

Fair Housing and Environmental Justice: New Strategies and Challenges

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Introduction

Fair housing and environmental justice are deeply intertwined, though they have long operated in separate siloes among both policymakers and advocates. In recent years, the importance of connecting these issues has been brought home in acute ways. This included the public exposure of lead poisoning in Flint, Michigan (which gave momentum to successful efforts to raise HUD's lead threshold), and the disastrous impacts of Hurricanes Katrina, Sandy, and Harvey (highlighting the need not only for emergency preparation, but also for proactive, equitable climate adaptations).

Environmental justice (EJ) and fair housing advocacy both take place against a complex backdrop of racial segregation, disparities in access to political power, municipal fragmentation, boundary-drawing around resources, disinvestment, and administrative silos. Progress can be slow even in progressive administrations. However, HUD itself holds important environmental health responsibilities and is empowered to undertake important EJ strategies. For example, HUD can improve oversight of the siting of subsidized housing; provide housing choice away from environmental burdens through housing vouchers; offer funding to directly address household and community EJ needs; develop guidance, policies, and technical assistance regarding climate change and other EJ issues; and incentivize state and local EJ improvements through its spending power. Environmental justice is part of the agency's legal responsibilities¹

1. *See, e.g.*, Title VI of the Civil Rights Act of 1964 (requiring nondiscrimination by recipients of federal financial assistance); Title VIII of the Civil Rights Act of 1968 (the Fair Housing Act) (providing for nondiscrimination by public and private actors and requiring HUD and its recipients to "affirmatively further fair housing"); Exec. Order 12898, Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations (1994) (requiring federal executive agencies and the entities to which they extend financial support or project approval to "identify and address, as appropriate, disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minority populations"); the National Environmental Policy Act (NEPA) and implementing regulations, 24 C.F.R. §§ 58.5–58.6 (requiring site reviews); Memorandum of Understanding on Environmental Justice and Executive Order 12898 (signed by seventeen federal agencies, including HUD, in 2011); HUD Site &

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and overlaps with its broad missions of advancing coordinated development, nondiscrimination and desegregation, and effective administration of housing and community development programs.²

HUD made a number of meaningful advances for environmental justice within its programs in past administrations. Yet despite the compelling real-world connections among environmental justice and housing and community development, EJ considerations have lacked structural force and consistency across HUD programs. Instead, federal housing programs have only sporadically addressed EJ concerns. For example, HUD's 2016–2020 EJ Strategy reported on a number of fine programmatic initiatives but lacked guidance applicable to how other programs should promote EJ outcomes. Some of HUD's most important and largest program areas still place residents in harm's way. Communication between EPA and HUD remains inadequate, and there is insufficient oversight or concrete action being taken to follow sight standards for affordable housing units. In concrete terms for vulnerable American households, to live in subsidized housing often means to risk environmental health exposures that are damaging and inequitable. In addition, the potential for federal funding (including HUD funding) to serve as meaningful leverage for equitable, forward-looking local and state action on emerging EJ issues—such as climate change—remains undeveloped.

Still, the HUD of the Obama years, which worked constructively with the resources offered by progressive think tanks, universities, and social justice organizations, made a number of notable steps forward. This included the issuance of the Affirmative Furthering Fair Housing (AFFH) regulation, discussed below. It also included energy improvements for subsidized housing; “healthy homes” initiatives to address exposure to lead, radon, and other toxins, which can have a severe life-long impact on children's brain development, school attendance, and other aspects of health; disaster-preparedness competitions, with the potential to scale up innovations that protect vulnerable communities from flood hazards; improved health and safety inspections for subsidized housing; data development and sharing with the Environmental Protection Agency (EPA) and the Department of Health and Human Services (HHS); the “Green and Healthy Homes Initiative” public-private partnership, which finances retrofits for low-income households in response to the high utility-cost burdens that will be exacerbated by severe weather; a program of Tribal Government Consultations; and the formulation of a Climate Change Adaption Plan

Neighborhood Standards, implementing Title VI and Title VIII and governing the location of new construction and rehabilitated subsidized housing.

