 297 (1991)).

8. See generally *Facility Search Results*, U.S. ENV’T PROT. AGENCY: ENF’T & COMPLIANCE HIST. ONLINE, <https://echo.epa.gov/facilities/facility-search/results> (last visited Sept. 23, 2021) (showing many facilities on ECHO as being noncompliant for 12 out of 12 quarters).

9. See generally *Laws and Executive Orders*, U.S. ENV’T PROT. AGENCY: LAWS & REGULS., <https://www.epa.gov/laws-regulations/laws-and-executive-orders> (last visited Dec. 4, 2021) (“[L]aws serve as EPA’s foundation for protecting the environment and public health.”).

Incarcerated individuals will receive environmental justice and Eighth Amendment protections if the federal government devotes more EPA resources to provide for correctional facility compliance with its regulations.

I. BACKGROUND

A. Impacted Population

The United States has approximately two million individuals incarcerated in prisons and jails,¹⁰ representing about 0.7% of the overall United States population.¹¹ Correctional facilities consist of predominately minority populations.¹² As of 2019, the state and federal prison population was 31% white, 33% black, 23% latinx, and 13% other races or ethnicities.¹³ The prison population makeup is approximately three-fifths low-income individuals and approximately two-thirds minorities.¹⁴ Imprisonment rates thus have disproportionate effects on low-income and minority populations.¹⁵ Correctional facilities—specifically prisons—are inhumane by design and house one of the most vulnerable populations.¹⁶

While incarcerated, an individual's contact with outside communities is limited. The correctional institution becomes the individual's primary community. These facilities serve as communities, yet the census counts incarcerated individuals as residents within the town where they are incarcerated using the facility's address.¹⁷ Despite being counted as residents these individuals lack voting rights in 48 states,¹⁸ while their census count

10. SENT'G PROJECT, *supra* note 3, at 3.

11. Peter Wagner & Wanda Bertram, "What percent of the U.S. is incarcerated?" (*And other ways to measure mass incarceration*), PRISON POL'Y INITIATIVE (Jan. 16, 2020), <https://www.prisonpolicy.org/blog/2020/01/16/percent-incarcerated/>.

12. Tara O'Neill Hayes & Margaret Barnhorst, *Incarceration and Poverty in the United States*, AM. ACTION F. (June 30, 2020), <https://www.americanactionforum.org/research/incarceration-and-poverty-in-the-united-states/>.

13. SENT'G PROJECT, *supra* note 3, at 5 (citing E.A. Carson, *Prisoners in 2019*, WASH., D.C.: BUREAU OF JUST. STAT. (2021)).

14. Hayes & Barnhorst, *supra* note 12.

15. *Id.*

16. Hot Take, *The Ultimate Abolition*, at 3:40 (Mar. 21, 2021), <https://www.hottakepod.com/the-ultimate-abolition/>.

17. *Prison Gerrymandering Project: Population and the Census—FAQ*, PRISON POL'Y INITIATIVE, <https://www.prisonersofthecensus.org/faq.html> (Aug. 24, 2022).

18. See SENT'G PROJECT, *supra* note 3, at 7 (referencing Uggen, C., Larson, R., Shannon, S., & Pulido-Navo, A., *Locked Out 2020: Estimates of People Denied Voting Rights Due to a Felony Conviction*, The Sentencing Project (2020)).

gerrymanders free citizens' districts.¹⁹ Gerrymandering, in this respect, works to dilute the vote of minority groups.²⁰ Prisons and jails are "inextricably intertwined" with society,²¹ yet individuals within these facilities lack decision-making rights that affect society, and that all other citizens retain. Thus, these individuals lack political representation—mirroring environmental justice communities.²² These individuals lack a voice in political representation and thus do not take part in the political process that leads to creating environmental legislation. The population size and treatment suggest a slippery slope: a society curtailing this many individuals' rights risks forgoing the entire society's rights as well.²³

Individuals in the United States detention system are ignored in the environmental justice movement.²⁴ Yet, these individuals come from communities with toxic environments and transition to toxic correctional facilities.²⁵ A Scottish court recently declined extraditing a Scottish man who allegedly committed a crime in Texas—reasoning that the poor correctional conditions in the United States are potentially international human rights violations.²⁶ Experts noted that an extradition denied solely due to confinement conditions is extremely rare.²⁷ The criminal justice system and the impacted communities are noticeably linked to environmental injustice—

19. Hansi Lo Wang & Kumari Devarajan, *Your Body Being Used: Where Prisoners Who Can't Vote Fill Voting Districts*, CODE SWITCH, NPR.ORG (Dec. 31, 2019), <https://www.npr.org/sections/codeswitch/2019/12/31/761932806/your-body-being-used-where-prisoners-who-can-t-vote-fill-voting-districts>.

20. ALAN IDES & CHRISTOPHER N. MAY, CONSTITUTIONAL LAW: INDIVIDUAL RIGHTS, 297 (Aspen Publishers, 5th Ed. 2010).

21. Aaron Littman, *Free-World Law Behind Bars*, 131 YALE L. J. 1385, 1388 (2022).

22. Katie Fagan, *Prisoners Need Environmental Justice too*, U. ALA. BIRMINGHAM: UAB INST. HUM. RTS. BLOG (Feb. 17, 2020), <https://sites.uab.edu/humanrights/2020/02/17/prisoners-need-environmental-justice-too/>.

23. Ram A. Cnaan, Jeffrey N. Draine, Beverly Frazier & Jill W. Sinha, *The Limits of Citizenship: Rights of Prisoners and ex-Prisoners in USA*, U. PENN. SCHOLARLYCOMMONS, 1, 7 (JAN. 1, 2008).

24. Adam Mahoney, *America's Biggest Jails Are Frontline Environmental Justice Communities*, PRISON LEGAL NEWS (Aug. 1, 2021), <https://www.prisonlegalnews.org/news/2021/aug/1/americas-biggest-jails-are-frontline-environmental-justice-communities/>.

25. *See id.* ("This social and environmental harm is then intensified when members of these communities are moved out of the toxic environments in which they live and into toxic facilities where they are held against their will.")

26. Keri Blakinger, *Do Texas Prison Conditions Violate Human Rights Standards? One Scottish Court Says Yes: Tiny Cells, Lacking Medical Treatment and Sweltering Conditions Cited by Judge who Blocked Extradition*, MARSHALL PROJECT: INSIDE OUT (Mar. 17, 2022), <https://www.themarshallproject.org/2022/03/17/do-texas-prison-conditions-violate-human-rights-standards-one-scottish-court-says-yes>.

27. Michael Marks, *Scottish Judge Rejects Extradition Request due to Texas Prison Conditions*, TEX. STANDARD: NAT'L DAILY NEWS SHOW TEX. (Mar. 18, 2022), <https://www.texasstandard.org/stories/scottish-judge-rejects-extradition-request-due-to-texas-prison-conditions/>.

showing an imminent need for the environmental justice movement to include incarcerated individuals.²⁸

B. Relevant Laws and Enforcement

1. Constitutional Provisions

Courts are obligated to enforce the constitutional rights of “all persons, including prisoners.”²⁹ Individuals retain the “essence of human dignity inherent in all persons” even while incarcerated.³⁰ Incarcerated individuals retain Eighth Amendment rights against cruel and unusual punishment, Fourteenth Amendment Equal Protection from discrimination, and limited First Amendment rights to free speech and religion.³¹ To determine whether prison regulations infringe on incarcerated individual’s constitutional rights, courts use a rational basis test that considers whether the regulation’s means are rationally connected to a legitimate governmental interest.³²

The Eighth Amendment reads: “Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”³³ Prison officials’ duty under the Eighth Amendment is to ensure reasonable safety.³⁴ These officials violate their Eighth Amendment duty if they are deliberately indifferent while exposing incarcerated individuals to a “sufficiently substantial” risk of serious damage to future health.³⁵ A court examines “deliberate indifference” using a subjective recklessness test—considering whether the prison official was subjectively aware that the incarcerated individual faced a risk.³⁶ The incarcerated individual must allege an objectively, sufficiently-serious deprivation that posed a substantial risk of serious harm.³⁷

28. Tamisha Walker & Sagaree Jain, *Prisons Pollute and Incarcerated or not, Everyone Deserves Just Transition*, PRISM: CRIME, REFORM & ABOLITION (Feb. 17, 2022), <https://prismreports.org/2022/02/17/prisons-pollute-and-incarcerated-or-not-everyone-deserves-just-transition/>.

29. *Brown v. Plata*, 563 U.S. 493, 510 (2011).

30. *Id.* (holding that “prisoners retain the right essence of human dignity inherent in all persons”).

31. *Prisoners’ rights*, LEGAL INFO. INST.: WEX, https://www.law.cornell.edu/wex/prisoners%27_rights (last visited Sept. 26, 2021).

32. *Id.*; *Rational Basis Test*, LEGAL INFO. INST.: WEX, https://www.law.cornell.edu/wex/rational_basis_test (last visited Dec. 7, 2021).

33. U.S. CONST. amend VIII.

34. *Farmer v. Brennan*, 511 U.S. 825, 844 (1994).

35. *Id.* at 843.

36. *Id.* at 828, 839, 840.

37. *Id.* at 834.

The Fifth and Fourteenth Amendments provide that no individual shall be deprived life, liberty, or property without due process.³⁸ Due process protections include both substantive and procedural rights.³⁹ The Supreme Court observed that the substantive due process doctrine can be supported by “a rule of personal autonomy and bodily integrity”⁴⁰ A lower federal court has found this substantive due process right in the environmental context,⁴¹ and scholars have analyzed substantive due process being used to protect public health and welfare.⁴² For example, a plaintiff can show a Due Process Clause violation if a government actor was deliberately indifferent concerning public water systems contaminants, thus creating “a special danger to a plaintiff that the [government] knew or should have known about,” even if the subject statutory minimums were not exceeded.⁴³ Thus, a plaintiff can show a Due Process Clause violation if a government actor was deliberately indifferent regarding dangerous contaminants, even if the contaminants were within statutory minimums, if the government knew or should have known a special danger existed.

