UNC CENTER FOR CIVIL RIGHTS

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Via Email: ejstrategy@epa.gov
Charles Lee, Deputy Associate Assistant Administrator for Environmental Justice
USEPA, Office of Environmental Justice (2201-A)
1200 Pennsylvania Avenue, NW
Washington, DC 20460

Re: **Comments on EJ 2020 Action Agenda**

Dear Mr. Lee:

On behalf our client communities across North Carolina, we submit these public comments on the U.S. Environmental Protection Agency (EPA) Draft EJ 2020 Action Agenda, Environmental Justice Strategic Plan 2016-2020 ("Action Agenda"). Together with the undersigned organizations and individuals, we join and incorporate by reference the comments submitted by Earthjustice and the Environmental Justice Leadership Forum on Climate Change ("EJL Forum"), offering this additional "from the ground" feedback.

Dismantling institutionalized racism is core to the Center for Civil Rights' organizational mission. Because policies and practices with discriminatory effects maintain structural racism, disparate impact analysis is critical—not just for any civil rights protection effort, but for good government. We appreciate each of the three goals listed in the Action Agenda, as well as the "Key Results" promised by 2020. Unfortunately, absent a fundamental shift in EPA's enforcement of disparate impact regulations under Title VI of the Civil Rights Act of 1964 those goals and results are illusory.

The Action Agenda incorrectly claims that Title VI "provides a legal right of action for situations in which recipients of EPA financial assistance for environmental program and activities discriminate against persons on their race, color, or national origin, sex, disability and age." (Action Agenda p 6). Title VI prohibits practices with a discriminatory effect on the basis of race or ethnicity-- not sex, disability or age. More importantly, as a result of the 2001 Supreme Court decision in *Alexander v. Sandoval*, which shattered the private right of action to enforce Title VI's disparate impact regulations, the ***only*** "legal right of action" under Title VI to challenge policies or practices with discriminatory effects lies with the federal agencies charged with enforcing the Act. This means that our clients-- and the tens of thousands of other people that live in predominantly poor African American, American Indian or Latino neighborhoods across this country and disproportionately bear the burdens of pollution from municipalities, industry and commerce-- are forced to rely on EPA to vindicate their rights under Title VI.

The Action Agenda's visionary language falls flat for our clients, who ask: "Why then, with so many Title VI complaints still pending after years in its Office of Civil Rights, has EPA never made a finding of race discrimination? What use is a 'legal right of action' that is never actually enforced?" The structural changes urged by our colleagues at Earthjustice and EJL Forum are long overdue. We submit that they must include genuine, finalized and enforceable legal standards consistent with the prevailing law of disparate impact. Discrete scientific standards under the Clean Air Act or Clean Water Act cannot continue to dictate whether or not "adverse effects" exist.

EPA's decades-old "draft guidances," including its Framework for Adverse Disparate Impact Analysis contained in Draft Revised Guidance for Investigating Title VI Administrative Complaints Challenging Permits, Federal Register Volume 65, Number 124 (Tuesday, June 27, 2000), 39676-78, and its Toolkit for Assessing Potential Allegations of Environmental Injustice (2003), echo the promises reiterated in the 2020 Action Agenda regarding cumulative impacts and cumulative risks analyses. These documents properly consider "non-chemical stressors" and the particular vulnerabilities of poor, non-white communities whose "social determinants of health" (Action Agenda p 19) make the disproportionate location of polluting, end-use operations nearest their neighborhoods much more damaging than if they had been located near affluent, predominantly white communities. Yet when we file Title VI complaints against our state regulatory agency and provide reams of scientific, peer-reviewed research that demonstrates that interplay, OCR investigators tell us they don't know how to consider cumulative impacts or risks. They inquire only about whether particular ambient air quality standards are met, whether testing from a particular regulated facility shows exceedance of allowable chemical levels.

As the EJL Forum comments point out, "best practices" where cumulative impacts and cumulative risks assessments are concerned abound and are at EPA's disposal. If EPA is actually going to enforce Title VI-- if it is actually going to "demonstrate progress on significant national environmental justice challenges" such as lead poisoning in municipal water supplies or the unbearable stench and water contamination from the concentration of industrial swine and poultry operations—it must actually apply effective legal standards and make prompt disparate impact determinations using a common sense, scientifically-supported approach.

Likewise, EPA should address potential remedies using a common sense, scientifically supported approach. As one example related to North Carolina's staggering concentration of industrial swine and poultry operations in poor communities of color, Dr. Steve Wing of the UNC School of Public Heath's Department of Epidemiology recently suggested the following to representatives of the Office of Inspector General:

1. Rather than focusing on emissions of specific chemical or physical pollutants, consider instead ambient concentrations of pollutant mixtures whose adverse effects have been established by complainants, and focus on controlling buffers: enforce adequate distances between polluting sources and where people live, attend school, work.

2. Regulate based on new available technologies: for example, storing animal waste in open waste pits and spraying that waste on sandy soils near where people live, attend school and/or work should not be permitted.

3. Regulate based on impacts in communities rather than on emissions from individual facilities. Many communities are impacted by not just one facility but by many co-located polluters, and the density of polluting facilities, including, for example, concentrated animal feeding operations, chemical plants, fracking sites, mines, power plants, and landfills in the vicinity of the complainants' neighborhood(s), must be considered.

All three of the above reflect the established disparate impact legal standard, yet EPA has failed to actually implement that standard.

Finally, in places like North Carolina, where the balance of power and the relationship between the regulators and the regulated industry so undeniably tip the scales in the industry's favor at the expense of both the environment and overburdened communities of color, EPA's enforcement of Title VI must be swift *and it must be visible*. Two examples from North Carolina illustrate that point. When the national and North Carolina Pork Councils took the unprecedented step, in December 2015, of seeking to intervene in the Title VI environmental justice complaint filed by the NC Environmental Justice Network, the Rural Empowerment Association for Community Help, and Waterkeeper Alliance, Inc. (EPA 11R-14-R4), the delay in EPA's response to that intervention led to further intimidation of Complainants by industry representatives. With apparent support by the state regulatory agency Respondent, Pork Council representatives showed up unannounced at what was supposed to have been a confidential mediation, derailing the EPA Alternative Dispute Resolution process and intimidating our clients. If EPA had acted promptly, that intimidation and disruption of the Title VI process might have been avoided.

After nearly a decade, EPA has yet to issue any findings or make any determinations in the 2007 Title VI environmental justice complaint filed by the undersigned Rogers-Eubanks Neighborhood Association ("RENA", EPA 13R-07-R4). That complaint, which sought to address the adverse impacts of the county landfill on a historic, black and excluded community, appears to have been lost in EPA's "interagency partnership," passed from Region 4 to Regions 5 and 7 with absolutely no follow-up or communication with RENA or the Center in years. While RENA continues to work with the local agencies and municipalities to address their concerns, seemingly abandoned by EPA's OCR, they have lost faith in the promise of Title VI.

If Title VI is to have any meaning in the realm of environmental justice, if documents like EPA's EJ 2020 Action Agenda, 2000 Framework, or 2003 "draft revised guidance" are to have any credibility, EPA must act now, during the waning days of this Administration, to address the more than 20-year backlog of cries for legal action.

Sincerely,

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