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EPA's Environmental Justice Program – Isolated from Civil Rights

PEER Comments on EPA 2020 Environmental Justice Action Agenda
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The U.S. Environmental Protection Agency (EPA) has invited comment on a "draft EJ 2020 Action Agenda." These comments by Public Employees for Environmental Responsibility (PEER) contend that this draft EJ 2020 plan continues, and in fact worsens, core flaws that have weakened and marginalized EPA's environmental justice program for the past two decades.

The key weaknesses on the draft plan are that it –

- Wrongly separates environmental justice from its underlying basis in the Civil Rights Act of 1964;
- Contains no guidance for state and local recipients of EPA funds, leaving the program as a an intellectual construct without content; and
- Lacks any planning for enforceable regulation.

I. Flunking Civil Rights

By severing environmental justice from civil rights EPA has reduced environmental justice to a largely voluntary program. As articulated in this plan, environmental justice is aspirational in nature, with EPA serving mainly in a cheerleading role.

This diminution of environmental justice stands in stark contrast to the core values of the environmental justice movement itself, coming out of the civil rights movement of the 1960s.

Before the expression "environmental justice" came into usage, the core issue was clearly named and understood as environmental racism. Yet over the years EPA has increasingly turned away from the issues of race and civil rights, to a degree that it is fair to ask whether at EPA environmental justice has become a distraction from EPA's obligation to deal with issues of race and civil rights.

Whatever the motivation, the fact remains that at EPA civil rights has fallen off the environmental justice table, and among the costs has been the disempowerment of communities desperately in need of environmental justice and a lessening of their ability to invoke Title VI of the Civil Rights Act of 1964 in order to obtain that justice. The further isolation of civil rights

from EJ is evident in the draft EJ 2020 Action Agenda in its relegation of Title VI of the Civil Rights Act to a single bullet in a short list of "related efforts" at the tail end of the draft EJ 2020 "Framework."

This disconnection of EJ from Title VI has left both programs in weaker shape than is needed, at a time when the programs should be working hand in hand, complementing and reinforcing each other. Both are in need of attention.

In reality, EPA's management of these issues actually undermines communities' civil rights. Many and perhaps most communities facing environmental discrimination are predominantly minority. Yet EPA, by withholding the involvement of its Title VI civil rights program and staff, has effectively neutered the agency's own capacity for engaging the issues as the civil rights issues which in fact they are.

Title VI of the Civil Rights Act is not only the law of the land, but is a recognized tool for bringing about environmental justice. Environmental justice and the Civil Rights Act are intertwined, and have been so since the inception of the environmental justice movement.

Environmental justice was institutionalized at EPA and in the federal government on February 11, 1994, when President Clinton signed Executive Order 12898, "Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations." In almost every action addressing environmental justice since then the Agency has cited E.O. 12898 as its basis for action, including in Plan EJ 2014, issued in 2011. In issuing that Executive order in 1994, President Clinton accompanied it with a Presidential memorandum, the purpose of which was:

> "…to underscore certain provision of existing law that can help ensure that all communities and persons across this Nation live in a safe and healthful environment. Environmental and civil rights statutes provide many opportunities to address environmental hazards in minority communities and low-income communities." (Emphasis added.)

Having noted that the E.O. is intended "to promote nondiscrimination in Federal programs substantially affecting human health and the environment," his memorandum then went on to direct "that all department and agency heads take appropriate and necessary steps to ensure that the following specific directives are implemented immediately:" among them the following:

> "In accordance with Title VI of the Civil Rights Act of 1964, each Federal agency shall ensure that all programs or activities receiving Federal financial assistance that affect human health or the environment do not directly, or through contractual or other arrangements, use criteria, methods, or practices that discriminate on the basis of race, color, or national origin."

Thus from inception, environmental justice at the federal level and in its foundational Executive Order 12898 has been intended to work in tandem with the Civil Rights Act, most specifically by way of Title VI of the Civil Rights Act. In sum, environmental justice has a basis in law, most specifically in the Civil Rights Act of 1964.