2. Environmental Statutes

The Clean Water Act (CWA) and the Safe Drinking Water Act (SDWA) are two significant environmental laws. The CWA establishes the basic structure for regulating: (1) pollutant discharges into United States’ waters and (2) quality standards for surface waters.⁴⁴ The EPA has used its CWA authority to implement pollution control programs and develop recommendations for national surface waters quality criteria.⁴⁵

The SDWA protects drinking water quality in the United States—focusing on all waters actually or potentially designed for drinking use.⁴⁶ The EPA has SDWA authority to: (1) establish minimum standards to protect tap water and (2) require all public water systems owners or operators to comply

38. U.S. CONST. amends. V, XIV.

39. See CLIFFORD VILLA, ET AL., ENVIRONMENTAL JUSTICE: LAW, POLICY & REGULATION 138 (3d ed. 2020) (citing Meyer v. Nebraska, 262 U.S. 390 (1923); Pierce v. Soc’y of Sisters, 268 U.S. 510 (1925); Griswold v. Connecticut, 381 U.S. 479 (1965); Roe v. Wade, 410 U.S. 113 (1973)).

40. See *id.* (citing Parenthood v. Casey, 505 U.S. 833 (1992)).

41. See *id.* (citing Juliana v. United States, 217 F.Supp.3d 1224, 1250 (D. Or. 2016)).

42. See *id.* (citing Michael C. Blumm & Mary Christina Wood, “No Ordinary Lawsuit”: *Climate Change, Due Process, and the Public Trust Doctrine*, 68 AM. U. L. REV.1 (2017)).

43. See *id.* at 168 (citing Boler v. Earley, 865 F.3d. 391 (6th Cir. 2017), *cert. denied*, 138 S.Ct. 1294 (2018)).

44. 33 USCS § 1251; *Summary of the Clean Water Act*, U.S. ENV’T PROT. AGENCY: LAWS & REGULS., <https://www.epa.gov/laws-regulations/summary-clean-water-act> (last visited Oct. 8, 2021).

45. *Id.*

46. 42 U.S.C. §300f; *Summary of the Safe Drinking Water Act*, U.S. ENV’T PROT. AGENCY: LAWS & REGULS., <https://www.epa.gov/laws-regulations/summary-safe-drinking-water-act> (last visited Nov. 15, 2021).

with standards.⁴⁷ The EPA can authorize state governments to implement SDWA rules for the agency.⁴⁸ Under the SDWA, the EPA set maximum contaminant levels and treatment requirements for over 90 contaminants in public drinking water.⁴⁹ SDWA violations, like many environmental statutes, are generally subject to strict liability.⁵⁰

3. Environmental Regulations

The EPA identifies and attempts to solve environmental issues.⁵¹ Regulatory statutes require pursuing “public interest,” because without regulation, private behavior will not prioritize public interest.⁵² Regulation further centers around performance—specifically by—aligning utilities with public needs.⁵³

The EPA sets national standards for states and tribes to enforce through their own regulations.⁵⁴ The EPA’s original intent was to set and enforce standards collaboratively with states while providing financial and technical support to develop and expand state pollution control programs.⁵⁵ The EPA suggests a “step-by-step financial planning process” to assist communities in determining their capital assets, technical and financial needs, and find resources to meet compliance goals.⁵⁶ The EPA presents four main financing options: (1) municipal revenue-generating authority, (2) grants, (3) loans, and (4) bonds.⁵⁷

Supplemental to the SDWA, the National Primary Drinking Water Regulations (NPDWR) and the National Secondary Drinking Water Regulations (NSDWR) provide additional drinking water standards.⁵⁸ The NPDWR sets standards and treatment techniques limiting drinking water contaminate levels to protect public health.⁵⁹ Public water systems are

47. *Id.*

48. *Id.*

49. *Drinking Water Standards and Regulations*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/healthywater/drinking/public/regulations.html> (last visited Nov. 15, 2022).

50. VILLA, ET AL., *supra* note 39, at 168.

51. *Our Mission and What We Do*, U.S. ENV’T PROT. AGENCY: ABOUT EPA, <https://www.epa.gov/aboutepa/our-mission-and-what-we-do> (last visited Nov. 6, 2021).

52. SCOTT HEMPLING, *PRESIDE OR LEAD? THE ATTRIBUTES & ACTIONS OF EFFECTIVE REGULATIONS* 3 (2d. 2013).

53. *Id.* at 41.

54. U.S. ENV’T PROT. AGENCY: ABOUT EPA, *supra* note 51.

55. *The Origins of EPA*, U.S. ENV’T PROT. AGENCY: EPA HIST., <https://www.epa.gov/history/origins-epa> (last visited Nov. 6, 2021).

56. *Financing for Environmental Compliance*, U.S. ENV’T PROT. AGENCY: COMPLIANCE, <https://www.epa.gov/compliance/financing-environmental-compliance> (last visited Oct. 7, 2021).

57. *Id.*

58. CTRS. FOR DISEASE CONTROL & PREVENTION, *supra* note 49.

59. *Id.*

required to follow NPDWR standards and treatment techniques.⁶⁰ The NPDWR also outlines Maximum Contaminant Level Goals (MCLG), which are the contaminant levels in drinking water that present no known or expected risks to health.⁶¹ However, MCLGs are non-enforceable public health goals.⁶²

The NPDWR enforceable standards are set according to Maximum Contaminant Levels (MCL), which are the highest contaminant levels allowed in drinking water—set as close to MCLGs “as feasible” considering technology and costs.⁶³

The NSDWR water quality standard guidelines are provided to help public water systems manage drinking water issues.⁶⁴ The NSDWR sets standards for 15 contaminants that “may not be harmful to public health,” but water systems are not required to follow these standards.⁶⁵ Thus, the levels prioritize feasibility yet still allow room for contaminant levels that may have known or expected risks to health.

4. Environmental Enforcement Procedures and Tools

Environmental enforcement stems from Congress enacting environmental laws and the EPA implementing the law through regulations and enforcement.⁶⁶ The legal standard for environmental law liability depends on whether liability is civil or criminal. Environmental civil liability is strict and arises when an environmental violation exists, without considering if the responsible parties knew the law or regulation was violated.⁶⁷

Current EPA enforcement procedures are separated into two categories: civil enforcement and criminal enforcement.⁶⁸ The EPA can choose to handle a case internally as an administrative or civil matter or refer the case to the

60. *Id.*

61. *National Primary Drinking Water Regulations*, U.S. ENV'T PROT. AGENCY: GROUND WATER & DRINKING WATER (2009), https://www.epa.gov/sites/default/files/2016-06/documents/npwdr_complete_table.pdf.

62. *Id.*

63. *Id.*

64. *Id.*; *Drinking Water Standards and Regulations*, CTRS. FOR DISEASE CONTROL & PREVENTION: HEALTHY WATER: DRINKING WATER: PUB. WATER SYS. (Nov. 3, 2020), <https://www.cdc.gov/healthywater/drinking/public/regulations.html>.

65. U.S. ENV'T PROT. AGENCY: GROUND WATER & DRINKING WATER, *supra* note 61.

66. U.S. ENV'T PROT. AGENCY: ABOUT EPA, *supra* note 51; *See generally* U.S. ENV'T PROT. AGENCY: EPA HIST. *supra* note 55 (outlining the EPA's creation, resulting from President Nixon's plan to consolidate federal government's environmental responsibilities under one federal agency).

67. *Basic Information on Enforcement*, U.S. ENV'T PROT. AGENCY: ENF'T, <https://www.epa.gov/enforcement/basic-information-enforcement> (last visited Oct. 7, 2021).

68. *Id.*

Department of Justice (DOJ) for external civil or criminal prosecution.⁶⁹ When violations may result in both civil and criminal action, the EPA has a parallel proceedings policy.⁷⁰

Civil enforcement results include settlements, civil penalties, injunctive relief, supplemental environmental projects (SEPs), and mitigation.⁷¹ Injunctive relief here requires a regulated entity to perform or refrain from performing a designated action, to bring the entity into environmental law compliance.⁷² SEPs, which an alleged environmental law violator may undertake, provide tangible environmental or public health benefits to the community or environment affected by the alleged violation.⁷³ SEPs are closely related to the relevant violation, but go beyond any legal requirements for resolving the violation.⁷⁴

Environmental criminal liability requires the responsible party's intent to violate the law or regulation.⁷⁵ Environmental crimes may be prosecuted through conventional criminal codes regarding conspiracies, false statements, mail and wire fraud, and environmental specific statutes that make acts criminally punishable.⁷⁶ The EPA's environmental crime investigations mostly involve environmental felonies, labeled "knowing violations."⁷⁷ Environmental felonies invoke liability when the responsible party had intent regarding the subject violation.⁷⁸ Criminal enforcement results include: (1) criminal penalties such as fines imposed by a judge at sentencing and restitution to the violation's affected individual(s); and (2) incarceration for the individual defendant.⁷⁹

The EPA's audit policy provides regulated entities 21 days from discovering an actual or potential violation to disclose that violation to the EPA.⁸⁰ The EPA defines "discovery" as "when any officer, director, employee or agent of the facility has an objectively reasonable basis for

69. SALLY S. SIMPSON, JOEL GARNER & CAROLE GIBBS, FINAL TECHNICAL REPORT: WHY DO CORPORATIONS OBEY ENVIRONMENTAL LAW? ASSESSING PUNITIVE AND COOPERATIVE STRATEGIES OF CORPORATE CRIME CONTROL, 66 (2007), <https://www.ojp.gov/pdffiles1/nij/grants/220693.pdf>.

70. DANIEL RIESEL, ENVIRONMENTAL ENFORCEMENT: CIVIL AND CRIMINAL §6.01[2] (2021).

71. U.S. ENV'T PROT. AGENCY: ENF'T, *supra* note 67.

72. *Id.*

73. *Supplemental Environmental Projects (SEPs)*, U.S. ENV'T PROT. AGENCY: ENF'T, <https://epa.gov/enforcement/supplemental-environmental-projects-seps> (last visited Oct. 7, 2021).

