

July 28, 2016

Charles Lee
Deputy Associate Assistant Administrator for Environmental Justice
USEPA, Office of Environmental Justice (2201-A)

Re: Comments on Draft EJ 2020 Action Agenda

Dear Mr. Lee:

The undersigned organizations are pleased to submit our comments with regard to EPA’s draft EJ 2020 Action Agenda. We write to urge EPA not to neglect important cross-cutting obligations under the Fair Housing Act (FHA), 42 U.S.C. §§3600-3620. As reflects the extensive real-world connections between housing and environmental policy, the goals of Title VI, Executive Order 12898, and the FHA are mutually reinforcing. EPA’s enforcement, funding, and other policies will fall far short of serving environmental justice unless they are aligned and coordinated with fair housing policies.

Specifically, the EPA EJ 2020 Action Agenda should include strategies for alignment with HUD’s Affirmatively Furthering Fair Housing (“AFFH”) rule. This regulation implements the provision of the FHA that not only bars discrimination, but also requires that federal agencies and recipients take affirmative measures to remedy residential segregation and its harms, including adverse environmental health effects.¹ It requires recipients of federal housing assistance to document fair housing problems and goals for addressing them—including an assessment of environmental factors. See 24 C.F.R. § 5.154(d). While HUD’s rule applies directly to its own recipients, the underlying FHA obligation applies directly to all agencies that administer housing and community development funds, as well as their recipients.²

Fair Housing and the Connection to Environmental Health

Our nation’s interest in environmental health and equity has long been intertwined with fair housing, and were primary concerns of Congress in passing the FHA.³ Today’s social science is equally grave and compelling. The finding, reached just prior to the 1988 amendments to the Act, “that race was consistently a more prominent factor in the location of commercial hazardous waste facilities than any other factor examined” has been repeatedly confirmed since that time. Hazardous materials disposal sites, municipal waste facilities, power plants, and other sources of pollution are all disproportionately located in racially and ethnically identifiable communities of color, in a way that neither

¹ 42 U.S.C. § 3608, providing: “All executive departments and agencies shall administer their programs and activities relating to housing and urban development (including any Federal agency having regulatory or supervisory authority over financial institutions) in a manner affirmatively to further the purposes of this subchapter and shall cooperate with the Secretary [of Housing and Urban Development] to further such purposes.”

² Id.; see also Executive Order 12892, 59 Fed. Reg. 2939 (Jan. 17, 1994).

³ See, e.g., discussion of evidence that residential segregation was subjecting people of color to “less healthy surroundings,” 134 Cong. Rec. 19715, 19716-17 (1988) (statement of Sen. Specter) (quoting exhibit read into the record regarding a study of African Americans), while freedom from housing barriers “may give children the opportunity to grow up in a healthier atmosphere,” 114 Cong. Rec. 2277 (1968) (statement of Sen. Mondale) (quoting Commission on Civil Rights Report for 1967 regarding African-Americans in segregated communities).

housing preferences nor wealth gaps adequately explain.⁴ Residents of segregated communities are significantly more likely to experience high-volume releases of toxic chemicals, to breathe high concentrations of harmful air pollutants, and to live in chronically substandard housing with multiple asthma triggers as well as lead hazards in paint, dust, and soil.⁵ Minority communities are also less likely to benefit from the reliable municipal infrastructure⁶ or access to green spaces that mitigate other environmental burdens.

The “Affirmatively Furthering” Regulation and Opportunities for Coordination

Recognizing the connection between environmental and housing civil rights concerns, HUD has specifically provided for an analysis of environmental health factors to comply with its new AFFH regulation.⁷ The regulation requires that program participants

