



Fresno Council of Governments
Policy Board
2035 Tulare Street Suite 201
Fresno, CA 93721

September 7th, 2017

Re: Fresno COG's Public Participation, Title VI, Environmental Justice, and Housing Obligations, and Deficiencies in Current RTP process

Dear Sir or Madam,

Leadership Counsel for Justice and Accountability works alongside low-income communities of color in the San Joaquin Valley and the East Coachella. These communities have crumbling roads and lack sidewalks, green spaces, street lighting, clean water and other vital services and infrastructure. The families living in these communities have received little to no benefit from transportation and land use planning in the past, and bear a disproportionate burden of environmental contamination such as poor air quality and contaminated water. Furthermore, these communities do not have the means by which to pay for necessary infrastructure or technological solutions to these health hazards, and often live in these communities because they cannot afford to live elsewhere. The fact that these communities lack adequate transportation infrastructure and public transit options compounds their inability to ensure a healthy and safe atmosphere for their families by cutting them off from accessing areas of economic and educational opportunity.

Federal and state law recognize the interconnectedness of all of these issues – affordable housing, jobs, environmental harm, land use planning, and transportation planning – in contributing to segregation of cities and regions along income and race lines. For that reason, federal and state law require that entities like Fresno COG conduct targeted and meaningful public engagement of low-income and minority communities in the RTP process, and require the COG to address housing and land use issues that are inextricably linked with transportation infrastructure and investment decisions.

Lack of public participation in scenario development

Last year, ClimatePlan's statewide report recognized Fresno COG as being one of only a few MPOs to model scenarios developed by community stakeholders in 2014. However, advocates are disappointed that Fresno COG chose not to continue this positive work in the 2018 RTP process.¹ While Fresno COG engaged the public in workshops about local agency project proposals and plans to allow community

¹ ClimatePlan, *Leading the Way*, p. 11.

input on choosing between scenarios,² and it allowed input from the RTP Roundtable to develop scenarios, Fresno COG has not sufficient input from the public, and in particular from disadvantaged communities, in developing scenarios for its SCS. In order to comply with its obligations under federal and state law, Fresno COG must conduct a round of workshops that allows for this kind of input before the scenarios are finalized. Specifically, the COG must engage low-income communities of color to ensure that its funding scenario does not have a disparate impact on these communities, and must consult low income and minority populations about their current transportation, housing and land use needs and solutions to address those needs.

At the root of the problem here is the Fresno COG's restriction of stakeholders who may participate in scenario development. Title VI requires that Fresno COG ensure that the chosen transportation funding scenario does not cause a discriminatory impact on low-income communities of color in Fresno County, since Fresno COG is a recipient of federal funds.³ In order to ensure that regional transportation planning does not have a discriminatory impact, the Federal Transit Administration has made it clear that the COG must ensure the "full and fair participation" by all potentially affected communities in the transportation decision-making process,⁴ and federal law requires Fresno COG to specifically "seek out" the needs of "low income and minority households" in its public participation process for the RTP.⁵ Specifically, the US Department of Transportation's order on environmental justice requires Fresno COG to elicit input from affected low-income and minority populations.⁶ To ensure effective engagement of these groups, federal Executive Orders make it clear that the public must be educated on the health impacts of projects, and in a language that they can understand.⁷ California law specifically requires that Fresno COG conduct this type of public participation process for the scenario development portion of the RTP.⁸

For this reason, Fresno COG must guarantee the public, and particularly low-income communities of color, the opportunity to participate in scenario development. Participation may not be limited to voting between predetermined scenarios. The public must be engaged in a way that allows them to accurately weigh the pros and cons of various alternative and provide input that shapes the options that the county may pursue. Fresno COG has sought input from the RTP Roundtable stakeholders, made of overwhelmingly of local agencies, and incorporated limited data from public input in 2014 and one workshop in the City of Fresno. The COG has limited public input to making a selection between scenarios that the public had little role in shaping, and the Policy Board may completely discount that

² In the second round of workshops, the public will not be able to play a meaningful part in the eventual scenario, since their options are limited by what the COG gives them. They will clearly not be able to change the actual scenarios. If the public chooses a certain scenario over others, it is unclear whether this will have any impact on the RTP Roundtable's recommendation to the COG Policy Board, or the Policy Board's eventual scenario selection. Thus the second round of workshops seems perfunctory, and not designed to allow for meaningful public participation in the eventual scenario that shapes RTP funding.