74. *Id.*

75. U.S. ENV'T PROT. AGENCY: ENF'T, *supra* note 67.

76. RIESEL, *supra* note 70, § 6.01[1].

77. U.S. ENV'T PROT. AGENCY: ENF'T, *supra* note 67.

78. *Id.*

79. *Id.*

80. *EPA Audit Policy*, U.S. ENV'T PROT. AGENCY: COMPLIANCE, <https://www.epa.gov/compliance/epas-audit-policy> (last visited Nov. 5, 2021).

believing that a violation has, or may have, occurred.”⁸¹ The Policy’s incentives include: (1) significant penalty reductions; (2) for criminal violation disclosures, no recommendation for criminal prosecution; and (3) no routine requests for audit reports to trigger enforcement investigations.⁸²

The EPA “Enforcement and Compliance History Online” tool (ECHO) provides information on individual facilities’ compliance with environmental laws.⁸³ ECHO shows enforcement cases, facility reports, air pollutant reports, pollutant loading reports, effluent charts, effluent limit exceedances reports, CWA program area reports, facility documents, and permit limits report.⁸⁴ The EPA recently added “ECHO Notify,” allowing individuals to sign up for weekly email notifications for specific locations and facilities’ enforcement and compliance data changes.⁸⁵

The EPA also maintains a State Review Framework Results Table providing recommendations “designed to address significant issues identified during the review, and consequently, represent a key tool for improving the performance of compliance and enforcement programs across the country.”⁸⁶

C. Current Legal Solutions

1. Incarcerated Individuals’ Rights to Law and Courts

Courts disagree regarding when incarcerated individuals have rights to access courts.⁸⁷ The Supreme Court has held incarcerated individuals’ right to access courts does not guarantee the right to file any claim, but only the right to non-frivolous lawsuits attacking prison sentences or challenging confinement conditions.⁸⁸

Incarcerated individuals face procedural issues when raising claims. While incarcerated individuals can file lawsuits in court, they must first

81. *Id.*

82. *Id.*

83. *ECHO Tool Guide*, U.S. ENV’T PROT. AGENCY: ENF’T & COMPLIANCE HIST. ONLINE, <https://echo.epa.gov/resources/general-info/tool-guide> (last visited Sept. 23, 2021).

84. *ECHO Quick Start Guide*, U.S. ENV’T PROT. AGENCY: ENF’T & COMPLIANCE HIST. ONLINE, <https://echo.epa.gov/resources/general-info/learn-more-about-echo> (last visited Sept. 23, 2021).

85. *ECHO Notify*, U.S. ENV’T PROT. AGENCY: ENF’T & COMPLIANCE HIST. ONLINE, <https://echo.epa.gov/tools/echo-notify> (last visited Mar. 25, 2022); EPA Press Office, *New EPA Tool Provides the Public with Customized Updates on Local Enforcement and Compliance Activities*, U.S. ENV’T PROT. AGENCY: NEWS RELEASES: HEADQUARTERS (Mar. 22, 2022), <https://www.epa.gov/newsreleases/new-epa-tool-provides-public-customized-updates-local-enforcement-and-compliance>.

86. *State Review Framework Results Table*, U.S. ENV’T PROT. AGENCY: COMPLIANCE, <https://www.epa.gov/compliance/state-review-framework-results-table> (last visited Sept. 23, 2021).

87. COLUM. HUM. RTS. L. REV., A JAILHOUSE LAWYER’S MANUAL 37 (12th ed. 2020).

88. *Id.*

attempt to resolve complaints through the individual facility's grievance procedure before filing a lawsuit and proceed with all available administrative appeals.⁸⁹ Once an incarcerated individual has exhausted administrative remedies, they can bring a suit under the Prison Litigation Reform Act (PLRA).⁹⁰ Generally, courts do not recognize an emergency exception to the exhaustion requirement, but few decisions have allowed for an exception to avoid "irreversible harm."⁹¹ A court can dismiss a case if satisfied that the action is frivolous, malicious, fails to state a claim where relief can be granted, or seeks monetary relief where the defendant is immune from such relief.⁹² Under the PLRA and the Federal Tort Claims Act (FTCA) an incarcerated individual's civil damages claim must show physical injury, as § 1997e(e) prohibits actions for mental or emotional injury.⁹³

2. Constitutional Actions

The Eighth Amendment requires the government to furnishing incarcerated individuals with basic human needs, including "reasonable safety."⁹⁴ Correctional officers deny an incarcerated individual Eighth Amendment rights when they: (1) know and disregard an incarcerated individual's health or safety (conscious disregard); (2) can infer awareness that a substantial risk of serious harm exists (awareness that a risk exists); and (3) draw the inference that a risk exists (actual knowledge that risk exists).⁹⁵ Eighth Amendment deliberate indifference claims are evaluated at a higher standard than regulatory compliance claims.⁹⁶ When a court finds Eighth Amendment violations, it may grant appropriate injunctive relief.⁹⁷

3. Environmental Statute Citizen Suits

Most federal environmental statutes contain citizen suit provisions allowing private individuals to bring actions to enforce requirements

89. *Know Your Rights: The Prison Litigation Reform Act (PLRA)*, AM. CIV. LIBERTIES UNION (last updated Nov. 2002), https://www.aclu.org/sites/default/files/images/asset_upload_file79_25805.pdf.

90. *Id.*; 42 U.S.C. § 1997e (2013).

91. COLUM. HUM. RTS. L. REV., *supra* note 87, at 378.

92. *Id.*

93. *Id.* at 418, 420.

94. *Helling v. McKinney*, 509 U.S. 25, 33 (1993).

95. *Farmer v. Brennan*, 511 U.S. 825, 837 (1994) (stating "a prison official cannot be found liable under the Eight Amendment for denying an inmate humane conditions of confinement unless the official knows of and disregards an excessive risk to inmate health or safety; the official must be both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference").

96. *Stockton v. California*, LEXIS 142078 (E.D. Cal. 2011)

97. *Farmer v. Brennan*, at 846.

established under the relevant law.⁹⁸ Federal agency regulations may preempt states' common law injury claims that result from noncompliance with federal regulations.⁹⁹ The Sixth Circuit found that the SDWA does not preclude civil action for deprivation of rights claims under 42 U.S.C. § 1983.¹⁰⁰ Therefore, when a plaintiff cannot receive adequate relief through environmental laws, they may still seek relief pursuant to 42 U.S.C. § 1983.¹⁰¹

II. LEGAL ARGUMENT

A. *Current Environmental Law Enforcement is Inadequate*

The law in books is different from the law in action. Enforcement determines the distance between the two. Studies show that only a fraction of people with litigable grievances sue. Federal agencies go after an even smaller proportion of offenders. If that changed overnight, and every arguable violation resulted in some form of enforcement action, the law as we know it would mean something very different. The words that appear in statutes and in judicial decisions would be the same, but their practical effect would be transformed by the shift in enforcement practices.¹⁰²

1. Environmental Law Enforcement Generally

Environmental and health inequities still persist in the United States despite federal agencies' attempts at reducing these threats.¹⁰³ The three major purposes for environmental enforcement are fixing the problem, deterring future violations, and leveling the playing field.¹⁰⁴ The EPA was not specifically designed to address unfair outcomes that stem from environmental policies and practices, and the environmental protection paradigm has since institutionalized unequal enforcement.¹⁰⁵ The EPA's

98. VILLA, ET AL., *supra* note 39.

99. *See generally* In Re Chrysler-Dodge-Jeep Ecodiesel Mktg., 295 F. Supp. 3d 927, 1026 (N.D. Cal. 2018) (holding violation of federal emission standards is directly preempted by the CAA); *see also* Nemet v. VW Grp., 349 F. Supp. 3d 881, 914 (N.D. Cal. 2018) (holding the CAA did not preempt state law claims); *see also* Jackson v. GMC, 770 F. Supp. 2d 570, 572–74 (S.D.N.Y. 2011) (holding the CAA preempted state claims because the claims were premised on failing to meet federal standards).

100. Boler v. Earley, 865 F.3d 391, 409 (6th Cir. 2017), *cert. denied*, 138 S.Ct. 1294 (2018).

101. 42 U.S.C. § 1983 (1996).

102. Margaret H. Lemos, *Articles: State Enforcement of Federal Law*, 86 N.Y.U. L. REV. 698, 699 (2011).

103. Robert D. Bullard, *Overcoming Racism in Environmental Decision Making*, in POJMAN, POJMAN & MCSHANE, *supra* note 1, at 315.

104. VILLA, ET AL., *supra* note 39, at 254.

105. Bullard, *supra* note 103.

objectives to identify and attempt to solve environmental issues should include addressing unfair outcomes, which are undoubtedly environmental issues. This “paradigm” has exploited economically and politically disenfranchised communities’ vulnerability.¹⁰⁶

EPA enforcement procedures have been criticized for “not protect[ing] all impacted communities evenhandedly,” as “low-income communities and communities of color suffer a disproportionate share of environmental harms and enjoy fewer environmental amenities than other communities.”¹⁰⁷ Current laws leave significant gaps in protection and do not alleviate potential for disparate racial impacts.¹⁰⁸ The EPA has various formal enforcement options yet rarely utilizes them.¹⁰⁹ Enforcement decisions are largely subjective and discretionary.¹¹⁰ Enforcement discretion includes deciding which facilities to inspect, what penalties to impose, and where enforcement sources should be allocated.¹¹¹ Agency employees have significant discretion in agency enforcement actions, which are hidden from the public’s view and oversight.¹¹²

The EPA’s most commonly used formal enforcement procedures are administrative cases.¹¹³ In fiscal year 2020, the EPA opened 247 new criminal cases (77 more than fiscal year 2019) and 123 in fiscal year 2021.¹¹⁴ To compare, in both fiscal years 2020 and 2021 the EPA initiated and concluded approximately 1,600 civil judicial and administrative cases.¹¹⁵ The EPA reached 40 SEP agreements with violators and 575 voluntary disclosures covering violations at 787 facilities.¹¹⁶ The EPA announced that

106. *Id.*

107. JOEL A. MINTZ, CLIFFORD RECHTSCHAFFEN & ROBERT KUEHN, ENVIRONMENTAL ENFORCEMENT: CASES & MATERIALS 35, 35 (2007).

108. Marianne Engelman Lado, *No More Excuses: Building a New Vision of Civil Rights Enforcement in the Context of Environmental Justice*, 22 U. PENN. J. L. & SOC. CHANGE 281, 294 (2019).