⁴ See, e.g., Helen H. Kang, Pursuing Environmental Justice: Obstacles and Opportunities – Lessons from the Field, 31 Wash. U.J.L. & Pol’y 121, 126-27 (2009); U.S. Env’tl. Prot. Agency, Environmental Equity: Reducing Risk for All Communities 15 (1992), available at <http://infohouse.p2ric.org/ref/32/31476.pdf>; Robert D. Bullard et al., Toxic Wastes and Race at Twenty: 1987–2007, 38-47 (2007), available at www.ucc.org/justice/advocacy_resources/pdfs/environmental-justice/toxic-wastes-and-race-at-twenty-1987-2007.pdf (summarizing confirmatory effect of more recent studies); U.S. Comm’n on Civil Rights, Not in My Backyard: Executive Order 12,898 and Title VI as Tools for Achieving Environmental Justice 16-19 (2003), available at www.usccr.gov/pubs/envjust/ej0104.pdf (same); Luke W. Cole & Sheila R. Foster, From the Ground Up: Environmental Racism and the Rise of the Environmental Justice Movement 167-83 (2001) (annotated bibliography of studies); see also Rachel D. Godsil, Environmental Justice and the Integration Ideal, 49 N.Y.L. Sch. L. Rev. 1109, 1115 (2005) (noting that inequitable distribution of environmental risks “has been confirmed by scores of studies,” to the point that “few now dispute” it).

⁵ See, e.g., Daniel R. Faber & Eric J. Krieg, Unequal Exposure to Ecological Hazards 2005: Environmental Justice in the Commonwealth of Massachusetts vi (Oct. 12, 2005), available at <http://www.northeastern.edu/nejrc/wp-content/uploads/Final-Unequal-Exposure-Report-2005-10-12-05.pdf>; Robert D. Bullard, Dumping in Dixie: Race, Class, and Environmental Quality 98, n.12-17 (3d ed. 2000); Vicki Been & Francis Gupta, Coming to the Nuisance or Going to the Barrios? A Longitudinal Analysis of Environmental Justice Claims, 24 Ecology L.Q. 1, 34 (1997) (rejecting Been’s prior hypothesis that “market dynamics” increase minority residency rates in neighborhoods after siting of hazardous waste facilities); Paul Mohai & Robin Saha, Racial Inequality in the Distribution of Hazardous Waste: A National-Level Reassessment, 54 Soc. Probs. 343, 361 (2007) (“[R]acial disparities in the distribution of the nation’s [hazardous waste facilities] persist despite controlling for the economic and sociopolitical make-up of the tracts . . .”), available at

http://scholarworks.umt.edu/cgi/viewcontent.cgi?article=1001&context=environstudies_pubs; Godsil, supra, at 1118; Seema Arora & Timothy N. Cason, Do Community Characteristics Influence Environmental Outcomes? Evidence from the Toxics Release Inventory, 1 J. App. Econ. 413, 415-16 (1998). For criteria-pollutant exposures, see, e.g., Lara P. Clark et al., National Patterns in Environmental Injustice and Inequality: Outdoor NO₂ Air Pollution in the United States, 9 PLOS ONE e94431, 2 (2014), available at www.ncbi.nlm.nih.gov/pmc/articles/PMC3988057/pdf/; Marie Lynn Miranda et al., Making the Environmental Justice Grade: The Relative Burden of Air Pollution Exposure in the United States, 8 Int’l J. Env’tl. Res. Pub. Health 1755, 1768-69 (2011), available at www.ncbi.nlm.nih.gov/pmc/articles/PMC3137995/pdf/ijerph-08-01755.pdf. For hazardous-pollutant exposures, see, e.g., Jeremy L. Mennis & Lisa Jordan, The Distribution of Environmental Equity: Exploring Spatial Nonstationarity in Multivariate Models of Air Toxic Releases, 95 Annals Soc’y Am. Geog’rs 249 (2005); Russ Lopez, Segregation and Black/White Differences in Exposure to Air Toxics in 1990, 110 Env’tl. Health Persp. 289 (2002); see also Jayajit Chakraborty & Paul A. Zandbergen, Children at Risk: Measuring Racial/Ethnic Disparities in Potential Exposure to Air Pollution at School and Home, 61 J. Epidem. Cmty. Health 1074, 1074 (2007).

⁶ A number of cases have been brought under the FHA based on claims of discrimination in the provision of municipal services, e.g., Committee Concerning Community Improvement v. City of Modesto, 583 F.3d 690 (9th Cir. 2009); Kennedy v. City of Zanesville, 505 F. Supp. 2d 456 (S.D. Ohio 2007); see also, e.g., Lopez v. City of Dallas, No. 3:03-CV-2223-M, 2004 WL 2026804 (N.D. Tex. Sept. 9, 2004); Miller v. City of Dallas, No. 3:98-CV-2995-D, 2002 WL 230834 (N.D. Tex. Feb. 14, 2002).