³ "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." Title VI, 42 U.S.C. § 2000d.

⁴ Federal Transit Administration Circular 4703.1, *Environmental Justice Policy Guidance for Federal Transit Administration Recipients* (hereinafter "FTA Circular 2012"), August 15th, 2012, p. 2, available at https://www.transit.dot.gov/sites/fta.dot.gov/files/docs/FTA_EJ_Circular_7.14-12_FINAL.pdf

⁵ 23 C.F.R. § 450.316(a)(1)

⁶ U.S. Department of Transportation Updated Environmental Justice Order 5610.2(a) (hereinafter "U.S. Department of Transportation EJ Order 5610.2(a)"), § (7)(c)(4), p. 10, available at https://www.transit.dot.gov/sites/fta.dot.gov/files/docs/FTA_EJ_Circular_7.14-12_FINAL.pdf

⁷ Executive order 12898, 7(b), § (5)(b)(2), available at

https://portal.hud.gov/hudportal/HUD?src=/program_offices/fair_housing_equal_opp/FHLaws/EXO12898

⁸ SB 375, Cal Gov Code § 65080 (b)(2)(F)



decision and pursue a scenario that the public had no role in shaping and did not approve. This is not effective public participation according to Fresno COG's federal legal obligations.

Fresno COG's scenario development process must include meaningful engagement with low-income communities of color, input from those communities to identify their transportation needs, and solicitation of those communities' recommendations for solutions to address those needs, to ensure that Fresno COG's transportation investments do not cause an intentional or unintentional discriminatory impact on those communities. The most effective way to do is to directly ask low-income communities of color to identify their transportation needs and solutions to address those needs. Communities are in the best position to identify the factors that impede their access to effective transportation options, and the COG should consult their expertise to determine how to address those needs. Therefore, the COG must do another round of workshops before the scenarios are finalized, and use the following methodology to ensure that the needs of low-income communities of color are being met:⁹

- 1) Ask communities to identify their transportation needs.
 - a) Meaningfully engage with communities: provide resources so that they can meaningfully participate, including hosting workshops at times and places that are convenient for low-income and minority communities to attend.
- 2) With community, identify what the contributing factors are that create existing inequities.
- 3) Set quantified goals for addressing those factors.
- 4) Use that quantified goal to compare proposed scenarios for the SCS in order to see how each scenario achieves equity goals.
- 5) Once a scenario is chosen, identify the actions and investments that will be made during the four-year life cycle of the RTP to achieve those goals.
- 6) Track the progress of those goals over the lifetime of the RTP.

Establishing a pattern of hostility toward equity in violation of Title VI

The 2018 RTP process has consistently rejected the inclusion of language and action oriented towards addressing historical inequity and disinvestment in low-income communities of color. Most notably, the RTP Roundtable summarily denied inclusion of any language promoting equity in transportation investment in the Policy Element at the Roundtable meeting on July 26th, 2017. This unwillingness to make commitments towards furthering Title VI obligations goes directly against the spirit of Title VI and against the law's prohibition against disparate impacts on minority and low-income populations and requirements to address discriminatory conditions.

The roots of current Environmental Justice requirements come from the Civil Rights Movement of the 1960s. The Equal Protection Clause of the US Constitution and Title VI of the Civil Rights Act of 1964 prohibited discrimination based on the protected classes of race, color or national origin. Title VI extends the prohibition against discrimination to entities receiving federal funds, and its obligations extend to all of that entities' projects regardless of whether all projects have received federal funding. All applications

⁹ This methodology is proposed by Richard Marcantonio, and adapted from the US Department of Housing and Urban Development's AFH rule by which MPOs receiving federal funds for housing must identify housing affordability needs in compliance with Title VI.

for federal financial assistance from the US Department of Transportation require an assurance that the program will be conducted “in compliance with all requirements imposed by” Title VI.¹⁰

As explained by the Federal Transit Authority, Title VI does not just prohibit policies and practices that are committed with discriminatory intent; Title VI also prohibits “neutral policies or practices” that have a “disparate impact,” meaning that regardless of the intent behind the action they are unlawfully because they cause an unjustifiable discriminatory effect.¹¹

Furthermore, Title VI requires entities receiving federal funds to “take *affirmative action* to overcome the effects of prior discrimination” by that entity “on the ground of race, color, or national origin.”¹² Fresno County has historically seen a lack of infrastructure investment in majority Latino communities by Fresno COG and other local agencies, and Fresno COG has taken no steps to address that inequity. Recognizing the pervasiveness of historical discrimination against protected groups, the federal government requires Fresno COG to address that inequity by ensuring participation of members of those communities in the RTP.