109. Simpson, Garner & Gibbs, *supra* note 69.

110. MINTZ, RECHTSCHAFFEN & KUEHN, *supra* note 107.

111. *Id.*

112. Robert R. Kuehn, *Remedying the Unequal Enforcement of Environmental Laws*, 9 ST. JOHN’S J. LEGAL COMMENT 625, 640 (1994).

113. Simpson, Garner & Gibbs, *supra* note 69.

114. *EPA Enforcement Annual Results Fiscal Year 2020*, U.S. ENV’T PROT. AGENCY: ENF’T, <https://www.epa.gov/enforcement/enforcement-annual-results-fiscal-year-2020> (last visited April 3, 2022); *EPA Enforcement Annual Results for Fiscal Year 2021*, U.S. ENV’T PROT. AGENCY: ENF’T, <https://www.epa.gov/enforcement/enforcement-annual-results-fiscal-year-2021> (last visited April 3, 2022).

115. Todd S. Mikolop, Alexandra Hamilton & Erin Grisby, *EPA Releases Annual Enforcement Statistics for 2021, Announces “Rigorous Enforcement is Back,”* 12 NAT’L L. REV. 27, <https://www.natlawreview.com/article/epa-releases-annual-enforcement-statistics-2021-announces-rigorous-enforcement-back> (Jan. 27, 2022) (from *Hunton Andrews Kurth: The Nickel Report*).

116. *Id.*

the agency's criminal enforcement investigations for fiscal year 2021 led to a total 28 years of incarceration for 105 defendants charged.¹¹⁷

Despite available avenues for criminal enforcement, environmental agency attorneys rarely pursue alleged criminal violations.¹¹⁸ While the EPA and DOJ have attempted to coordinate criminal investigations and prosecutions, environmental cases brought to criminal court may be subject to scrutiny—as demonstrated by *United States v. Gold*.¹¹⁹ In *United States v. Gold*, a district court dismissed the case because an EPA attorney was involved in the case's administrative proceedings and also referred the case to the State Attorney for criminal proceedings.¹²⁰

Regardless of the EPA's own enforcement procedures, the EPA delegates CAA, CWA, and RCRA implementation authority to the states and territories (54 total entities).¹²¹ The EPA only holds RCRA implementation authority in four entities, CWA implementation authority in seven entities, and CAA implementation authority in one entity.¹²² These numbers demonstrate that the federal government has delegated significant federal regulation implementation authority to the states. The State Review Framework Results Table shows that states' implementation is insufficient. The table shows that for EPA recommended corrective actions or other recommendations, 11% are overdue for state implementation.¹²³ Overdue recommendations date back to 2012.¹²⁴ While 82% of these recommendations were completed, every finding level indicates “area for improvement.”¹²⁵

Confusion clearly exists regarding where authority to enforce environmental laws actually lies. For example, the Sixth Circuit Court of Appeals held that a state law enforcing the gasoline-volatility standard

117. *EPA Announces Enforcement and Compliance Accomplishments for Fiscal Year 2021*, U.S. ENV'T PROT. AGENCY: NEWS RELEASES: HEADQUARTERS (Jan. 20, 2022), <https://www.epa.gov/newsreleases/epa-announces-enforcement-and-compliance-accomplishments-fiscal-year-2021> (last visited December 3rd, 2022); see also *Criminal Enforcement: Environmental Crime Cases Opened, Defendants Charged, and Sentencing Results (Years of Incarceration)*, U.S. ENV'T PROT. AGENCY: ENF'T, <https://www.epa.gov/enforcement/enforcement-annual-results-fiscal-year-2021#criminal%20enforcement> (last visited April 3, 2022).

118. RIESEL, *supra* note 70, § 6.01[2].

119. See *id.* §§ 6.01[2]–[3] (citing *United States v. Gold*, 470 F. Supp. 1336 (N.D. Ill. 1979, *aff'd* 616 F.2d 1021 (7th Cir. 1980)).

120. *Id.* at § 6.01[3].

121. *State Review Framework*, U.S. ENV'T PROT. AGENCY: COMPLIANCE, <https://www.epa.gov/compliance/state-review-framework> (last visited Sept. 23, 2021).

122. See *id.* (stating the EPA holds RCRA implementation authority in Alaska, Iowa, Puerto Rico, and Virgin Islands; CWA implementation authority in the District of Columbia, Idaho, Massachusetts, New Hampshire, New Mexico, Pacific Territories, and Puerto Rico; and CAA implementation authority in the Pacific Territories).

123. *Id.*

124. *Id.*

125. *Id.*

violated the U.S. Constitution’s Supremacy Clause and Dormant Commerce Clause and that the enforcement standard was federal law enforcement.¹²⁶ The court held that the EPA had ultimate enforcement power and power to sanction the state for failing to enforce their implementation plan.¹²⁷

2. Correctional Facility Environmental Law Compliance

While the EPA has tools for tracking environmental compliance, there is no nationwide system to track air or water quality in correctional facilities.¹²⁸ Therefore, current conditions and compliance are observed through conditions reported to the EPA—or conditions complained about by those subjected to them. In the last five years alone, correctional facilities have faced 92 informal and 51 formal CAA violation actions,¹²⁹ notwithstanding the procedural hurdles that may have limited this number.

The ECHO tool lists many correctional facilities having 12 out of 12 noncompliant quarters, with very few to zero inspections and enforcement actions (formal and informal) taken against them.¹³⁰ Many prisons lack systematic monitoring of water, air, and soil quality for compliance.¹³¹ The ECHO tool also has an “Analyze Trends” feature that includes a “Drinking Water Dashboard.”¹³² The Drinking Water Dashboard includes a “Serious Violators” section that shows 2,619 serious violators for FY2021 YTD.¹³³ The 2021 data shows 3 correctional facilities labeled serious violators.¹³⁴ The 2020 data shows 7 correctional facilities out of 4,421 are serious violators.¹³⁵ Prisons routinely have water that is visibly contaminated and rarely have healthy water.¹³⁶

At Osborn Correctional Facility (Osborn) “[t]he inmates say they are forced to drink foul water while guards bring their own bottled water from outside the prison. Even therapy dogs at Osborn are provided with bottled or

126. *Amemex, Inc. v. Wenk*, 936 F.3d 355, 356 (6th Cir. 2019).

127. *Id.* at 360.

128. Walker & Jain, *supra* note 28.

129. *Id.*

130. *See generally*, U.S. ENV’T PROT. AGENCY: ENF’T & COMPLIANCE HIST. ONLINE, *supra* note 8 (showing many facilities on ECHO as being noncompliant for 12 out of 12 quarters).

131. Cartier, *supra* note 5.

132. *Analyze Trends: Drinking Water Dashboard*, U.S. ENV’T PROT. AGENCY: ENF’T & COMPLIANCE ONLINE HIST. <https://echo.epa.gov/trends/comparative-maps-dashboards/drinking-water-dashboard?state=National> (last visited Sept. 23, 2021).

133. *Id.*

134. *Id.*

135. *Id.*

136. Cartier, *supra* note 5.

filtered water, according to the complaint.”¹³⁷ The EPA’s ECHO tool shows Osborn as maintaining CWA compliance.¹³⁸ However, Osborn has not been inspected for CWA compliance since September 18, 2018.¹³⁹ Further, the ECHO tool has no information regarding the facility’s compliance with SDWA.¹⁴⁰

At Bedford Hills Correctional Facility (Bedford Hills), the incarcerated individuals have reflected that “[a]lthough officials have repeatedly stated that there is no problem with the water, [the incarcerated individuals] have asked multiple officers as well as members of administration to drink it in front of [them], to which [the officers and administrators] have refused.”¹⁴¹ In October 2021, ECHO showed Bedford Hills as CWA noncompliant for 12 out of 12 quarters, with significant violations for 5 quarters.¹⁴² A year later, in 2022, ECHO still showed Bedford Hills as CWA noncompliant for 12 out of 12 quarters, however now with only 3 quarters with significant violations.¹⁴³ Despite this extremely consistent noncompliance—the last CWA “compliance monitoring activity” at Bedford Hills was on December 8, 2021.¹⁴⁴

New York State has taken two formal CWA enforcement actions against Bedford Hills in the past five years, resulting in \$20,000 in penalties.¹⁴⁵ For perspective, New York’s Department of Corrections Budget was \$3,623,062,000.¹⁴⁶ Bedford Hill’s \$20,000 in penalties over the past five years is not even 1% of DOC’s 2021 budget. The EPA Civil Enforcement Case Report does not identify what CWA sections were violated and notes

137. Pat Eaton-Robb, *Connecticut inmates say drinking water is contaminated with sewage*, ASSOCIATED PRESS: HARTFORD COURANT (Sept. 13, 2019), <https://www.courant.com/news/connecticut/hc-news-prison-water-sewage-20190913-ryinyo5iyngbdchbtk3p4csdqe-story.html>.

138. *Detailed Facility Report: Osborn Correctional Institution*, U.S. ENV’T PROT. AGENCY: ENF’T & COMPLIANCE ONLINE HIST. <https://echo.epa.gov/detailed-facility-report?fid=110070374050> (last visited Nov. 20, 2022).

139. *Id.*

140. *Id.*

141. Char Adams, *Women in New York prisons complain of contaminated water after Hurricane Ida*, NBCBLK: NBC NEWS (Sept. 14, 2021), <https://www.nbcnews.com/news/nbcblk/women-new-york-prisons-complain-contaminated-water-hurricane-ida-rcna2020> (last visited December 3rd, 2022).

142. *Detailed Facility Report: Bedford Hills Correctional Facility*, U.S. ENV’T PROT. AGENCY: ENF’T & COMPLIANCE ONLINE HIST., <https://echo.epa.gov/detailed-facility-report?fid=110010438801> (last visited Oct. 8, 2021).

143. *Id.* (last visited Nov. 20, 2022).