⁷ 24 C.F.R. § 5.154(d).

complete an Assessment of Fair Housing (AFH) that assesses fair housing issues and contributing factors, including an examination of environmental health,⁸ drawing from a variety of recommended data sources. The participant must identify fair housing goals, which are to be incorporated into its planning processes, and must certify to HUD that it will take meaningful actions towards those goals.⁹

As part of the AFH process, HUD is to provide program participants with an Environmental Health Index, drawing upon Environmental Protection Agency estimates of air quality carcinogenic, respiratory, and neurological toxins by neighborhood. Program participants evaluate the index with the residency patterns depicted in the maps, and supplement this with local data and knowledge, for example regarding the siting of highways, industrial plants, or waste sites. However, while HUD is developing guidance with regard to public engagement and the analysis of local data and knowledge, much of this process will remain at the participant's discretion.¹⁰ Similarly, procedures for incorporation of AFH goals into "planning processes have not been specifically delineated by HUD guidance, though the regulation explicitly reaches environmental planning."¹¹

Recommendations

As noted, the AFH process presents significant opportunities for coordination but little guidance on how this is to be achieved. We therefore recommend that EPA require (or at least incentivize) its recipients to develop plans for coordination and engagement with the AFH process. Such plans should entail: the designation of staff and procedures to supply relevant data and knowledge that may inform environmental health analyses (including, but not limited to, information regarding Title VI complaints and their resolution); coordination in designating fair housing goals and metrics; and oversight with regard to meaningful actions taken toward those goals.

We also strongly recommend that EPA leverage the AFH process as a platform for its own EJ and antidiscrimination fact-finding. The environmental health assessments (and potentially other components of the AFH) required by HUD present an opportunity for EPA to more effectively target its enforcement resources. EPA should implement

⁸ See, e.g., HUD Assessment of Fair Housing Tool, 9 ("Location of environmental health hazards: The geographic relationship of environmental health hazards to housing is an important component of fair housing choice. When environmental health hazards are concentrated in particular areas, neighborhood health and safety may be compromised and patterns of segregation entrenched. Relevant factors to consider include the type and number of hazards, the degree of concentration or dispersion, and health effects such as asthma, cancer clusters, obesity, etc. Additionally, industrial siting policies and incentives for the location of housing may be relevant to this factor."). Available at www.huduser.gov/portal/sites/default/files/pdf/Assessment-of-Fair-Housing-Tool.pdf. This topic will be addressed further in additional guidance under development at HUD, including an AFFH Guidebook for participants.

⁹ See generally 24 C.F.R §§5.150-5.168; see also 78 Fed. Reg. 43710 (July 16, 2015).

¹⁰ Moreover, every HUD assisted project must be examined to ensure that it does not negatively impact surrounding environment and that the site will not have an adverse environmental or health effect on end-users. See 24 C.F.R. §58.5. For more general information, see www.hudexchange.info/programs/environmental-review.

¹¹ "Each program participant shall conduct an AFH for the purpose of examining its programs, jurisdiction, and region, and identifying goals to affirmatively further fair housing and to inform fair housing strategies in the consolidated plan, annual action plan, the PHA Plan and any other plan incorporated therein, and community plans including, but not limited to, education, transportation, or environmental related plans." 24 C.F.R. § 5.154.

systematic procedures for reviewing such information and rigorously pursuing potential Title VI violations.

We recommend that the EJ 2020 Action Agenda be revised to promote the following strategies:

- 1) Require its recipients to participate in HUD's AFFH process by providing Title VI and environmental justice data and analyses to relevant HUD program participants engaged in Analyses of Fair Housing (AFHs) required by HUD's AFFH regulation (see 24 C.F.R. § 5.154);
- 2) Establish procedures through which EPA will identify and notify HUD of instances in which any HUD program participant may be engaging in actions, within the sphere of environmental health, that are materially inconsistent with its AFFH obligation, and therefore violates its AFFH certification;
- 3) Establish procedures through which the AFHs are systematically reviewed by EPA pursuant to the full scope of its environmental justice authority, as well as its Title VI regulations, and any action that may be required as a result of that review; and
- 4) Proactively coordinate with HUD during its EJ-related and Title VI enforcement process to ensure that HUD may assist in addressing any housing issues that arise during the review process.

Thank you for your consideration of these recommendations.

Sincerely,

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