

[NEW] Chapter 3: Civil Rights and Environmental Justice in Regional Transportation Planning (for the 2016 RTP and CTP Guidelines)

An overwhelming body of research shows that low-income people – and people of color regardless of income – systematically bear more than their fair share of the harms of transportation investment and development, and at the same time often receive an unfairly low share of the benefits.¹ An unfair distribution of the benefits and burdens of regional planning and investments, even when unintentional, has the effect of contributing to a variety of acute and cumulative disparities in the outcomes that low-income people and people of color experience. These outcomes include disparities in mortality rates and other public health problems,² as well as disparities in access to employment, educational³ and housing opportunities.⁴

To mitigate historic and present-day trends in disparity that result from transportation and land use decisions and to improve conditions in communities of color and low-income from segregation and displacement, federal and state civil rights and Environmental Justice laws and best practices emphasize close attention to equality in the distribution of burdens and benefits of planning and investment decisions. Two important mechanisms through which this attention is required are *meaningful public involvement* and robust *equity analyses* in planning and investment decisions that ensure *fair outcomes*.⁵ Regions are more prosperous, healthy and environmentally sustainable when they are more equitable,⁶ a tenet borne out by implementation experience under SB 375 and other climate-related statutes in California.⁷

¹ See, e.g., Bullard, R. D., G. S. Johnson and A. O. Torres, Eds. (2004). *Highway Robbery: Transportation Racism & New Routes to Equity*. Cambridge, MA, South End Press; Grengs, J. (2015). "Nonwork Accessibility as a Social Equity Indicator." *International Journal of Sustainable Transportation* 9(1): 1-14; Helling, A. and D. S. Sawicki (2003). "Race and residential accessibility to shopping and services." *Housing Policy Debate* 14(1-2): 69-101; Rowangould, G. M. (2013). "A census of the US near-roadway population: Public health and environmental justice considerations." *Transportation Research Part D: Transport and Environment* 25: 59-67.

² See, e.g., CDPH, *Pedestrian Injuries in California: Age and Race Differences*, available at <https://www.cdph.ca.gov/programs/Documents/California%20Pedestrian%20Injuries.Age%20and%20Race%20Differences.Sept2014.pdf>; Alameda County Public Health Department, *Getting on Board for Health: A Health Impact Assessment of Bus Funding and Access* (May 2013), available at http://www.acphd.org/media/308930/transithia_es.pdf.

³ Rowangould, Gregory. "A Census of the US near-Roadway Population: Public Health and Environmental Justice Considerations." *Transportation Research, Part D* 25 (2013): 59–67.

⁴ Schill, Michael H., and Susan M. Wachter. "Housing Market Constraints and Spatial Stratification by Income and Race." *Housing Policy Debate* 6, no. 1 (January 1995): 141–67. doi:10.1080/10511482.1995.9521184.

⁵ Karner, A. and D. Niemeier (2013). "Civil rights guidance and equity analysis methods for regional transportation plans: a critical review of literature and practice." *Journal of Transport Geography* 33: 126-134.

⁶ See, e.g., Benner, C. and M. Pastor (2012). *Just Growth: Inclusion and Prosperity in America's Metropolitan Regions*. New York, Routledge (economic growth correlates with equity in metro regions).

⁷ For example, an "Equity, Environment and Jobs" scenario developed by a social equity coalition, the 6 Wins Network, was deemed the "environmentally-superior alternative" in the EIR for Plan Bay Area, and found to perform best on a number of regional performance measures, including but not limited to equity measures. Other examples come from the implementation of requirements to benefit disadvantaged communities with investments from the Greenhouse Gas Reduction Fund. See sec. 5.

This Chapter begins with a review of the main bodies of federal and state law relevant to regional planning – Title VI of the Civil Rights Act of 1964 and its state analogue, Section 11135 of the California Government Code (sec. 3.1), Environmental Justice (sec. 3.2), and Affirmatively Furthering Fair Housing (sec. 3.3). It then moves to a discussion of the federal requirement to seek out and consider the needs of low-income and minority households, first in the context of the required Public Participation Plan (sec. 3.4), and then in connection with best practices recently adopted by the California Air Resources Board relating to ensuring that underserved communities meaningfully benefit from public investment (sec. 3.5). Section 3.6 discusses the implications of these legal requirements and best practices for the Title VI and EJ Analysis of the RTP. Section 3.7 discusses the FHWA/FTA review of MPO’s self-certification of their Title VI compliance.