144. *Id.*

145. *Id.*

146. *FY 2021 Executive Budget: Department of Corrections and Community Supervision*, N.Y. STATE: DIV. BUDGET (Jan. 29, 2020), <https://www.budget.ny.gov/pubs/archive/fy21/exec/agencies/appropdata/CorrectionsandCommunitySupervisionDepartmentof.html> (last visited December 3rd, 2022).

no data records returned for complying actions, supplemental environmental projects taken, or estimated pollutant reductions.¹⁴⁷

Regarding SDWA compliance, in October 2021, ECHO showed that Bedford Hills had inactive SDWA compliance, had been SDWA noncompliant for 7 of 12 quarters, and had 27 informal enforcement actions against the facility.¹⁴⁸ Now, in 2022, ECHO still shows Bedford Hill's SDWA compliance status as inactive, but with only 2 noncompliant quarters out of 12, and with 23 informal enforcement actions.¹⁴⁹ The state brought all enforcement actions against Bedford Hills, not the EPA.¹⁵⁰ New York's state government owns the facility's water system, which serves 1,300 individuals.¹⁵¹ The water system is sourced from groundwater, under surface water influence, and is a community water system that has changed from public to non-public.¹⁵²

At United States Penitentiary (USP) Atlanta, the water was “adulterated, polluted, and contaminated,” containing harmful substances, specifically arsenic—which is lethal at high levels and can cause cancer at low levels.¹⁵³ USP Atlanta is an EPA Superfund site, but is not listed on the EPA's national priority list.¹⁵⁴ The facility recognized its water issues in November 2018.¹⁵⁵ The drinking water tested in 2018 had 17 ppb of arsenic, while the EPA's maximum contaminant level is 10 ppb.¹⁵⁶ Despite these recognized water issues, USP Atlanta's ECHO facility report only contains information regarding CAA.¹⁵⁷ The facility has unresolved CAA violations, yet as of

147. *Civil Enforcement Case Report: Bedford Hills Correctional Facility*, U.S. ENV'T PROT. AGENCY: ENF'T & COMPLIANCE ONLINE HIST., <https://echo.epa.gov/enforcement-case-report?id=NY-R320190715133> (last visited Oct. 8, 2021).

148. U.S. ENV'T PROT. AGENCY: ENF'T & COMPLIANCE ONLINE HIST., *supra* note 142.

149. *Id.* (last visited Nov. 20, 2022).

150. *Id.*

151. *Id.*

152. *Id.*

153. Wilborn P. Nobles III, *Federal prisoners sue Atlanta over drinking water contamination claims*, ATLANTA J.-CONST. (Apr. 8, 2021), <https://www.ajc.com/news/atlanta-news/federal-prisoners-sue-atlanta-over-drinking-water-contamination-claims/BDTPUCMVR5C2LLOM4XRR7B2FWY/>.

154. *Superfund Site Information: US Penitentiary Atlanta*, U.S. ENV'T PROT. AGENCY: SUPERFUND, <https://cumulis.epa.gov/supercpad/cursites/csitinfo.cfm?id=0405858> (last visited Oct. 8, 2021).

155. Adrienne Haney, *Elevated levels of arsenic found at Federal Penitentiary in Atlanta*, 11 ALIVE: LOCAL (Feb. 7, 2019), <https://www.11alive.com/article/news/elevated-levels-of-arsenic-found-at-federal-penitentiary-in-atlanta/85-ecf4c149-a800-4295-a1b1-6ea8d56bf3af>.

156. *Arsenic Found in Atlanta Prison Drinking Water*, WATER QUALITY PRODS. MAG. (Feb. 7, 2019), <https://www.wqpmag.com/arsenic-removal/arsenic-found-atlanta-prison-drinking-water>; WGCL Digital Team, *Elevated Levels of Arsenic Found in Drinking Water at USP Atlanta*, CBS 46: NEWS (Feb. 6, 2019), https://www.cbs46.com/news/elevated-levels-of-arsenic-found-in-drinking-water-at-usp/article_40dc308e-2a78-11e9-ab38-774359a5f571.html.

157. *Detailed Facility Report: U S Penitentiary Atlanta*, U.S. ENV'T PROT. AGENCY: ENF'T & COMPLIANCE ONLINE HIST., <https://echo.epa.gov/detailed-facility-report?fid=110005664762> (last updated Sept. 21, 2022).

October 2021, had not had an on-site inspection since July 25, 2018 and had only 1 informal enforcement action taken against the facility in 5 years.¹⁵⁸ Now, USP Atlanta has had 2 additional on-site inspections, but still has unresolved CAA violations, with 7 of 12 noncompliant quarters.¹⁵⁹ The ECHO report shows no information regarding USP Atlanta's CWA, RCRA, and SDWA compliance.¹⁶⁰

A prison guard at State Correctional Institution (SCI) Mahanoy, noticing "black, foul-smelling water" told an incarcerated individual that they would "have to be crazy to bathe in that water."¹⁶¹ Similar to USP Atlanta, SCI Mahanoy's ECHO facility report only contains CAA compliance information.¹⁶² SCI Mahanoy has no CAA violation identified, but has not been inspected since April 10, 2018.¹⁶³ The facility's ECHO report contains no CWA, RCRA, or SDWA information.¹⁶⁴

An individual incarcerated at SCI Frackville once wrote that the facility's water was brown and smelled, that they had not had clean water in four months.¹⁶⁵ Yet, the individual noted that the facility's guards drink bottled water, while the incarcerated individuals drink and shower in dirty water.¹⁶⁶ SCI Frackville's ECHO report, like many others, does not contain any information on CWA or SDWA compliance.¹⁶⁷ The report only shows CAA and RCRA information, both with no identified violations.¹⁶⁸ The facility, however, has not had any compliance monitoring activity since March 26, 2021.¹⁶⁹

SCI Fayette specifically, along with many facilities, lacks systematic water, air, and soil quality monitoring.¹⁷⁰ The individuals at SCI Fayette call the water "tea water," due to the brown color.¹⁷¹ ECHO has 2 different

158. *Id.*

159. *Id.*

160. *Id.*

161. Betsy Piette, *Poisoned water plagues Pennsylvania prisons*, WORKERS WORLD (Oct. 17, 2016), <https://www.workers.org/2016/10/27384/>.

162. *Detailed Facility Report: PA Dept. of Corr./Mahanoy SCI*, U.S. ENV'T PROT. AGENCY: ENF'T & COMPLIANCE ONLINE HIST., <https://echo.epa.gov/detailed-facility-report?fid=110001214258> (last visited Oct. 8, 2021).

163. *Id.*

164. *Id.*

165. See Piette, *supra* note 161 ("From SCI Frackville prison, Major Tillery, a prisoners' advocate, wrote Oct. 12: 'We haven't had clean water here for over four months. The water is brown and smells.'").

166. See *id.* ("The guards drink bottled water. We complained and first were told nothing was wrong. Then for three days, a month or so ago, prisoners were given a gallon of bottled water a day. Since then, it's back to drinking and showering in dirty water.").

167. *Detailed Facility Report: PA DEPT OF CORR/FRACKVILLE SCI*, U.S. ENV'T PROT. AGENCY: ENF'T & COMPLIANCE ONLINE HIST., <https://echo.epa.gov/detailed-facility-report?fid=110009435334> (last updated Sept. 21, 2022).

168. *Id.*

169. *Id.*

170. Cartier, *supra* note 5.

171. *Id.*

facility reports for SCI Fayette, labeled “SCI FAYETTE” covering RCRA,¹⁷² and “PA CORRECTIONS/SCI FAYETTE.”¹⁷³ SCI Fayette’s has no CAA violations identified and has been inspected 2 times in 5 years, most recently on September 7, 2021.¹⁷⁴ The facility has no RCRA violations identified, but has not been evaluated for RCRA violations since July 26, 2017.¹⁷⁵ ECHO contains no CWA or SDWA compliance information for SCI Fayette.¹⁷⁶

B. Inadequate Enforcement Violates Environmental Justice Principles

Citizens deserve to expect environmental laws to be enforced vigorously, fairly, and equitably.¹⁷⁷ The EPA’s Fiscal Year 2022 Budget in Brief states that “ensuring compliance and enforcement of cornerstone environmental laws is paramount to a fair and just society.”¹⁷⁸ The EPA defines environmental justice as all people receiving fair treatment with respect to environmental law, regulation, and policy enforcement.¹⁷⁹ Through this definition, the EPA implies that without fair environmental enforcement, environmental justice is not achieved. Fairness includes “evenhanded treatment of regulated entities.”¹⁸⁰ However, the government’s ability for effective compliance oversight is limited because there are too many regulated entities.¹⁸¹ On the other hand, environmental injustice can be defined as: (1) the disproportionate pollution exposure in communities of color and poor communities; (2) its concomitant effects on health and environment; and (3) the unequal environmental protection and

172. *Detailed Facility Report: SCI Fayette*, U.S. ENV’T PROT. AGENCY: ENF’T & COMPLIANCE ONLINE HIST., <https://echo.epa.gov/detailed-facility-report?fid=110020745611> (last updated Sept. 21, 2022).

173. *Detailed Facility Report: PA Corrections/SCI Fayette*, U.S. ENV’T PROT. AGENCY: ENF’T & COMPLIANCE ONLINE HIST., <https://echo.epa.gov/detailed-facility-report?fid=110055589563> (last updated Sept. 21, 2022).

174. *Id.*

175. U.S. ENV’T PROT. AGENCY: ENF’T & COMPLIANCE ONLINE HIST., *supra* note 172.

176. *Id.*; U.S. ENV’T PROT. AGENCY: ENF’T & COMPLIANCE ONLINE HIST., *supra* note 173.

177. *See* Kuehn, *supra* note 112, at 626 (“Citizens have a right not only to expect that environmental laws will be vigorously enforced, but also a right to expect that when the government does enforce the laws, it will do so in a fair and equitable manner...Government efforts to detect noncompliance with environmental laws and the government’s response to such noncompliance should not differ because a community may be comprised of racial minorities or low income persons.”).

178. *FY 2022 EPA Budget in Brief*, U.S. ENV’T PROT. AGENCY: OFF. CHIEF FIN. OFFICER, 1, 11 (2021), <https://www.epa.gov/sites/default/files/2021-05/documents/fy-2022-epa-bib.pdf>.

179. *Environmental Justice*, U.S. ENV’T PROT. AGENCY, <https://www.epa.gov/environmentaljustice> (last visited Sept. 23, 2021).