Title VI of the Civil Rights Act gains practical traction and consequence in its prohibition of federal funding for any "recipient" state and local agencies whose programs may have a discriminatory effect on minority populations. In practice the vast majority of EPA's programs are implemented at the state and local level by such "recipient" agencies, and almost every one of these agencies receives EPA funds. Under the law a "discriminatory" effect includes any impact resulting from "procedures, criteria or methods" used in those programs that may result in a disparate or disproportionate impact. It is Title VI which provides the federal government with powerful role in overseeing hundreds of state and local agencies, and imposing on them an affirmative obligation to take steps and implement procedures to protect communities from discriminatory environmental impacts.

Where environmental justice and Title VI overlap is in their shared goal and requirement to protect communities of color from being subject to disparate or disproportionate impacts. Environmental justice expands this protection to include low income and other populations, but the core requirement in law to protect minority communities remains embedded. The relevance of this to the day-to-day struggles of environmental justice communities is that many, and perhaps most, such communities have a substantial minority population. Therefore, when a minority community raises a concern regarding disparate environmental impacts, that concern can and ought to be addressed as both an environmental justice and a civil rights issue.

While there was little progress on the EJ front during the administration of President Bush (2001-2008,), there were high expectations when President Obama took office in January 2009. His appointment of Lisa Jackson as EPA Administrator further kindled hopes for renewed attention to EJ. By 2010 a multi-year strategy was coming together and was issued in 2011 as "Plan EJ 2014," the first ever such plan at EPA.

Significantly, however, a near final draft was almost completely silent on Title VI of the Civil Rights Act. Then, largely in response to a series of meetings Administrator Jackson had been holding with the "Title VI Alliance," a group of about a dozen EJ and civil rights advocates from across the country, the final Plan EJ 2014 was revised to include more than three dozen references to Title VI.

By contrast with the 2014 Plan and Title VI Supplement, the EJ 2020 Action Agenda stands out by way of its almost complete omission of Title VI.

In short, EPA has lost its way on civil rights and environmental justice. The agency has allowed Title VI to become a "third rail," too hot to be touched. The EJ 2020 plan needs to touch that rail if it seeks to have any power.

II. Absence of Substantive Guidance

The most fundamental gap in EPA meeting its civil rights and environmental justice responsibilities is that it has never provided substantive guidance to the hundreds of state and local "recipient" agencies funded by EPA on how to fulfill their obligations under Title VI of the Civil Rights Act.

Other federal agencies such as the Departments of Transportation (DOT), Education and Health and Human Services have issued such guidance and followed up with vigorous oversight to ensure that it is used in practice, in some cases withholding tens of millions of federal dollars because recipients failed to follow agency guidance.

While EPA has issued procedural Title VI guidance on public involvement, it has not provided guidance on addressing the substantive issue of actual disparate impacts. It is the lack of this guidance, more than any other single factor, which has let state and local environmental agencies off the hook for their obligations under the Civil Rights Act, and left communities vulnerable to environmental negligence and discrimination.

It is imperative that EPA move immediately to remedy the gap it has allowed to develop between its environmental justice and civil rights programs, and that steps to address this gap be incorporated into both EJ 2020 as well as the Civil Rights Office "Strategic Plan" mentioned in the draft EJ 2020 Framework. This gap exists in many forms, including the Agency's organizational structure, policies, programs and day-to-day operations, and must be addressed at all of these levels. Clearly this will not happen without a clear, credible and sustained commitment from the EPA Administrator herself.

Without guidance supported by regulations requiring use of that guidance, there will be no right of redress for environmental injustice. In 2001, the U.S. Supreme Court ruled, in *Alexander v. Sandoval* (532 U.S. 275) against the right of private citizens to bring suit under Section 602 of the Civil Rights Act. This section deals with discriminatory effects or impacts and does not rely on demonstrations of "intention" to discriminate. The Act's accompanying Section 601 prohibits intentional discrimination and under this provision individuals have the right to sue but proving intentional discrimination is a tall order. If EPA issued binding Title VI guidance for recipients, and the recipients failed to comply with that guidance, then such failure could be used as powerful evidence that the discriminatory effects are indeed intentional.