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3.1 Title VI and Federal Title VI Certification

Requirements:

Title VI of the Civil Rights Act of 1964 prohibits discrimination by recipients of federal funds on the basis of race, color or national origin.⁸ A similar prohibition applies to recipients of state funds under California law.⁹ Title VI and its implementing regulations bar both intentional discrimination and “disparate impact” discrimination (i.e., a neutral policy or practice that has an unjustified disparate impact on protected groups).¹⁰ An entity that receives federal funding for even a limited purpose is subject to Title VI in all of its policies, programs or activities, whether or not they are directly supported with federal funds.¹¹

⁸ 42 USC 2000d et seq. (“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.”).

⁹ Cal. Gov. Code § 11135.

¹⁰ 49 CFR § 21.5 (b) (2); FTA, Title VI Circular, ch. 1, sec. 5 (e), (f).

¹¹ 42 U.S.C. § 2000d, d-4a (prohibiting discrimination “under any program or activity” receiving funding and defining “program or activity”). California Government Code § 11135 is equally far-reaching.

Title VI (like Environmental Justice, see section 3.2) applies to both MPO and statewide planning. As noted in a memorandum of the joint federal agencies, “concerns for compliance with provisions of Title VI and the EJ Orders have been raised by citizens and advocacy groups with regard to broad patterns of transportation investment and impact considered in metropolitan and statewide planning. While Title VI and EJ concerns have most often been raised during project development, *it is important to recognize that the law also applies equally to the processes and products of planning.*”¹²

An MPO may not discriminate either “directly or through contractual or other arrangements,”¹³ and is affirmatively required to ensure the Title VI compliance of its sub-recipients, including county Congestion Management Agencies (CMAs).¹⁴ This is of particular importance in the RTP to the extent that MPO solicits the project proposals of subrecipients, such as CMAs within a multi-county region, for inclusion in the financial element of the RTP.

Caltrans is responsible for monitoring the Title VI compliance of California MPOs.¹⁵ Similarly, “If the MPO passes planning funds through to one or more subrecipients, the MPO is responsible for ensuring those subrecipients comply with Title VI.”¹⁶ In its capacity as a primary recipient, the MPO shall also submit to FTA “[a] description of the procedures the MPO uses to provide assistance to potential subrecipients applying for funding, including its efforts to assist applicants that would serve predominantly minority populations.”¹⁷

The general prohibition of Title VI is far-reaching. U.S. DOT’s Title VI regulations enumerate specific prohibitions, while also cautioning that “the enumeration of specific forms of prohibited discrimination in [the regulation] does not limit the generality of the prohibition.”¹⁸ Among the specific forms of discrimination the rule calls out are prohibitions on “(i) [d]eny[ing] a person any ... benefit provided under the program; (ii) [p]rovid[ing] any ... benefit to a person which is different, or is provided in a different manner, from that provided to others under the program; (iii) [s]ubject[ing] a person to segregation ... in any matter related to his receipt of any ... benefit under the program; (iv) [r]estrict[ing] a person in any way in the enjoyment of any advantage or privilege enjoyed by others receiving any ... benefit under the program; ... or (vii) [d]eny[ing] a person the opportunity to participate as a member of a planning, advisory, or similar body

¹² FHWA/FTA, Memorandum re: Implementing Title VI Requirements in Metropolitan and Statewide Planning (Oct. 7, 1999), pp. 1-2 (emphasis added), available at https://cms.fta.dot.gov/sites/fta.dot.gov/files/docs/Implementing_TitleVI_Requirements.pdf.

¹³ 49 CFR § 21.5 (b) (1).

¹⁴ FTA, Title VI Circular, ch. VI, sec. 3 (“If the MPO passes planning funds through to one or more subrecipients, the MPO is responsible for ensuring those subrecipients comply with Title VI.”)

¹⁵ FTA, Title VI Circular, ch. VI, sec. 3 (“Since States ‘pass through’ planning funds to the MPO, MPOs are subrecipients of the State and must submit Title VI compliance reports for planning activities to the State in order to assist the State in demonstrating compliance with Title VI. The State is thus responsible for monitoring the Title VI compliance of the MPO for those activities for which the MPO is a subrecipient.”)