180. MINTZ, RECHTSCHAFFEN & KUEHN, *supra* note 107, at 34.

181. RICHARD J. LAZARUS, *THE MAKING OF ENVIRONMENTAL LAW* 191, 191 (2004).

environmental quality provided through laws, regulations, governmental programs, enforcement, and policies.¹⁸²

Enforcement program credibility and promoting compliance rely on this consistent treatment.¹⁸³ Yet enforcement itself has been inadequate in practice, when reported, and even further when the EPA's website inadequately reports enforcement. The ECHO tool—on its face—is an exceptional feat for providing transparency into regulated entities compliance and the EPA's enforcement efforts against noncomplying facilities. However, observing only 6 above-mentioned correctional facilities, all 6 facilities lack compliance and enforcement information regarding at least 1 environmental law. The information available is sparse. The ECHO tool, as it currently stands, is insufficient. The tool mirrors the laws themselves—great on its face, yet poor in implementation. ECHO would be extremely beneficial if it was actually utilized and updated as intended. But information on regulated entities is not up-to-date or adequately reported, if reported at all.

The EPA's Fiscal Year 2022 budget states that it “will hold bad actors accountable for their violation.”¹⁸⁴ But, if a law's purpose is enforcement and responding to the issues it is intended to address,¹⁸⁵ the EPA's goal to hold “bad actors accountable” should not be a new idea. The EPA is unlikely to bring the Bureau of Prisons to court, because federal agencies generally cannot take judicial action against other federal agencies.¹⁸⁶ Further, the federal government is also unlikely to seek enforcement actions and civil penalties against state and local governments.¹⁸⁷ Because both federal and state governments lack serious environmental enforcement, individuals are responsible for their communities' environmental safety, including the air

182. Juliana Maantay, *Mapping Environmental Issues: Pitfalls and Potential of Geographic Information Systems in Assessing Environmental Health and Equity*, 110 ENV'T HEALTH PERSPS. 161, 161 (2002).

183. *Id.*

184. U.S. ENV'T PROT. AGENCY: OFF. CHIEF FIN. OFFICER, *supra* note 178, at 11.

185. *See generally Approaching a Problem*, HOUSE OFF. LEGIS. COUNS.: BEFORE DRAFTING, <https://legcounsel.house.gov/before-drafting/approaching-problem> (“The first step in the legislative drafting process is identifying a problem to be solved.”) (last visited April 10, 2022).

186. *See* LAZARUS, *supra* note 181, at 191 (“Because of the unitary executive theory—which provides that intra-executive branch disputes must be resolved within that branch—one federal agency generally cannot bring another federal agency to court.”).

187. *See id.* (“Additionally, the federal government has historically proven reluctant to bring enforcement actions and seek civil penalties against state and local governments.”).

they breathe and the water they drink.¹⁸⁸ Thus, the incarcerated individuals bear the burden to hold these facilities accountable.¹⁸⁹

The incarcerated communities face procedural hurdles that the free communities do not, thus face increased difficulties in holding regulated entities accountable. Incarcerated individuals must first attempt to resolve complaints through the individual facility's grievance procedure and exhaust all administrative remedies and appeals before filing a lawsuit.¹⁹⁰ Thus, there are far more steps involved if an incarcerated individual wishes to bring an EPA noncompliance action against a correctional facility than if any nonincarcerated individual wishes to bring an EPA noncompliance action against any regulated entity. For example, CWA protections may be more difficult for incarcerated individuals to receive, because water testing and expert witnesses to prove the subject claim are unlikely to be available to an average pro se incarcerated litigant—an incarcerated litigant appearing on their own behalf.¹⁹¹

Robert D. Bullard, an environmental justice movement leader, observed that at-risk populations could be protected if the laws were enforced.¹⁹² But these laws are not enforced—at least not how Congress or the EPA presumably intended. The EPA's original intent was to set and enforce standards in concert with states while financially and technically supporting state's efforts to develop and expand state programs.¹⁹³ Congress granted the EPA authority to regulate environmental issues,¹⁹⁴ and the EPA delegates vast implementation and enforcement authority to individual states.¹⁹⁵ These inconsistencies regarding whether the EPA or individual states have authority over certain environmental provisions makes the inconsistent and inadequate compliance and enforcement not surprising. The EPA delegating

188. See Vermont Journal of Environmental Law Symposium: The World of Waste in a Wasteful World: CERCLA Panel, at 22:40 (Oct. 16, 2021) (discussing how state and local governments have “gotten out of the business of serious environmental enforcement” and how individuals are on their own regarding their communities' environmental safety).

189. See LAZARUS, *supra* note 181, at 191 (“Citizen suits...have proven critical both in forcing government to act and in guarding against executive branch lawmaking compromises that are not true to the statutory mandates under which the federal agency is operating. Such suits have likewise proven essential to enforcing environmental protection standards directly against the facilities to which those standards apply.”).

190. AM. CIV. LIBERTIES UNION, *supra* note 89.

191. Paul Wright, *Re: Comment on the Inclusion of Prisoner Populations in the EPA's Draft Framework for EJ 2020 Action Agenda*, HUM. RTS. DEF. CTR. 8 (July 14, 2015), https://www.prisonlegalnews.org/media/publications/EJ%202020%20HRDC%20Prison%20Ecology%20comment%20to%20EPA%20with%2091%20sign%20ons%20FINAL_1.pdf; *Pro se*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/pro_se (last visited Dec. 7, 2021).

192. Bullard, *supra* note 103, at 322.

193. U.S. ENV'T PROT. AGENCY: EPA HIST., *supra* note 55.

194. U.S. ENV'T PROT. AGENCY: LAWS & REGULS., *supra* note 9.

195. U.S. ENV'T PROT. AGENCY: COMPLIANCE, *supra* note 121.

authority to states has proven ineffective. States are overdue, at a reported 11% rate, for implementing recommended corrective actions and other recommendations.¹⁹⁶ While 82% of recommendations were completed, most findings showed “area for improvement.”¹⁹⁷ Regardless, if the EPA has delegated extensive authority to the states, how can the EPA be certain self-reporting is accurate and that these numbers are not vastly underrepresenting noncompliance?

Environmental law and regulation enforcement is clearly a widespread problem, not just for the incarcerated population. Yet incarcerated populations are already vulnerable and lack adequate resources necessary to advocate for the responsible agencies to enforce these laws. These populations already have a difficult time accessing courts and judicial relief. Incarcerated individuals already lack rights and freedoms. Although incarcerated individuals are protected against cruel and unusual punishment, correctional facilities do not comply with minimum environmental standards intended to keep these individuals safe. Incarcerated individuals must exhaust all available remedies before relying on the courts to hold these facilities and agencies accountable. If regulated entities viewed noncompliance penalties seriously from the get-go—and if noncompliance penalties were serious—the incarcerated population would not have to jump through these hurdles. Yet this is not the case, and the incarcerated population must jump through procedural hurdles to advocate for an even remotely healthy environment.

C. Incarcerated Individuals Deserve Basic Human Rights

Clean water is a basic right. Prisoners should not have their health destroyed because they broke the law. A life sentence should not be death sentence.¹⁹⁸

Incarceration results in individuals forfeiting constitutional liberties and rights, however, they are still “fellow human beings” and retain “a human dignity.”¹⁹⁹ The Eighth Amendment protects incarcerated individuals from cruel and unusual punishment—this protection is “animated by ‘broad and idealistic concepts of dignity, civilized standards, humanity, and

196. *Id.*

197. *Id.*

198. Jamani M., *Campaign: To: Department of Corrections Secretary John Wetzel, Governor Tom Wolfe, and the Federal EPA: Unsafe Drinking/Bathing Water in Pennsylvania Prisons*, DIY ROOTS ACTION, <https://diy.rootSACTION.org/petitions/unsafe-drinking-bathing-water-in-pennsylvania-prisons> (last visited Nov 20, 2022).

199. *See* Madrid v. Gomez, 889 F. Supp. 1146, 1244 (N.D. Cal. 1995) (citing Toussaint v. McCarthy, 926 F.2d 800, 801 (9th Cir.1990), *cert. denied*, 502 U.S. 874 (1991)).

decency.”²⁰⁰ Is it not cruel and unusual for correctional facilities to knowingly maintain facility conditions that do not comply with environmental standards? Despite how seemingly cruel and inhumane these acts seem, constitutional Eighth Amendment standards at times neglect to adequately protect incarcerated individuals.²⁰¹

Justice Kennedy, as a circuit judge, noted that “[u]nderlying the Eighth Amendment is a fundamental premise that prisoners are not to be treated as less than human beings.”²⁰² Congress and the EPA did not create and enforce environmental laws and regulations for them to be ignored. Yet in correctional facilities maintaining noncompliance, the laws and regulations are clearly ignored. Any facilities not complying with these minimum safety standards are putting the individuals who live in the facilities at risk. An individual’s incarceration status should not dissolve their rights to environmental protections, as “[e]very individual has a right to be protected from environmental degradation.”²⁰³

Correctional facilities impose these conditions upon fellow human beings who retain human dignity—incarcerated individuals are therefore being neglected basic human rights. These individuals are being denied protection from environmental degradation. They are being denied protections that Congress and the EPA designed specific environmental provisions to enforce.

D. Environmental Law Violations Coincide with Eighth Amendment Violations

Laws are made to solve issues.²⁰⁴ Following issues being identified and laws being created to solve them, if responsible agencies do not adequately implement and enforce the laws, then the issues persist.²⁰⁵ Compliance is a major issue regarding environmental laws and regulations.²⁰⁶ Correctional facilities frequently have suits brought against them for inhumane

200. *See id.* at 1245 (citing *Estelle v. Gamble*, 429 U.S. 97, 102, (1976); *Hudson v. McMillian*, 503 U.S. 1 (1992); *Patchette v. Nix*, 952 F.2d 158, 163 (8th Cir.1991); *Michenfelder v. Summer*, 860 F.2d 328, 335 (9th Cir.1988); *Spain v. Procunier*, 600 F.2d 189, 200 (9th Cir.1979)).

201. Littman, *supra* note 21, at 1389.

202. *See Spain v. Procunier*, 600 F.2d at 200 (9th Cir. 1979) (citing *Furman v. Georgia*, 408 U.S. 238, 271–73 (1972) (Brennan, J. concurring)).