On May 4 of 2015, EPA released a "Title VI Progress Report" in which it once again committed, as it had in the 2012 Supplement, to issue guidance or a "toolkit" for recipients. What was lacking, however, was any acknowledgment of, or explanation for, why such a commitment has been contained in formal Agency every year for each of the past four years, (always for "this year") and yet the commitment has never been met. Meanwhile a draft of such guidance has yet to be circulated by the Office of Civil Rights within the Agency or even at the Office of Environmental Justice.

Without guidance, EJ will remain a voluntary, aspirational goal with no practical tools for affected communities to defend themselves.

III. No Enforcement, No Progress

The Environmental justice section of the EPA website declares:

> "EJ 2020 is a strategy for advancing environmental justice ... It is not a rule"

That statement encapsulates its limitations.

It is no secret either within EPA or among civil rights advocates that other agencies such as DOT, and the Federal Highway Administration (FHWA), are far ahead of EPA when it comes to administering their Title VI programs and coordinating between their EJ and Title VI programs. The FHWA recently released a "Reference Guide" for EJ practitioners at both the agency and at the state and local agencies receiving FHWA funds. The Guide lays out FHWA's view of the relationship between EJ and Title VI, and goes on to describe in practical terms how the programs should interact in dealing with EJ and Title VI issues that arise in any particular community.

Beyond the Guide, it is the actual practices of FHWA staff that show how FHWA has taken a common sense problem-solving approach into communities raising Title VI and EJ issues. EJ staff at EPA likewise is well aware of, and seen in practice, the DOT's willingness to work hand in hand with other federal agencies such as EPA in developing practical solutions to communities' Title VI concerns.

This contrasts fundamentally with EPA's highly legalistic and analytically oriented approach in which countless hours and staff resources are spent on essentially desk exercises rather than in pursuit of practical solutions working with the communities and other involved parties.

A look at FHWA's working definition of what EJ means at that agency may shed light on the difference between the two agencies. From FHWA's "Environmental Justice Reference Guide" (April 1, 2015):

> "Environmental justice at FHWA means identifying and addressing disproportionately high and adverse effects of the agency's programs, policies, and activities on minority and low-income populations to achieve an equitable distribution of benefits and burdens. This includes the full and fair participation by all potentially affected communities in the transportation decision-making process."

By way of contrast consider the opening statement of EPA's Draft EJ 2020 Framework, also released in April, 2015:

> "EPA's environmental justice efforts seek to protect the health and environment of overburdened communities, support them to take action to improve their own health and environment, and build partnerships to achieve community health and sustainability."

While the FHWA is making a clearly stated commitment to "identify and address" real situations on the ground in communities, EPA's plans to "seek," "support" and "build partnerships." Thus, EPA adopts a passive cheerleading-like approach. This contrasts with FHWA's clear statement of who (FHWA) will do the acting, that they will "identify and address" discriminatory activities, and FHWA's clear statement that the affected communities are to be involved in "decision-making."

Thus, other federal agencies are less confused about EJ and civil rights. It is especially disconcerting that EPA, the one federal agency tasked with coordinating EJ efforts among all

federal agencies, lags so far behind other federal agencies when it comes to carrying out the requirements of the Civil Rights Act.