¹⁶ *Id.*

¹⁷ FTA, Title VI Circular, ch. VI, sec. 2.

¹⁸ 49 CFR Section 21.5 (b) (5).

which is an integral part of the program.”¹⁹ The regulation also broadly prohibits the utilization of “criteria or methods of administration which have the effect of subjecting persons to discrimination because of their race, color, or national origin, or have the effect of defeating or substantially impairing accomplishment of the objectives of the program with respect to individuals of a particular race, color, or national origin.”²⁰ In addition, it applies to unjustified unequal effects related to the “sit[ing] or location of facilities.”²¹ In an appendix, the regulation includes “[e]xamples demonstrating the application of the provisions of this section to certain types of Federal financial assistance administered by the Department of Transportation.”²²

Title VI’s prohibition against discrimination on the basis of national origin includes a mandate to ensure language access,²³ which must be integrated into the MPO’s public participation plan.²⁴ (See sec. 3.4.)

U.S. DOT administers policies, programs, and activities which are subject to the requirements of Title VI “so as to identify, early in the development of the program, policy or activity, the risk of discrimination and disproportionately high and adverse effects so that positive corrective action can be taken.”²⁵ An integral part of ensuring Title VI compliance is therefore the conduct, early in the development of the RTP, of a race- and ethnicity-specific Title VI Analysis, both at the project and the plan levels. (See sec. 3.6.) Failure to conduct such an analysis can place an agency at risk of losing federal funding, as occurred in California in 2010.²⁶

Federal law requires MPOs to “certify . . . that the metropolitan transportation planning process is being carried out in accordance with . . . Title VI of the Civil Rights Act of 1964.”²⁷ FHWA and FTA conduct a joint planning certification review at the conclusion of each MPO planning cycle to ensure that certification has been properly made. (See sec. 3.7.) A Title VI analysis capable of identifying disparities by race and ethnicity is essential to a valid Title VI self-certification. (See Sec. 3.6.)

¹⁹ 49 CFR Section 21.5 (b) (1).

²⁰ 49 CFR Section 21.5 (b) (2).

²¹ 49 CFR Section 21.5 (b) (3).

²² 49 CFR Section 21.5 (b) (6) & Appendix C. One example in App. C, for instance, states that “The location of projects requiring land acquisition and the displacement of persons from their residences and businesses may not be determined on the basis of race, color, or national origin.”

²³ [See Lau and Executive Order 13166]

²⁴ FTA, Title VI Circular, Chap. III, sec. 8. (“The content and considerations of Title VI, the Executive Order on LEP, and the DOT LEP Guidance shall be integrated into each recipient’s established public participation plan or process . . .”)

²⁵ U.S. Department of Transportation, Updated Environmental Justice Order 5610.2(a) (amended 5/2/2012), p. 9.

²⁶ See letter of FTA Administrator Peter Rogoff to Steve Heminger and Dorothy Dugger, Feb. 12, 2010, available at http://www.publicadvocates.org/wp-content/uploads/feb_12_bart_mtc_letter.pdf; see also *S. Camden Citizens in Action*, 145 F. Supp. 2d at 481 (granting plaintiff’s request for declaratory judgment on this basis).

²⁷ 23 C.F.R. § 450.334 (a) (3).

Best Practices related to integrating Title VI into the regional planning process and ensuring Title VI compliance in its outcomes are described in Sections 3.5 and 3.6 of this Chapter.

3.2 Environmental Justice

Requirements:

Federal legal requirements relating to Environmental Justice (EJ) in regional planning and transportation derive from an Executive Order issued by President Bill Clinton in 1994. The EJ Executive Order requires 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.”²⁸ It also mandates that federally-funded “programs, policies, and activities” must “not have the effect of excluding persons (including populations) from participation in, denying persons (including populations) the benefits of, or subjecting persons (including populations) to discrimination under, such programs, policies, and activities, because of their race, color, or national origin.”²⁹

The U.S. Department of Transportation and the Federal Highway Administration have implemented the Executive Order in their own Environmental Justice Orders.³⁰ U.S. DOT defines “minority”³¹ and low-income.³² It also defines “adverse effects” as “the totality of significant individual or cumulative human *health or environmental effects, including interrelated social and economic effects ...*” and includes within that definition “isolation, exclusion or separation of minority or low-income individuals within a given community or from the broader community,” as well as “the denial of, reduction in, or *significant delay in the receipt of, benefits* of DOT programs, policies, or activities.”³³ It defines “[d]isproportionately high and adverse effect on minority and low-income populations” as “an adverse effect that: (1) is *predominately borne by* a minority population and/or a low-income population, or (2) will be suffered by the minority population and/or low-income population and is *appreciably more severe or greater in magnitude* than the adverse effect that will be suffered by the non-minority population and/or non-low-income population.”³⁴

²⁸ Executive Order 12898, “Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations” (Clinton 1994), § 1-101.