2. 42 U.S.C. § 3541 (congressional statement of purpose in establishing HUD); *id.* § 3601 et seq. (Fair Housing Act).

to enable the agency to assess and mitigate risks more systematically.³ In its 2016–2020 EJ Strategy, HUD also indicated plans to continue its collaboration with the Department of Transportation (with implications for access to healthier neighborhoods, shortened commute times, and exposure to air and noise pollutants) and to issue guidance on civil rights enforcement relating to EJ.⁴

As discussed below, however, the initiatives developed by the last administration left much work to be done. In addition, the Trump administration's focus on deregulation and its rollbacks to civil rights and environmental enforcement are presenting serious new challenges.

Emerging Challenges and Opportunities

Interagency Coordination and Environmental Enforcement

Robust environmental enforcement and remediation in low-income neighborhoods is a crucial public health need and must accompany the siting standards and residential mobility options discussed below. In addition, better communication and coordination between EPA and HUD are needed in order for each of these agencies to know when subsidized housing residents are living in contaminated areas and take concrete measures to respond.

Unfortunately, however, environmental justice coordination between HUD and EPA has remained far too limited. A key feature of Obama-era housing programs was the growing momentum behind interagency programs as a strategy for community revitalization and the promotion of civil rights, but this mainly took place on the level of pilot programs and demonstrations, without strong requirements for action. For instance, the Sustainable Communities Initiative, a joint endeavor of HUD, EPA, and the Department of Transportation (DOT), supported regional, community-participation-intensive Fair Housing Equity Assessments, which served as test pilots for development of the Affirmatively Furthering Fair Housing (AFFH) rule and its “access to opportunity” analysis. HUD and EPA initiated data-sharing agreements to support the Assessments of Fair Housing (AFH) and other processes. Importantly, HUD and EPA signed a Memorandum of Understanding in January 2017 providing that they would “improve communication when either identifies a nexus between HUD Properties and [Superfund] sites which EPA has

3. See U.S. DEP'T OF HOUS. & URBAN DEV., HUD ENVIRONMENTAL JUSTICE STRATEGY 2016–2020 (Nov. 2016), available at <http://www.hudexchange.info/resource/3843/hud-environmental-justice-strategy/>.

4. *Id.* at 12, stating: “[w]hile current investigation guidance does not specifically address environmental justice, the Office of Fair Housing and Equal Opportunity (FHEO) is in the process of revising guidance for investigators to encompass EJ complaints, compliance reviews, voluntary compliance and enforcement actions dealing with EJ issues.”

identified as of potential health concern for housing residents.”⁵ This action was prompted by the recognition of the high number of subsidized units near such sites. While a promising step, the MOU did not create binding or enforceable obligations. Further monitoring and advocacy are needed to ensure that HUD and EPA follow through on the agreement and that they actually take remediation measures and offer relocation options.

In addition, EPA has fallen far short (even during the Obama years) in protecting EJ communities. As the 2016 report of the U.S. Commission on Civil Rights documented, EPA’s EJ enforcement activities have long been severely inadequate, with lengthy backlogs, limited staff capacity, insufficient investigations, and weak penalties (if any).⁶ This failure to conduct basic enforcement activities will inevitably worsen throughout the Trump administration, which has drastically cut EPA funding and threatened to roll back environmental protections. (And it will likely do the same with civil rights laws and guidance.)⁷ Environmental justice populations (low-income and minority communities) often are exposed to cumulative environmental burdens, which are unaccounted for by the floor-level protections set by general environmental standards. If those standards are loosened, it is these households who are likely to suffer first and most. Because there is currently no private right of action to enforce disparate impact claims under the Civil Rights Act of 1964,⁸ residents of environmentally

5. Memorandum of Understanding between the U.S. Dep’t of Hous. & Urban Dev. and the U.S. Evtl. Prot. Agency regarding Improving Communication About Certain Public and HUD-Assisted Multifamily Housing Near Superfund Sites (Jan. 11, 2017), *available at* <http://www.hudexchange.info/resources/documents/Memorandum-of-Understanding-between-HUD-and-EPA-Regarding-Improving-Communication-About-Certain-Public-and-HUD-Assisted-Multifamily-Housing-Near-Superfund-Sites.pdf>.

6. U.S. COMM’N ON CIVIL RIGHTS, ENVIRONMENTAL JUSTICE: EXAMINING THE ENVIRONMENTAL PROTECTION AGENCY’S COMPLIANCE AND ENFORCEMENT OF TITLE VI AND EXECUTIVE ORDER 12898 (Sept. 2016), *available at* http://www.usccr.gov/pubs/Statutory_Enforcement_Report2016.pdf. Among the report’s findings is this critical assessment of the EPA: “The EPA has a history of being unable to meet its regulatory deadlines and experiences extreme delays in responding to Title VI complaints in the area of environmental justice. . . . EPA’s Office of Civil Rights has never made a formal finding of discrimination and has never denied or withdrawn financial assistance from a recipient in its entire history, and has no mandate to demand accountability within the EPA.”

