

Velveta Golightly-Howell, Director
Lilian Dorka, Deputy Director
Jeryl Covington, Acting Assistant Director
US Environmental Protection Agency
Office of Civil Rights
Mail Code 1201-A
1200 Pennsylvania Avenue, N.W.
Washington, DC 20460

March 14, 2016

**Re: Comments on Nondiscrimination in Programs or Activities Receiving Federal Assistance
from the Environmental Protection Agency, EPA-HQ-OA-2013-0031**

To Whom It May Concern:

The undersigned civil rights organizations are pleased to submit our comments with regard to EPA's proposed rulemaking on nondiscrimination in programs or activities receiving federal assistance. Our comments specifically address the potential for this regulatory amendment to build an important bridge between the requirements of Title VI and those of the Fair Housing Act (FHA), 42 U.S.C. §§3600-3620. As sister legislation to Title VI's requirement that EPA ensure nondiscrimination by its recipients (and promote environmental justice, as per Executive Order 12898), the FHA both bars discrimination and requires that federal agencies and recipients take affirmative measures to remedy residential segregation and its harms, including adverse environmental health effects.¹ Yet EPA's current nondiscrimination regulations fail to reach across agencies or sources of law, instead focusing narrowly on siloed Title VI reviews by EPA. This limitation squanders EPA's full authority to provide for nondiscrimination and does not reflect real-world connections between housing and environmental policy.

We urge EPA to amend its nondiscrimination regulations to provide for coordination with HUD, establishing procedures that sync the existing requirements of Title VI and Title VIII. Such coordination is not only good policy, but it is also required by Executive Order 12892 (January 17, 1994). Specifically, we recommend that EPA:

- 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

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."

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 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 Title VI enforcement process to ensure that HUD may assist in addressing any housing issues that arise during the Title VI review process.

The time for such coordination is doubly ripe. While EPA strives to roll out a “model program” of civil rights enforcement, HUD recently issued a new AFFH regulation requiring 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). Amending the Title VI regulations as we recommend would better implement the shared legislative aims of the civil rights protections of Title VI and the Fair Housing Act, the sound policy imperatives of interagency cooperation, and the extensive record connecting fair housing and environmental health. While the finer details of both these policies may be appropriately developed through guidance, we recommend their inclusion at the regulatory level. This would ensure that the new requirements are expediently and consistently institutionalized, and are fully subject to EPA’s oversight and enforcement schemes.

In addition to coordinating with HUD in the AFFH process, EPA should also coordinate with other agencies in the AFFH process. Moreover, we strongly urge EPA to develop a comprehensive environmental justice framework beyond the Title VI reviews included in these regulations. In keeping with our recommendations in this letter, robust E.J. oversight and enforcement should include procedures for active coordination with HUD and other agencies with an interest in the review.

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.² 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 housing preferences nor wealth gaps adequately explain.³ Residents

² 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).

³ 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. Evtl. 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-

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.⁴ Minority communities are also less likely to benefit from the reliable municipal infrastructure⁵ 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.⁶ The regulation requires that program participants complete an Assessment of Fair Housing (AFH) that assesses fair housing issues and contributing factors, including an examination of environmental health,⁷ drawing from a variety of recommended data sources. The participant

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).

⁴ 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).

⁵ 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).

⁶ 24 C.F.R. § 5.154(d).

⁷ 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

must identify fair housing goals, which are to be incorporated into its planning processes (for example, the Consolidated Plans required by HUD), and must certify to HUD that it will take meaningful actions towards those goals.⁸

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.⁹

We therefore recommend that EPA's regulations require 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 systematic procedures for reviewing such information and rigorously pursuing potential Title VI violations.

Thank you for your consideration of these recommendations.

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.

⁸ See generally 24 C.F.R §§5.150-5.168; see also 78 Fed. Reg. 43710 (July 16, 2015).

⁹ 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.

Sincerely,

Megan Haberle
Philip Tegeler
Poverty & Race Research Action Council
Email: mhaberle@prrac.org
Phone: 718-614-9804

Joe Rich
Lawyers' Committee for Civil Rights Under Law
Email: jrich@lawyerscommittee.org

IDARE LLC

Fair Housing Justice Center

Fair Share Housing Center

GASP

LatinoJustice PRLDEF

Massachusetts Law Reform Institute

NAACP

National Disability Rights Network

National Fair Housing Alliance

The Public Interest Law Project

Texas Low Income Housing Information Service

Vernice Miller-Travis
(For identification only: Vice Chair Maryland Comm on EJ and Sustainable Communities)