Fresno COG’s federal civil rights obligations are imperative. Fresno COG has a legal obligation under Title VI to create equity through including language and actions that specifically identify and addressing the needs of populations that have historically received a disproportionately low benefit from investment and planning, and have received a disproportionately high percentage of adverse effects. Fresno COG must reverse the current pattern of hostility towards civil rights obligations by integrating concrete commitments into all elements of its RTP that proactively resolve historical patterns of inequitable investment, and prohibit disparate effects on these populations.

Inadequate environmental justice indicator

Because of technological limitations, Fresno COG was not able to model an Environmental Justice (EJ) indicator that effectively measures the relative impact of regional transportation investments on environmental justice communities. Instead, the EJ subcommittee had to choose between simplistic indicators that do not measure how transportation investments will address transportation needs in environmental justice communities. Furthermore, flawed modeling assumptions do not currently allow for an accurate measure of impacts on environmental justice communities. Fresno COG’s model currently assumes that EJ populations all live within the borders to neatly defined TAZ zones, and that these populations will not move for the next 20 years. Fresno COG must change the environmental justice indicator to measure how the RTP scenarios will address needs identified by environmental justice communities and individuals in the short term, and make a clear commitment in its action element of the RTP to develop an activity-based model by the beginning of 2021 so that it can use this model in the 2022 RTP process.

The groups that the COG must address through its EJ analysis overlap with but are distinct from those whom it must protect under civil rights law. According to the U.S. Department of Justice, “... the core tenet of environmental justice – that development and urban renewal benefitting a community as a whole not be unjustifiably purchased through the disproportionate allocation of its adverse environmental and health burdens on the community’s minorities– flows directly from the underlying principle of Title VI

¹⁰ FTA Circular 2012.

¹¹ *Id.*, p. 2.

¹² U.S. Department of Justice Civil Rights Division, Title VI Legal Manual, 2001, 28 C.F.R. § 42.104(b)(6), p. 59 (emphasis added)

itself.”¹³ However, Executive Order 12898 speaks of environmental justice “populations,” a phrase that contrasts with civil rights language protecting “classes” of people. Additionally, the use of the word “populations” instead of “communities” communicates that the environmental justice analysis must be detailed enough to look at individuals, not just groups of people living in geographically contiguous areas. In addition, the COG’s environmental justice analysis must assess different demographic groups differently; if the COG chooses to look at “communities of concern” or “vulnerable communities” in addition to the low-income and minority populations protected under federal civil rights law, it must do separate analyses of these groups in order to avoid diluting the analysis for groups protected under civil rights law. Furthermore, the US Department of Transportation’s environmental justice order prohibits any “significant delay” in low income communities of color receiving benefits from transportation investments, since this essentially amounts to a denial of equitable benefit for such communities.¹⁴ Executive Order 12898 requires each Federal agency, to the greatest extent practicable and permitted by law, and consistent with the principles set forth in the report on the National Performance Review, to achieve environmental justice as part of its mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects, including interrelated social and economic effects, of its programs, policies, and activities on minority populations and low-income populations in the United States. Pursuant to the U.S. Department of Transportation’s order 5610.2a on environmental justice, the Federal Transit Authority’s circular on environmental justice requires Fresno COG to take concrete measures in its avoid, minimize, and mitigate disproportionately high and adverse effects on EJ populations; ensure the full and fair participation by all potentially affected communities; and prevent the denial of, reduction in, or significant delay in the receipt of benefits by minority and low-income populations.¹⁵

Therefore, the Fresno COG must change the indicator and modeling to fit the following criteria:

- The Environmental Justice indicator must analyze the scenario’s impact on EJ communities over the next four years instead of 20 years, so as to ensure that there is no “significant delay” in delivering benefits to EJ communities. This also overcomes the incorrect assumption present in current modeling which presumes no geographical movement of EJ communities and low-income communities of color.
- Identify current factors creating inequity by using the methodology adapted from the HUD Assessing Fair Housing methodology outlined at the end of Item 1 above. This includes consulting with EJ communities to identify current transportation needs, identify factors causing those deficiencies, identifying solutions to address those needs, developing quantifiable measures of success towards addressing the identified needs and resolving obstacles to equity, using those measures to compare proposed scenarios, and using that gauge success throughout the four-year lifespan of the RTP.
- Fresno COG must develop an activity-based model or another type of model that allows for the COG and the public to see the impact on an individual household level, see the separate impact on different demographic groups, and look at the factors of race and ethnicity.
- Set aside 25% of funds for projects that directly target benefits to low-income and minority communities, ensuring that the “benefits” to communities conform with the needs and solutions that communities identified.