²⁹ Executive Order 12898, “Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations” (Clinton 1994), § 2-1.

³⁰ U.S. Department of Transportation, Updated Environmental Justice Order 5610.2(a) (amended 5/2/2012); FHWA, Actions to Address Environmental Justice in Minority Populations and Low-Income Populations, Order 6640.23 (12/2/1998).

³¹ “Minority means a person who is: (1) Black ...; (2) Hispanic or Latino ...; (3) Asian American ...; (4) American Indian and Alaskan Native ...; or (5) Native Hawaiian or other Pacific Islander ...” Order 5610.2(a), App. Sec. 1 (c).

³² “Low-Income means a person whose median household income is at or below the Department of Health and Human Services poverty guidelines.” Id., App. Sec. 1 (b).

³³ U.S. Department of Transportation, Updated Environmental Justice Order 5610.2(a) (amended 5/2/2012), pp. 14-15, App. sec. 1 (f) (emphasis added).

³⁴ U.S. Department of Transportation, Updated Environmental Justice Order 5610.2(a) (amended 5/2/2012), p. 15, App. sec. 1 (g) (emphasis added).

Title VI overlaps with but is distinct from Environmental Justice. One difference is that the federal Executive Order on Environmental Justice extends its protections not only to “minority populations” but also to “low-income populations.”³⁵ By using the word “populations” rather than the more specific word “communities,” the EJ Executive Order extends not only to the residents of a geographically-contiguous neighborhood but also to “populations” composed of residents who do not live in the same neighborhood but are similarly-situated with respect to the benefits or burdens of a plan or project. Thus, the U.S. DOT EJ Order defines “Minority Population” to mean “any readily identifiable groups of minority persons who live in geographic proximity, and if circumstances warrant, geographically dispersed [persons] who will be similarly affected by a proposed DOT program, policy or activity.”³⁶ This is especially relevant in the transportation context, as the “geographically dispersed” users of a particular portion of the transportation network who are “similarly affected” by an RTP investment or policy may comprise a minority population, a low-income population, or both.

In sum, FTA explains that federal Environmental Justice protections for these populations incorporate three guiding principles:

- “To avoid, minimize, or mitigate disproportionately *high and adverse human health and environmental effects, including social and economic effects*, on minority populations and low-income populations.
- To ensure the *full and fair participation* by all potentially affected communities in the transportation decision-making process.
- To prevent the *denial of, reduction in, or significant delay in the receipt of benefits* by minority and low-income populations.”³⁷

In the context of regional planning, the first principle protects low-income populations and minority populations against bearing an *unfair share of the adverse impacts* of the RTP and its investments; the third principle ensures that they receive a *fair share of the benefits* of the RTP and its investments, and receive those benefits in an equally timely manner; and the second principle ensures that they themselves have the “full and fair”

³⁵ Executive Order 12898, “Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations” (Clinton 1994), § 1-101. By contrast, the protection of Title VI extends only to classes defined by “race, color or national origin.” Additional differences are noted in the U.S. DOT’s EJ Order: “engaging in environmental justice analysis under Federal transportation planning and NEPA provisions will not necessarily satisfy Title VI requirements. Similarly, a Title VI analysis would not necessarily satisfy environmental justice requirements, since Title VI does not include low-income populations. Moreover, Title VI applies to all Federally-funded projects and activities, not solely those which may have adverse human health or environmental effects on communities.” U.S. Department of Transportation, Updated Environmental Justice Order 5610.2(a) (amended 5/2/2012), p. 8, sec. 7 (a).

³⁶ U.S. Department of Transportation, Updated Environmental Justice Order 5610.2(a) (amended 5/2/2012), p. 14, App. sec. 1 (e). The definition also includes “transient persons (such as migrant workers or Native Americans).” A similar definition of “low-income population” is found in sec. 1 (d).