203. Bullard, *supra* note 103, at 319.

204. *See generally* HOUSE OFF. LEGIS. COUNSEL: BEFORE DRAFTING, *supra* note 185 (“The first step in the legislative drafting process is identifying a problem to be solved. The next steps are developing a policy for solving it . . .”).

205. E.g., Champe S. Andrews, Esq., *The Importance of the Enforcement of Law*, 34 ANNALS AM. ACAD., July 1909, at 85.

206. *See Sawyer & Peter Wagner, supra* note 2, at 48 (concerning the laws that regulate the quality of drinking water).

environmental conditions—shown through various Eighth Amendment lawsuits. The link between environmental compliance and inhumane correctional facility environmental conditions is overlooked, if not completely ignored, and deserves recognition for what it is: environmental injustice and constitutional rights violations. Correctional officials violate the Eighth Amendment when they expose incarcerated individuals to a sufficiently substantial risk of serious damage to future health while acting with deliberate indifference.²⁰⁷ Facilities thus violate incarcerated individuals' Eighth Amendment rights by knowingly disregarding minimum environmental safety standards that these regulations set. Environmental provisions set minimum enforceable standards—yet the pollutant levels the EPA has recognized as public health goals are not feasible and thus unenforceable. The EPA therefore considered costs and feasibility in setting these standards, neglecting the populations these contaminants negatively impact.

Courts failing to find Eighth Amendment violations in cases where correctional facilities require incarcerated individuals to drink contaminated water demonstrate the inadequacy of Eighth Amendment jurisprudence regarding environmental protection in correctional facilities.²⁰⁸ The Seventh Circuit Court of Appeals held that a correctional facility failing to provide an environment completely free from pollution or safety hazards does not fall under cruel and unusual punishment.²⁰⁹ The court noted that requiring prisons to take remedial measures against contamination, that the responsible agencies do not believe require remedial measures, would be inconsistent with Eighth Amendment principles. The court emphasized that if environmental authorities see no reason to intervene with contamination at a certain level, correctional facilities should not be held to higher standards.²¹⁰ Even recognizing this, the court contradicted itself in finding the Eighth Amendment did not require recovery when the correctional facility's water's contamination level was almost twice the maximum level set by the EPA—based on reasoning that the EPA was “considering” changing the level despite not having done so.²¹¹

Correctional facilities, however, are not even being held accountable for violating the minimum standards. Courts fail to apply the same regulatory standards to incarcerated individuals that are applied to society at large—

207. *Farmer v. Brennan*, 511 U.S. 825, 843 (1994).

208. *See Littman*, *supra* note 21, at 1395 (referencing *Carroll v. DeTella*, 255 F.3d 470, 472 (7th Cir. 2001)).

209. *See Carroll v. DeTella*, 255 F.3d 470, 472 (7th Cir. 2001) (citing *McNeil v. Lane*, 16 F.3d 123, 125 (7th Cir. 1993); *Steading v. Thompson*, 941 F.2d 498 (7th Cir. 1991); *Harris v. Fleming*, 839 F.2d 1232, 1235-36 (7th Cir. 1988); *Clemmons v. Bohannon*, 956 F.2d 1523, 1527 (10th Cir. 1992)).

210. *Id.* at 472-73.

211. *Id.*

substantial compliance is viewed as enough.²¹² These correctional facilities lack the effective enforcement mechanisms for regulatory application that society at large retains,²¹³ leaving incarcerated individuals subject to unsafe conditions. The same regulations apply on paper, but those responsible for oversight leave compliance to correctional facility discretion.²¹⁴

Even if facilities follow these minimum standards, this may not be enough to evade known environmental hazards. Environmental compliance and environmental protection are not necessarily coexistent.²¹⁵ Even if facilities maintain compliance with environmental law, that compliance alone does not mean entirely evading potential harms to incarcerated individuals. At a minimum, correctional facilities should be held to Eighth Amendment standards regarding environmental compliance knowing the minimum standards are just that—minimum enforceable safety standards.²¹⁶ Therefore, by knowingly not complying with even these minimum and feasible environmental standards, facilities are being deliberately indifferent to incarcerated individuals' health and safety.

E. Incarcerated Communities Deserve Environmental Justice Status and Protections

The EPA defines environmental justice as “the fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income, with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies.”²¹⁷ The EPA states environmental justice will be achieved when everyone enjoys: (1) the same degree of protection from environmental and health hazards, and (2) equal access to the decision-making process to have a healthy environment to live, learn, and work.²¹⁸

To reiterate, environmental injustice can be defined as: (1) the disproportionate pollution exposure in communities of color and poor communities; (2) its concomitant effects on health and environment; and (3) the unequal environmental protection and environmental quality provided through laws, regulations, governmental programs, enforcement, and

212. See Littman, *supra* note 21, at 1396 (referencing *Masonoff v. DuBois*, 899 F. Supp. 782, 799 (D. Mass. 1995); *Mawby v. Ambroyer*, 568 F. Supp. 245, 251 (E.D. Mich. 1983); *Capps v. Atiyeh*, 559 F. Supp. 894, 913–14 (D. Or.); *Dawson v. Kendrick*, 527 F. Supp. 1252, 1294–97 (S.D. W. Va. 1981)).

213. Littman, *supra* note 21, at 1403.

214. *Id.* at 1425.

215. VILLA, ET AL., *supra* note 39, at 124.

216. U.S. ENV'T PROT. AGENCY: GROUND WATER & DRINKING WATER, *supra* note 61.

217. U.S. ENV'T PROT. AGENCY, *supra* note 173.

218. *Id.*

policies.²¹⁹ Environmental justice is analyzed through impacts on predominantly-minority communities, even if each such community is not formally labeled an “environmental justice community.”²²⁰ The poor and disenfranchised bear the greatest burden of environmental degradation.²²¹ The correctional facility population characteristics suggest that the adverse environmental conditions within these facilities directly affect already disenfranchised communities.²²²

The EPA is attempting to “elevate environmental justice as a top agency priority” and “cement environmental justice as a core feature of EPA’s mission.”²²³ To elevate this priority, the EPA proposed creating a new national environmental justice program office “to coordinate and maximize the benefits of the agency’s programs and activities for underserved communities.”²²⁴ The EPA’s FY2022 goal is to deliver 40% of relevant federal investments’ overall benefits to disenfranchised communities.²²⁵

Even in environmental justice discussions calling for environmental decisions protecting “all communities,” the focus is generally minority and low-income communities.²²⁶ The EPA has noted that “[o]verburdened and vulnerable communities are most often the victims of environmental crimes.”²²⁷ Incarcerated communities’ population statistics show that these communities are a vulnerable and overburdened population. Two million people are incarcerated in the United States—two-thirds are minority populations and three-fifths are low-income.²²⁸ The majority of the incarcerated community are minority and low-income individuals. These individuals are the environmental justice movement’s focus. Yet correctional facilities are not highlighted nor mentioned in the environmental justice definition. The EPA has not denoted specific resources, as it has for other specific communities, to correctional facilities. The EPA’s environmental justice guidelines and policies fail to consider incarcerated individuals, allowing continued harm.²²⁹

These communities’ makeups meet environmental justice community criteria. The incarcerated population consists of the country’s most

219. Juliana Maantay, *supra* note 182.

220. *Sierra Club v. FERC*, 867 F.3d 1357, 1363 (D.C. Cir. 2017).

221. POJMAN, POJMAN & MCSHANE, *supra* note 1.

222. Cartier, *supra* note 5.

223. U.S. ENV’T PROT. AGENCY: OFF. CHIEF FIN. OFFICER, *supra* note 178, at 10.

224. *Id.*

225. *Id.*

226. Nicholas Targ, *Essays: A Third Policy Avenue to Address Environmental Justice: Civil Rights and Environmental Quality and the Relevance of Social Capital Policy*, 16 TUL. ENV’T L. J. 167, 173 (2002).

227. U.S. ENV’T PROT. AGENCY: OFF. CHIEF FIN. OFFICER, *supra* note 178, at 12.

228. Hayes & Barnhorst, *supra* note 12.

229. Elizabeth A. Bradshaw, *Tombstone Towns and Toxic Prisons: Prison Ecology and the Necessity of an Anti-prison Environmental Movement*, 26 CRITICAL CRIM. 407, 407, 410 (2018).

vulnerable and overburdened citizen demographic.²³⁰ Correctional facility noncompliance should be recognized as environmental injustice because incarcerated communities—vulnerable and overburdened communities—are disproportionately exposed to environmental hazards.

Further, incarcerated individuals are denied “meaningful involvement” regarding development, implementation, and enforcement in the environmental law process. Environmental lawmaking centers on affected communities having meaningful opportunity to provide substantive input, as public participation increases laws’ effectiveness and receptiveness.²³¹ Incarcerated individuals’ inclusion in census data as residing in the town they are incarcerated in, inflates the facilities’ outer communities’ population makeup without giving the specified attention to that specific facility.²³² Thus, while the incarcerated individuals’ population characteristics are accounted for regarding voting, the outer community is who retains the participation utilizing the facilities’ populations’ characteristics. Administrative law is said to give everyone a voice²³³—yet incarcerated individuals voices are left largely powerless. Incarcerated individuals face procedural hurdles that the larger public does not. While administrative law may give everyone a voice,²³⁴ some voices are more powerful than others. The government therefore denies incarcerated individuals the “meaningful involvement” that environmental justice principles call for, further demonstrating that these communities should be categorized as environmental justice communities.

III. PROPOSED SOLUTIONS

A. EPA Should Include “Incarceration Status” in Environmental Justice Definition

The EPA’s “environmental justice” definition should include “incarcerated individuals” as a community deserving fair treatment and meaningful involvement. As it currently stands, the EPA’s definition refers to environmental justice as calling for “the fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income, with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies.”²³⁵ The definition can be

230. *See id.* at 410 (citing Wright, *supra* note 191).

231. LAZARUS, *supra* note 181, at 189.

232. PRISON POL’Y INITIATIVE, *supra* note 17.

233. *See* HEMPLING, *supra* note 52, at 53 (“Administrative law gives everyone a voice.”).