¹³ U.S. Department of Justice Civil Rights Division, Title VI Legal Manual, 2001, page 59.

¹⁴ FTA Circular 2012, p. 2 and 6.

¹⁵ FTA Circular 2012, p. 6, see also U.S. Department of Transportation EJ Order 5610.2(a)

- Fresno COG must increase its direct collaboration with community leaders and community-based organizations, and work to build solid bridges with these groups. By reaching out to community residents and letting their responses about their needs shape the environmental justice analysis and shape the scenarios, these groups will see that a real impact of their participation and will see that the COG respects their expertise about their needs and factors influencing their lives, and their participation will increase.

Fresno COG must make its modeling assumptions transparent.

The COG must make its modeling process transparent to ensure adequate measures of impacts on disadvantaged communities, and to comply with its obligations under SB 375 to “disseminate the...key assumptions of whichever travel demand model it uses in a way that would be useable and understandable to the public.”¹⁶ Fresno COG has not given the public a basic understanding of the data and modeling assumptions used in scenario development. ClimatePlan explains in its Leading the Way report that MPOs should “make these assumptions transparent” since these are integral to ensuring that the public knows the limitations of what scenario modeling can convey. For example, does the model assume that county demographics will change, or stay the same? Does the model look at household-level data, or does it make generalizations across regions?

We understand that these issues are complex, but the COG must make its modeling assumptions more transparent to stakeholders engaged in the process, including to the public.

Fresno COG must comply with its obligations to further fair housing in its Regional Transportation Plan

Both federal and state law recognize the inextricable nature of housing, land use planning, and transportation infrastructure in addressing historical and current segregation and discrimination. Fresno COG’s and local agencies’ repeated assertions that the Fresno COG does not do land use planning, and that it has no obligations to address fair housing beyond allocating RHNA requirements, are incorrect. Fresno COG must seek to affirmatively further fair housing through equitable land use policies and transportation investments in its Sustainable Communities Strategy.

The federal government recognizes the damage done to our society from “concentrated poverty” and “communities segregated by economic status,” and urges entities like Fresno COG to collaborate with local schools, housing agencies, and housing development agencies to “promote economic mobility and equal access to the many benefits provided by affordable housing, great schools, and reliable transportation.”¹⁷ SB 375 addresses transportation planning and planning for affordable housing as two interconnected elements of addressing systemic discrimination and disparate impacts, by requiring that “housing planning be coordinated and integrated with the regional transportation plan” by “allocat[ing] housing units within the region consistent with the development pattern included in the sustainable communities strategy.”¹⁸

¹⁶ SB 375, Section 3.

¹⁷ Dear Colleagues letter by the United States Secretaries of Transportation, Education, and Housing and Urban Development, 2016, found at <https://www2.ed.gov/documents/press-releases/06032016-dear-colleagues-letter.pdf>.

¹⁸ SB 375 section 10, CA Gov Code section 65584.04 (i)(1).



As this statement communicates, the RTP is more than just a transportation planning document; it plans for a development pattern and includes planning for federal affordable housing requirements beyond simply including RHNA numbers. This is because fair housing and equitable access to transportation are pieces of the same Title VI obligation to combat segregation and discrimination. These requirements are laid out further in SB 5, and show that Fresno COG must integrate the principle of Affirmatively Furthering Fair Housing throughout the RTP.

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We urge Fresno COG to address its legal obligations under federal and state law regarding the RTP SCS public participation process, Title VI obligations, environmental justice analysis, and housing requirements. We hope to work collaboratively with Fresno COG on ensuring that transportation planning, investment, land use planning, and fair housing implementation in the RTP are done in a way that combats and prevents discrimination and helps create a County whose residents can all access healthy, safe, and affordable places to live with access to educational and economic opportunities.

Thank you for your consideration. Please do not hesitate to contact us with questions or for further discussion of these points.

Sincerely,

Leadership Counsel for Justice and Accountability

In support:

Catholic Diocese of Fresno

Safe Routes to School National Partnership

The League of Women Voters of Fresno

Central California Asthma Collaborative