³⁷ Federal Transit Administration Circular 4703.1, “Environmental Justice Policy Guidance for Federal Transit Administration Recipients” (Aug. 15, 2012), p. 2 (emphasis added).

opportunity, among other things, to define the needs that they prioritize, rather than have those needs defined for them by others.³⁸

To ensure fair outcomes in terms of the distribution of benefits and burdens, U.S. DOT requires an Environmental Justice analysis of the RTP.³⁹

Best Practices: Best practices in implementing these EJ requirements fall under three overlapping categories and are discussed in subsequent sections:

(a) Ensuring Meaningful Public Participation: See Section 3.4.

(b) Ensuring Fair Outcomes: See Section 3.5.

(c) Conducting an Effective EJ Analysis of the RTP: See Section 3.6.

3.3 Affirmatively Furthering Fair Housing

Best Practices Recommended by the Secretary of U.S. DOT:⁴⁰

In July 2015, the U.S. Department of Housing and Urban Development (HUD) adopted a comprehensive new rule on “affirmatively furthering fair housing” (or AFFH),⁴¹ applicable specifically to state and local jurisdictions that receive HUD funds and public housing authorities. The rule explicitly seeks to “encourage and facilitate *regional approaches* to address fair housing issues” in recognition of the cross-jurisdictional character of patterns of segregation and disparity.⁴² The prototype of the new rule was the requirement in tri-agency Sustainable Communities Initiative grants, like the grants received by California MPOs in the Sacramento, Fresno and Bay Area regions,⁴³ to prepare a “Fair Housing and Equity Assessment.”⁴⁴

³⁸ California law is consistent in defining “environmental justice” to mean “the fair treatment of people of all races, cultures, and incomes with respect to the development, adoption, implementation, and enforcement of environmental laws, regulations, and policies.” Cal. Gov. Code § 65040.12 (e).

³⁹ See Section 3.6. *E.g.*, U.S. Department of Transportation, Updated Environmental Justice Order 5610.2(a) (amended 5/2/2012), p. 8, sec. 7 (a) (“*a Title VI analysis would not necessarily satisfy environmental justice requirements, since Title VI does not include low-income populations. Moreover, Title VI applies to all Federally-funded projects and activities, not solely those which may have adverse human health or environmental effects on communities.*”) (emphasis added).

⁴⁰ Note that the AFFH obligation extends directly to the State of California, and is therefore addressed as a *requirement* in the CTP Guidelines.

⁴¹ Department of Housing and Urban Development, Affirmatively Furthering Fair Housing, 80 Fed. Reg. 42272 (July 16, 2015) (Final rule).

⁴² 80 Fed. Reg. at 42273 (emphasis added); *see also id.* at 42286 (describing the importance of a regional analysis of fair housing issues and solutions).

⁴³ These grants were administered by HUD’s Office of Sustainable Communities. See <http://portal.hud.gov/hudportal/HUD?src=/hudprograms/sci>.

⁴⁴ For a HUD summary of FHEA results from regions nationally, see http://portal.hud.gov/hudportal/documents/huddoc?id=FHEAResSumm_CV.pdf.

The legal source of the new HUD rule is the requirement of the 1968 federal Fair Housing Act that “[a]ll executive departments and agencies shall administer their programs and activities relating to housing and urban development ... in a manner affirmatively to further the purposes of [the Fair Housing Act] and shall cooperate with the Secretary [of HUD] to further such purposes.”⁴⁵ The U.S. Department of Transportation has not yet adopted its own AFFH rule, but (as noted below) has recently encouraged transportation agencies to “identify impediments to accessing opportunity” and coordinate with local jurisdictions in addressing those impediments. The AFFH obligation extends directly to the State of California, and is addressed as a requirement in the CTP Guidelines.