7. As of mid-2017, the president had issued two executive orders directing all agencies to undertake retrospective reviews of regulations. *See* Comment Letter to HUD re: Reducing Regulatory Burden, Poverty & Race Research Action Council (June 14, 2017), *available at* http://prrac.org/pdf/Fair_Housing_Reg_Agenda_Comments.pdf.

8. *See Alexander v. Sandoval*, 532 U.S. 275 (2001) (holding that there is no private right of action to enforce disparate impact regulations promulgated under Title VI).

burdened areas must show intentional discrimination or must rely on government actors to bring cases that are based on discrimination rather than violation of general environmental standards. While advocacy for robust state and local laws and enforcement can help in many areas, there is no replacement for strong federal action in others.

There remains a great need in many places to institute structural interventions to the distribution of environmental benefits and burdens across neighborhoods and metropolitan regions. These include greater transparency in funding distribution schemes (e.g., for Community Development Block Grants and other funding sources), *ex ante* mechanisms such as health impact assessments or environmental justice reviews (e.g., as required under Federal Transit Administration guidance⁹), and consistent enforcement that addresses cumulative environmental impacts. As the Trump administration pursues deregulation and privatization in housing and other infrastructure, exploration of these strategies at the state and local levels will be all the more important for civil rights advocates.

Site Standards and Reviews

HUD's Site and Neighborhood Standards, which can be found in HUD's Title VI regulations and various programmatic regulations, implement Title VI and VIII and provide general criteria for the siting of new subsidized units.¹⁰ The current regulatory standards require, for example, that public housing sites "must be free from adverse environment conditions." Under the National Environmental Policy Act (NEPA) and Executive Order 12898, HUD also requires an EJ analysis prior to project siting as part of the environmental review conducted by the Office of Environment and Energy (OEE).

HUD has significant room to improve in implementing its siting standards, reviews, and oversight. A 2016 audit found that "HUD did not adequately implement environmental requirements or provide adequate

9. FED. TRANSIT ADMIN., U.S. DEP'T OF TRANSP., ENVIRONMENTAL JUSTICE POLICY GUIDANCE FOR FTA RECIPIENTS, CIRCULAR 4703.1 (Dec. 11, 2012).

10. The standards provide that the site "must be accessible to social, recreational, educational, commercial, and health facilities and services . . . that are at least equivalent to those typically found in neighborhoods [consisting largely of unassisted housing]." 24 C.F.R. § 941.202(d). See also 24 C.F.R. § 941.202 (public housing) ("The site must be free from adverse environmental conditions, natural or manmade, such as instability, flooding, septic tank back-ups, sewage hazards or mudslides; harmful air pollution, smoke or dust; excessive noise vibration, vehicular traffic, rodent or vermin infestation; or fire hazards . . . or in which substandard dwellings or other undesirable elements predominate, unless there is actively in progress a concerted program to remedy the undesirable conditions.").

oversight to ensure compliance with these requirements.”¹¹ And as HUD’s 2011–2015 EJ Strategic Plan stated:

Since 1970, HUD has implemented *Site and Neighborhood Standards* for HUD-assisted newly constructed and rehabilitated housing, requiring, for example, that such units be located in areas with access to amenities like transportation and educational and health facilities. Site and neighborhood standards are intended to prevent the use of HUD assistance in a manner that perpetuates or exacerbates segregation or that exposes residents to environmental or health hazards. However, that goal has not always been met. Furthermore, while attention is paid to site and location considerations for development of new federally-assisted housing to avoid building new properties in overburdened areas, federal housing investments that were made decades ago remain an important part of the full complement of affordable housing available to meet local housing needs. Recognizing the need to remediate existing cases of disproportionate exposure to hazards and address the lack of access to opportunities for federally-assisted housing residents in overburdened communities are critical aspects of achieving environmental justice.¹²

In the current administration, efforts to bring in private capital to finance publicly supported housing are growing, in particular through the Rental Assistance Demonstration (RAD) program. This program will result in new housing siting, and public housing agencies must certify compliance with site and neighborhood standards.¹³ Public Housing Authorities also may use RAD as a component of neighborhood revitalization efforts. This initiative provides both opportunities (an influx of capital) and new oversight challenges (including the monitoring of siting and revitalization outcomes). The ongoing monitoring of RAD conversions, including where housing is sited and whether housing mobility options are provided for families, is an emerging focus of fair housing advocacy (and important to ensure that healthy residential options are available).