234. *Id.*

235. *Environmental Justice*, *supra* note 179.

amended to include “the fair treatment and meaningful involvement of all people regardless of . . . incarceration status.” By including incarceration status within the EPA’s environmental justice definition, this community can benefit from special attention regarding environmental conditions. The amended definition’s language may read:

Environmental justice is the fair treatment and meaningful treatment of all people regardless of race, color, national origin, income, or incarceration status, with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies.

The EPA “Environmental Justice” webpage contains subdivisions regarding specific environmental justice focuses, such as “EJ for Tribes and Indigenous People.”²³⁶ On this webpage, the EPA notes a recognized need to work with recognized tribes and other indigenous populations to “effectively provide for environmental and public health,” in these communities and their interests.²³⁷ The EPA completed its Policy on Environmental Justice for Working with Federally Recognized Tribes and Indigenous Peoples, following the recognized need to work with these populations.²³⁸ The policy specifies the EPA’s work with these communities to protect their environment and public health.²³⁹ The EPA devotes “EJ Tribal and Indigenous People Advisors” for each EPA office and region.²⁴⁰

A similar policy for correctional facilities and incarcerated communities could be beneficial. A need to work with the incarcerated population is clear, but not recognized in the same way that the EPA recognizes the need to work with recognized tribes and indigenous peoples. The EPA should create a Policy on Environmental Injustice for Working with the Incarcerated Population, mirroring its policy regarding recognized tribes and indigenous peoples. This policy should devote specific EJ Advisors within each EPA region—giving correctional facilities’ environmental conditions specialized EPA attention. These specific EJ advisors within each region could advise these facilities on their current violations, how these violations impact the community, and ways to mitigate the disparate impact. This specialized attention may increase facility compliance with existing EPA regulations and environmental law.

236. *Environmental Justice for Tribes and Indigenous People*, U.S. ENV’T PROT. AGENCY: ENV’T JUST., <https://www.epa.gov/environmentaljustice/environmental-justice-tribes-and-indigenous-peoples> (last visited Nov. 16, 2022).

237. *Id.*

238. *Id.*

239. *Id.*

240. *Id.*

B. Congress Should Appropriate Specific Funds to EPA for Correctional Facility Inspections

The EPA's webpage for Environmental Compliance Financing suggests that over the next 20 years, cities, counties, and tribes will need to spend "billions of dollars" to improve capital assets and remain in compliance with federal environmental laws.²⁴¹ Rather than merely suggesting financing options for facility compliance, the EPA should allocate funds specifically for correctional facility environmental law and regulation compliance. The EPA already has similar programs in place for recognized environmental justice communities, namely for Tribal and Indigenous communities.²⁴² Agencies generally neglect to oversee regulation enforcement and compliance in correctional facilities.²⁴³ Despite the same regulations applying to correctional facilities,²⁴⁴ effective enforcement in these facilities does not exist.²⁴⁵

The EPA's FY2022 Budget outlines environmental-justice-specific funding to new grant opportunities, including, among others, a "Tribal Environmental Justice Grant Program, to support work to eliminate disproportionately adverse human health or environmental effects on environmental justice communities in Tribal and Indigenous communities."²⁴⁶ The EPA should create a similar grant program for correctional facilities to eliminate disproportionately adverse human health and environmental effects on incarcerated communities. A similar program could be a "Correctional Facility Environmental Justice Grant Program, to support work to eliminate disproportionately adverse human health or environmental effects on correctional facility environmental justice communities." This language mirrors the EPA's Tribal Environmental Justice Grant Program's language, but focuses on correctional communities.

C. EPA Should Utilize Criminal Enforcement Mechanisms

EPA data demonstrates that their cases are mainly enforced civilly.²⁴⁷ In fiscal year 2020, the EPA only opened 247 new criminal cases compared to initiating and concluding approximately 1,600 civil judicial and

241. U.S. ENV'T PROT. AGENCY: COMPLIANCE, *supra* note 56.

242. U.S. ENV'T PROT. AGENCY: OFF. CHIEF FIN. OFFICER, *supra* note 178

243. Littman, *supra* note 21, at 1425.

244. *Id.*

245. *Id.* at 1403.

246. U.S. ENV'T PROT. AGENCY: OFF. CHIEF FIN. OFFICER, *supra* note 178.

247. See U.S. ENV'T PROT. AGENCY: ENF'T, *supra* note 114 (noting 247 new EPA criminal cases compared to 1,600 initiated and completed civil cases); Mikolop, Hamilton & Grisby, *supra* note 115.

administrative cases, reaching 40 SEP agreements with violators, and 575 voluntary disclosures covering violations at 787 facilities.²⁴⁸ In fiscal year 2021, the EPA only opened 123 new criminal cases with a 96% conviction rate, while administrative and civil case numbers were almost unchanged from fiscal year 2020.²⁴⁹

If correctional facilities that violate EPA regulations' minimum standards are coexistent with facilities violating incarcerated individuals' Eighth Amendment rights, civil sanctions are not enough. Congress must recognize that regulatory and statutory laws are equally applicable in correctional facilities, and courts must enforce that. The contexts behind environmental violations and Eighth Amendment violations are equivalent. Therefore, the EPA should not take these violations lightly and should invoke or mirror Eighth Amendment enforcement procedures to implement their regulations upon these facilities. Civil sanctions are not threatening, especially when they can be justified as an additional business cost.²⁵⁰

If civil remedies were effective, the civil to criminal case ratio would not be concerning—but civil sanctions are not effective. Civil sanctions are not threatening—they allow regulated entities to save more money by maintaining noncompliance than by complying with environmental laws and regulations.²⁵¹ Criminal sanctions, on the other hand, can be far more threatening than fines and should be considered in all environmental matters.²⁵² Criminal sanctions cannot be readily converted into a mere business cost.²⁵³

The EPA may have realized its current criminal enforcement shortfall—the agency's fiscal year 2022 budget notes a “specialized criminal enforcement task force to address environmental justice issues and casework in partnership with the Department of Justice” is important.²⁵⁴ This task force intends to focus on “victims of environmental crimes in communities with environmental justice concerns.”²⁵⁵ The EPA and DOJ have the bandwidth and capabilities to collaborate that is demonstrated by this task force and the agencies' previous attempts to coordinate criminal investigations and

248. U.S. ENV'T PROT. AGENCY: ENF'T, *supra* note 114.

249. U.S. ENV'T PROT. AGENCY: ENF'T, *supra* note 114; Mikolop, Hamilton & Grisby, *supra* note 115.

250. *See generally* LAZARUS, *supra* note 181, at 195 (“A noneconomic criminal sanction cannot be readily converted into a mere cost of doing business ultimately reflected in a higher price charged to consumers[...]. The more expensive it is to comply with an environmental protection requirement, the more money there is to be saved by noncompliance.”).

251. *Id.*

252. *See id.* at 196 (discussing that many high-ranking corporate officials may be significantly more threatened by criminal sanctions than expensive fines); RIESEL, *supra* note 70, § 6.01.

253. *Id.*

254. U.S. ENV'T PROT. AGENCY: OFF. CHIEF FIN. OFFICER, *supra* note 178, at 12.

255. *Id.*

prosecutions.²⁵⁶ However, this task force will only assist incarcerated individuals if the EPA recognizes them as environmental justice communities.

Correctional facility directors may be forced to pay attention to environmental compliance when threatened with severe criminal sanctions such as incarceration, fines, and other penalties.²⁵⁷ Perhaps threatening criminal sanctions would increase publicly available data and reporting. Further, threatening criminal sanctions could create fear in repeatedly noncompliant facilities. Perhaps these facilities' officials would be more inclined to comply with standards if noncompliance would put them under the very same conditions they are causing incarcerated individuals to live in. However, these sanctions will not be effective if just written on paper and not actively enforced.

D. Congress Should Establish a new EPA Position for Correctional Facility Compliance.

Enforcement discretion exists partly because “there are far more regulated entities than resources available to police all of them.”²⁵⁸ Incarcerated individuals falling under the EPA's environmental justice definition's identified classifications, coupled with the widespread correctional facility environmental law noncompliance, demonstrates a need and right to increased attention to enforcement. Thus, even though there are far more regulated entities than resources available, this population deserves increased attention and resources allocated to their protection.

This task force may be a foundation to devote resources to environmental justice communities—but the correctional facilities are in crisis which requires specific attention. Additionally, with broad discretion and the DOJ's involvement with the task force, an additional external position could be useful and reduce any conflicts of interest between correctional facilities and the DOJ. If Congress created a new position, alongside this task force, the EPA can increase strict criminal enforcement and decrease discretion in correctional facilities.

256. RIESEL, *supra* note 70, § 6.01[2].

257. *See id.* § 6.02[3] (quoting Webster L. Hubble, Associate Attorney General, Testimony before the Subcommittee on Oversight and Investigations of the House Committee on Energy and Commerce (Nov. 3, 1993) (reported by Federal Document Clearing House)).

258. MINTZ, RECHTSCHAFFEN & KUEHN, *supra* note 107, at 35.

CONCLUSION

Incarcerated individuals should be recognized as environmental justice communities because they meet the EPA's "environmental justice" definition. Correctional facilities are significantly noncompliant with environmental laws and regulations, subjecting incarcerated individuals to excessive environmental harm. This noncompliance violates the Eighth Amendment by knowingly exposing incarcerated individuals to environmental hazards. Further, the incarcerated population being disproportionately low-income and minority individuals suggests this widespread noncompliance is environmental injustice.

This harm can be addressed by: (1) the EPA recognizing incarcerated individuals as environmental justice communities by amending its "environmental justice" definition to include "incarcerated individuals," and adopting an environmental justice policy for working with correctional facilities; (2) the federal government increasing EPA funding for frequent and consistent facility inspections; (3) the federal government establishing an EPA committee or task force specifically devoted to correctional facility compliance; and (4) shifting enforcement actions from prioritizing settlements and fines to criminal sanctions mirroring those imposed for Eighth Amendment violations.

The EPA amending its "environmental justice" definition to include incarcerated individuals is just one step—but this step alone is not enough. This recognition merely lays the foundation for incarcerated individuals achieving environmental justice—written words alone will not make meaningful change. Incarcerated individuals can begin experiencing true environmental justice when that recognition is translated into operational programs assisting their access to environmental needs.