Specifically, AFFH means “taking meaningful actions that, taken together, address significant disparities in housing needs and in access to opportunity, replacing segregated living patterns with truly integrated and balanced living patterns, transforming racially and ethnically concentrated areas of poverty into areas of opportunity, and fostering and maintaining compliance with civil rights and fair housing laws.”⁴⁶ The focus on overcoming patterns of segregation is already part of the direct Title VI and EJ obligation of MPOs, as noted in Sections 3.1 and 3.2.⁴⁷

Under HUD’s AFFH rule, the State of California and local jurisdictions must each prepare an Assessment of Fair Housing (AFH), the equivalent of an equity analysis (see Section 3.6). The AFH must “assess the elements and factors that cause, increase, contribute to, maintain, or perpetuate segregation, racially or ethnically concentrated areas of poverty, significant disparities in access to opportunity, and disproportionate housing needs.”⁴⁸ Specifically, the AFH must:

1. Identify, with robust community engagement, current patterns and conditions of segregation, racially concentrated poverty, disparities in access to opportunity, and disproportionate housing needs, utilizing data HUD provides⁴⁹ and other relevant regional data;⁵⁰

⁴⁵ 42 U.S.C. § 3608(d). *See also* Executive Order 12892 (Clinton 1994), sec. 5 (“If any executive agency concludes that any person or entity (including any State or local public agency) applying for or participating in, or supervised or regulated under, a program or activity relating to housing and urban development has not complied with this order or any applicable rule, regulation, or procedure issued or adopted pursuant to this order, it shall endeavor to end and remedy such violation by informal means.... In the event of failure of such informal means, the executive agency, in conformity with rules, regulations, procedures, or policies issued or adopted by it pursuant to section 4 of this order hereof, shall impose such sanctions as may be authorized by law.”).

⁴⁶ 24 C.F.R. § 5.152. Other protected categories include disability and familial status.

⁴⁷ The Title VI regulations prohibit “(iii) [s]ubject[ing] a person to segregation ... in any matter related to his receipt of any ... benefit under the program” (49 CFR Section 21.5 (b) (1)), and U.S. DOT’s EJ Order prohibits the “isolation, exclusion or separation of minority or low-income individuals within a given community or from the broader community.” U.S. Department of Transportation, Updated Environmental Justice Order 5610.2(a) (amended 5/2/2012), pp. 14-15, App. sec. 1 (f).

⁴⁸ 24 C.F.R. § 5.154 (a).

⁴⁹ HUD’s data is accessible at <https://egis.hud.gov/affht/>.

⁵⁰ 24 C.F.R. § 5.154(d)(2).

2. Identify key contributing factors of the patterns and conditions identified;⁵¹
3. Prioritize the most significant contributing factors and set goals that will meaningfully address the high priority factors, with “metrics and milestones” for each goal;⁵²
4. Tailor near-term actions and investments consistent with those goals;⁵³ and
5. Measure progress over the near term.⁵⁴

In completing the AFH, HUD grantees are required to consider neighborhood-level transportation and transit access, educational and economic opportunity, and environmental health factors.⁵⁵

On June 3, 2016, the Secretary of the U.S. Department of Transportation, in a Tri-Agency letter with the Secretaries of HUD and the U.S. Department of Education,⁵⁶ called on transportation agencies nationally to integrate the principles and goals of AFFH into their decision-making generally, and in particular, to “identify impediments to accessing opportunity” and to “coordinate efforts to address” issues of segregation and opportunity.⁵⁷

The letter describes the AFFH rule as “provid[ing] housing, transportation, and education stakeholders the chance to work together to develop thoughtful goals and strategies to promote fair housing choice and equal opportunity through, among other things, improved economic, education, and health outcomes for disadvantaged communities.” It calls out the importance of regional planning and coordination in order to affirmatively further fair housing, stating that:

HUD strongly encourages regional coordination in preparing an Assessment of Fair Housing under the AFFH rule. The reason is simple: many of the issues at stake are not confined to any one local jurisdiction’s borders, nor are the tools to address those issues always within the power of a single agency acting alone. Education and transportation stakeholders’ engagement and input in the fair

⁵¹ 24 C.F.R. § 5.154(d)(3).

⁵² 24 C.F.R. § 5.154(d)(4).

⁵³ 24 C.F.R. § 5.154(d)(5).

⁵⁴ 24 C.F.R. § 5.154(d)(7).

⁵⁵ HUD, Assessment Tool (Public Dec. 31, 2015) at 8, available online at <https://www.huduser.gov/portal/sites/default/files/pdf/Assessment-of-Fair-Housing-Tool.pdf> (last accessed July 12, 2016).

⁵⁶ The Tri-Agency letter is available at <https://www2.ed.gov/documents/press-releases/06032016-dear-colleagues-letter.pdf>.