As well as addressing the location of subsidized units, HUD and public housing authorities should improve performance in helping Housing Choice Voucher households access a broader range of housing options and neighborhoods. Specifically, additional resources and counseling should be pro-

11. See OFFICE OF INSPECTOR GEN., DEP’T OF HOUS. & URBAN DEV., AUDIT REPORT 2015-FW-0001, HUD DID NOT ADEQUATELY IMPLEMENT OR PROVIDE ADEQUATE OVERSIGHT TO ENSURE COMPLIANCE WITH ENVIRONMENTAL REQUIREMENTS (June 16, 2015), available at <http://www.hudoint.gov/reports-publications/audit-reports/hud-did-not-adequately-implement-or-provide-adequate-oversight>.

12. U.S. DEP’T OF HOUS. & URBAN DEV., 2012–2015 ENVIRONMENTAL JUSTICE STRATEGY 8 (Mar. 30, 2012), available at <https://portal.hud.gov/hudportal/documents/huddoc?id=envjustice.pdf>.

13. U.S. Dep’t of Hous. & Urban Dev., Rental Assistance Demonstration (RAD) Notice Regarding Fair Housing and Civil Rights Requirements (Nov. 10, 2016), available at https://portal.hud.gov/hudportal/documents/huddoc?id=16-17hsgn_16-17pihn.pdf.

vided to enable families to move from environmentally impacted buildings and areas.¹⁴

The Affirmatively Furthering Fair Housing Rule

Among the Obama administration's civil rights accomplishments was the 2015 issuance of the Affirmatively Furthering Fair Housing (AFFH) rule,¹⁵ named as another element of HUD's EJ Strategy. The rule implements the Fair Housing Act's requirement that HUD "affirmatively further" the purposes of the Act by expanding housing choice and promoting integration. It takes a wide-lensed, realistic approach to fair housing issues by requiring program participants to examine EJ-related issues, such as environmental health.¹⁶ Program participants (i.e., HUD block grant recipients and public housing authorities) must conduct Assessments of Fair Housing (AFHs) that analyze the fair housing issues specific to their regions and identify strategies to address them. This includes an assessment of "access to opportunity" by protected classes with an evaluation of "environmental health."¹⁷ HUD provides standardized federal data and mapping tools (including air quality data imported from EPA) for the process and prompts participants to supply relevant local data and qualitative information (largely at their discretion). It also requires them to incorporate public comments. The rule encourages local inter-agency consultations as well as interagency coordination strategies. And it prompts them to assess the role of "contributing factors" to fair housing issues, including the siting of public and private investments, factors affecting subsidized and affordable housing locations, factors affecting housing quality and affordability, and the "location of environmental hazards":

14. See Kami Kruckenberg & Philip Tegeler, Poverty & Race Research Action Council, *Policy Brief: Prescription for a New Neighborhood? Housing Vouchers as a Public Health Intervention* (July 2010), available at http://prrac.org/pdf/prescription_for_a_new_neighborhood.pdf.

15. 24 C.F.R §§ 5.150–5.168; see also Dep't of Housing & Urban Dev., *Affirmatively Furthering Fair Housing*, 80 Fed. Reg. 42271 (July 16, 2015).

16. See, e.g., DEP'T OF HOUS. & URBAN DEV., HUD GUIDANCE, ASSESSMENT OF FAIR HOUSING TOOL 9, available at <http://www.huduser.gov/portal/sites/default/files/pdf/Assessment-of-Fair-Housing-Tool.pdf>.

17. See HUD EXCHANGE, ASSESSMENT OF FAIR HOUSING TOOL FOR LOCAL GOVERNMENTS 5 (Jan. 2017), available at <https://www.hudexchange.info/resource/5216/assessment-of-fair-housing-tool-for-local-governments/> (asking participants to "describe how disparities in access to environmentally healthy neighborhoods relate to residential living patterns in the jurisdiction and region. . . . Informed by community participation, any consultation with other relevant government agencies, and the participant's own local data and local knowledge, [participants are asked to] discuss whether there are programs, policies, or funding mechanisms that affect disparities in access to environmentally healthy neighborhoods.").