Nor does EPA use its traditional enforcement to further EJ goals. For example, in June 2010 the EPA Office of Inspector General slammed EPA for a decade-long failure to implement national urban air toxics control plans, designed to alleviate a major public health threat to the nation's urban centers with concentrations of disadvantaged populations. ("Key Activities in EPA's Integrated Urban Air Toxics Strategy Remain Unimplemented" Report No. 10-P-0154). The Clean Air Act Amendments of 1990 required EPA to develop a strategy to reduce air toxics emissions in urban areas, particularly from small stationary sources. While the agency was required to issue new urban emissions standards in 2000 for these smaller local sources, such as cars, dry cleaners and gas stations, EPA failed to follow through. Yet EPA figures show acute risks from these local sources – potentially causing cancer in one in 28,000 Americans with two million residents in areas where the lifetime risk was one in 10,000 or greater..

Perhaps more problematic is the delay once again of any action on a previously proposed policy on the role of environmental standards in resolving Title VI complaints. In looking into Title VI complaints EPA has long relied on pre-existing environmental standards (such as the National Ambient Air Quality Standards, or NAAQS) as essentially disposing (by way of a "rebuttable presumption") of any disparate impact issues. In practice this tends to neutralize Title VI complaints simply by way of a desk exercise, rather than a real investigation of the root causes of the complaint at the community level. EPA had proposed changes to this policy nearly three years ago requiring a closer look at, for instance, localized impacts, but that policy change has apparently stalled.

Tellingly, EPA has not even come to grips with how it should investigate EJ complaints. An attempt at developing Title VI investigative guidance fell victim to an EPA management hoping to deal with discrimination solely as a technical issue that could be resolved with "science." The net result was an extremely lengthy, largely incomprehensible and fundamentally unusable guidance document proposed in 1998, then revised and recirculated as "draft revised" guidance document in 2000.

EPA has tried to obscure the fact that the guidance was never finalized by referring to it as "interim" guidance. The document pleased no one and drew a large amount of critical comments which were never responded to. Regardless, the main underlying flaw in this approach and a tendency which continues at EPA even now, was in trying to resolve issues that are essentially policy issues by hoping they could be resolved by "science." Whether this is due to confusion or political and managerial timidity remains unclear, but the result is the same – EPA has choked when it comes to identifying and acting on discriminatory practices.

In summary, it can be fairly said that the pattern at EPA on actually addressing environmental justice is studded with stalled policies, fragmented efforts and repeated unmet commitments.

Does EPA Have a Race Problem?

There have long been rumblings within EPA that it's problems in dealing with race outside the agency in its EJ and Title VI programs are directly related to its still unresolved issues around

race within the agency, issues which as described above, came to a head in the 1990s. The primary authority for addressing such issues is Title VII of the Civil Rights Act. EPA has placed both the Title VI ("external") and Title VII ("internal") programs in the same office. It is hard to imagine that problems in one program within the office would not have some effect on other programs in the same office.

Many agency employees feel strongly that fairness outside the agency goes hand in hand with fairness inside the agency. It is unlikely that the agency would be able to deal effectively with discrimination outside the agency if it has not been able to deal with it inside the agency. Many current employees of all ethnicities would say the agency has never addressed, let alone remedied, its "internal" civil rights issues.

Conclusion

In summary, a real commitment to EJ by EPA would –

- Restore the rightful relationship between civil rights and environmental justice by putting Title VI of the Civil Rights Act at the heart of the EJ plan and committing to implement the letter of that law fully.

- Issue guidance and supporting regulations directing the hundreds of "recipient" agencies to comply with Title VI and protect communities from discriminatory environmental effects. This guidance would clearly explain what steps these recipient agencies need to take.

- Would look to adopt best practices from other agencies such as the US DOT and FHWA for models of EJ and Title VI programs and how they are enforced.

In addition, meaningful progress would require that EPA get its own act together. At a minimum, the EPA's civil rights and EJ programs need to learn how to work together towards common goals. Ideally, it would then incorporate that new-found coordination between the programs into both the EJ 2020 plan and the Office of Civil Rights Strategic Plan.

Given the mixed, at best, record of EPA on EJ and Title VI thus far, there may not be reasonable grounds for optimism for meaningful progress during the final 18 months of the Obama administrator.

Respectfully submitted,

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