⁵⁷ The letter states: “Today, our agencies are calling on local education, transportation, and housing leaders to work together on issues at the intersection of our respective missions in helping to guarantee full access of opportunity across the country. Our goals are to identify impediments to accessing opportunity; to coordinate efforts to address these issues and to provide broad-reaching benefits; and to ensure that every child and family is provided with transportation, housing, and education tools that promote economic mobility. The new process in which communities are engaging under the Affirmatively Furthering Fair Housing rule (AFFH rule) from HUD provides an opportunity for cross-agency collaboration and strong community involvement. We urge you to take full advantage of the community participation process of the AFFH rule, so that regional planning promotes economic mobility and equal access to the many benefits provided by affordable housing, great schools, and reliable transportation.”

housing assessment are critical to ensuring each region realizes the vision for equal access to opportunity. This includes fair housing choice and educational opportunity throughout communities — both of which require strategic transportation investments. The success of the Nation’s metropolitan regions and rural areas in ensuring equal access to opportunity for all will help set the stage not only for improved economic, educational, and health outcomes in our most disadvantaged communities, but also for sustainable economic growth and environmental stewardship for all our citizens.⁵⁸

Additionally, the Tri-Agency letter encourages MPOs and other transportation agencies to do their part to affirmatively further fair housing by collaborating with housing and education agencies “to create good land use and planning strategies that foster ease of access to critical housing, school, and transportation resources for students, teachers, parents, and the broader community;” “to identify opportunities to align public transportation routes, sidewalk construction, and related bus stops with schools and housing facilities;” to “[e]nhance bicycle and pedestrian safety in and around local schools,” and to “[i]nclude local school districts, housing authorities, Head Start programs, community colleges, and other related entities in developing coordinated mass transit plans” like the RTP.⁵⁹

MPOs, unless they are HUD grantees, are not yet directly subject to the AFFH rule.⁶⁰ (By contrast, the State of California is a HUD recipient, and therefore the CTP is directly subject to the AFFH duty.) However, active participation by MPOs in the AFH community participation, analytical, and implementation processes is crucial to realizing AFFH goals. MPO and RTPA participation is also important in helping ensure that local jurisdictions within the region can obtain HUD funding for affordable housing and community development. MPOs can contribute to and gain from the Assessments of Fair Housing completed by HUD grantees in their regions by supporting them with data and research, and partnering closely with HUD grantees to plan and implement strategies and investments that will meaningfully address the fair housing goals identified through the process.

Another way MPOs can integrate AFFH principles into their work, building on the experience of the California recipients of Sustainable Communities Initiative grantees, is to conduct an RTP equity analysis that is consistent with the HUD methodology for the AFH. This is a best practice recommended in Section 3.6. Because that methodology focuses on the identification of current patterns and conditions related to segregation, access to opportunity and other civil rights issues impacting racial and ethnic minorities, it is also well suited as a methodology for a Title VI equity analysis of the RTP.

3.4 Adoption, Implementation and Periodic Review of the Public Participation Plan

⁵⁸ Tri-Agency letter, pp. 2-3.

⁵⁹ Tri-Agency letter, pp. 2-3.

⁶⁰ *But see* Executive Order 12892 (Clinton 1994), sec. 5; *see also* “Role of MPOs in the coordination and administration of HUD programs,” available at <http://www.huduser.gov/forums/node/361>.

Requirements:

Federal law requires metropolitan planning organizations to adopt and implement a public participation plan.⁶¹ The public participation plan must “be developed by the MPO in consultation with all interested parties” and must, among other things, “at a minimum, describe explicit procedures, strategies, and desired outcomes for . . . seeking out and considering the needs of . . . low-income and minority households.”⁶² (See chapter [4] for additional requirements in the public participation plan.)

The federal obligation does not end with adopting a plan for outreach and integration of the voices of low-income and minority residents; it also extends to “[p]eriodically reviewing the effectiveness of the procedures and strategies contained in the participation plan to ensure a full and open participation process.”⁶³ This periodic review can help ensure that the public participation plan, once adopted, is being implemented effectively and is achieving its goals of engaging low-income and minority residents in expressing and prioritizing their needs and their views on how the regional transportation plan can best meet those needs.