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. Environmental issues affecting health can include access to safe and clean drinking water, soil contamination, excessive air pollution, and indoor health hazards (lead based paint, radon, mold, asbestos). Relevant factors to consider include the type and number of hazards, the degree of concentration or dispersion (including in older housing stock), 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.¹⁸

A primary required outcome is the incorporation of fair housing goals into a range of local, regional, and state planning processes.¹⁹ The participant submits the AFH to HUD for review along with a certification that it is fulfilling its AFFH obligation.

The AFFH rule and its Assessment Tools have great potential as inter-agency, regionwide planning platforms. However, because the rule was cautiously designed not to stray outside the limits of HUD's regulatory authority, it allows significant local discretion. In light of limited resources for enforcement and technical assistance, its implementation will depend to a large extent on local agency cultures, personnel, and community engagement and organizing. Advocates can play an important role in ensuring that the AFH is properly used to document whether affordable housing, including HUD-subsidized housing, provides sufficient options in environmentally healthy areas.

EJ advocates, along with housing advocates and others, also may use the AFH process to document a range of environmental health disparities and the state or local mechanisms that drive or could remedy them (such as permitting strategies, health impact assessment legislation, zoning, and funding incentives). In this specific capacity, it seems more likely that the AFH will serve as an organizing tool, rather than as a legal tool. As a political matter, it is an open question how assertively HUD will exercise its discretion in determining that its recipients have violated their AFFH duties, and then rescind funding, for a broader scope of issues outside the traditional scope of AFFH as the courts have defined it. And, as a legal matter, it is unclear how far courts would go in approving such enforcement. This is a boundary unlikely to be pushed during the Trump administration.

18. *Id.*, app. C, at 12.

19. AFFH Rule, 24 C.F.R. § 5.154 ("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 Public Housing Agency (PHA) Plan and any other plan incorporated therein, and community plans including, but not limited to, education, transportation, or environmental related plans.").

As noted below, regulatory rollbacks and weakened enforcement may jeopardize the prospects for national consistency in robust fair housing planning, at least in the short term. However, the AFFH mandate is a statutory one, and localities ultimately benefit from coordinated planning processes, particularly those that advance intergenerational health outcomes. Advocates are optimistic that the AFFH framework and robust models generated by participants will have significant and lasting value.

EJ, HUD, and Climate Change

States and localities are engaged in planning for climate change, addressing both mitigation needs (such as emissions standards) and adaptation needs (such as flood control). Because of the ongoing disinvestment and cumulative environmental impacts encumbering many segregated communities, fair housing and equity planning policies are needed to inform both mitigation and adaptation. However, many of these plans currently lack equity criteria. This means that adaptation resources may not adequately serve vulnerable communities, including residents in HUD-subsidized households. The AFH process presents one opportunity to align fair housing and environmental justice analyses with climate change planning. Guidance on how the AFH might be used to formulate climate change or other environmental justice strategies has not been provided, and development of local models will be important for future policy formation.

In addition, HUD has so far developed a number of grant programs and initiatives relating to disaster relief and energy retrofiting (see discussion of HUD's 2016–2020 EJ Strategic Plan, above). The inclusion of equity criteria in competitive grant structures, and nondiscrimination oversight, continues to be important. New infrastructure is likely to be another area of growth for public-private partnerships and policy enacted through tax incentives, which have been trends in past Republican administrations and are a focus of Trump-era policy. Oversight mechanisms, and related advocacy, will need to respond to these developments.

Conclusion

Specific programmatic changes can be difficult to foresee with accuracy. Yet the Trump administration's intended legacy is overall one of deregulation,²⁰ privatization, and agency budget and enforcement cuts. All of these will deeply impact both fair housing and environmental justice. To respond effectively, we need both to cultivate progressive policies at the state and local levels and to continue vigilant advocacy on the federal stage with HUD and EPA. These agencies both need to more proactively engage in, and be held accountable for, policies that promote health for low-income households.

20. See, e.g., Exec. Order 13771, Reducing Regulation and Controlling Regulatory Costs (Jan. 30, 2017); Exec. Order 13777, Enforcing the Regulatory Reform Agenda (Feb. 24, 2017).