In addition, as part of the Title VI program (see Sec. 3.6), FTA requires MPOs not only to submit a public participation plan that includes an outreach plan to engage minority and limited English proficient populations, but also “a summary of outreach efforts made since the last Title VI Program submission.”⁶⁴

Language access is another component of Title VI.⁶⁵ [TO COME: Exec Order, [DOT Guidance](#), and DOJ guidance. The purpose of [the DOT] Language Access Plan (LAP or Plan) is to make reasonable efforts to eliminate or reduce barriers to DOT programs and activities for people who have a limited ability to speak, write, and/or understand the English language.] “The content and considerations of Title VI, the Executive Order on LEP, and the DOT LEP Guidance shall be integrated into each recipient’s established public participation plan or process (i.e., the document that explicitly describes the proactive strategies, procedures, and desired outcomes that underpin the recipient’s public participation activities).”⁶⁶

[TO COME: Insert re disability access requirements]

California law separately requires MPOs to “adopt a public participation plan, for development of the sustainable communities strategy.”⁶⁷ That plan must include

⁶¹ 23 C.F.R. § 450.316 (a) (1).

⁶² 23 C.F.R. § 450.316 (a) (1) (vii).

⁶³ 23 C.F.R. § 450.316 (a) (1) (x).

⁶⁴ FTA, Title VI Circular, ch. III, sec. 4(a)(4).

⁶⁵ *Lau v. Nichols*, 414 U.S. 563, 569 (1974); see https://www.lep.gov/faqs/042511_Q&A_TitleVI_and_Regulations.pdf.

⁶⁶ FTA, Title VI Circular, Chap. III, sec. 8.

⁶⁷ SB 375, Cal. Gov. Code § 65080 (b) (2) (F).

“[o]utreach efforts to encourage the active participation of a broad range of stakeholder groups in the planning process, consistent with the agency’s adopted Federal Public Participation Plan,” and must ensure that the MPO will “provide the public with the information and tools necessary to provide a clear understanding of the issues and policy choices.”⁶⁸ The “information and tools” that must be provided include the Title VI and EJ analyses, as discussed in Section 3.6.

SB 375 also addresses public participation in the related process of developing the Regional Housing Needs Allocation, or RHNA, and its methodology. The RHNA must be consistent with the SCS, and in its development MPOs and COGs must solicit “[p]articipation by organizations other than local jurisdictions and councils of governments ... in a diligent effort to achieve public participation of all economic segments of the community...”⁶⁹

Best Practices:

- Provide financial support to community-based and membership organizations across the region to help engage low-income residents, limited English speaking residents and residents of color in the public process. (In connection with federal Sustainable Communities Initiative grants through HUD, SACOG, Fresno County Council of Governments and MTC made subgrants to community groups to engage local residents in regional planning and implementation. The Fresno COG competitively awarded small amounts (\$1,000 - \$3,000) of competitive funding to such organizations during the development of their 2014 regional transportation plan/sustainable strategy for this purpose and the results were promising).⁷⁰
- Set aside a fund of regional discretionary or other revenues to be expended to address the priority needs identified by residents of underserved communities and/or populations.⁷¹
- Work with community-based and membership organizations across the region to jointly plan public workshops on the RTP, especially the Title VI and Environmental Justice analyses. They know the communities impacted by the RTP transportation projects and can assist with recruiting residents, businesses and other affected stakeholders. Be proactive in asking for their participation instead of waiting for them to come to you.

⁶⁸ *Id.*, § 65080 (b) (2) (F) (i) & (iii).

⁶⁹ Cal. Gov. Code § 65584.04. (c).

⁷⁰ Fresno’s best practice has long been encouraged by the federal agencies. See FHWA/FTA, Memorandum re: Implementing Title VI Requirements in Metropolitan and Statewide Planning (Oct. 7, 1999), pp. 1-2, available at https://cms.fta.dot.gov/sites/fta.dot.gov/files/docs/Implementing_TitleVI_Requirements.pdf (“Has the metropolitan planning organization (MPO) or State DOT made funds available to local organizations that represent low-income and minority populations to enable their participation in planning processes?”).

⁷¹ Relevant precedent in California includes SB 535 (de León 2012), discussed in section 3.5, the Active Transportation Program, and the Local Control Funding Formula in the context of public education. These programs, which commit to directing funds to meet the needs that underserved communities identify, have demonstrated a significant impact on the meaningful engagement of low-income residents and residents of color.

- Form an advisory group on Environmental Justice, Social Equity and/or Disadvantaged Communities to provide feedback throughout the RTP process. This group should include not only government agencies but also policy and community-based organizations that are focused on social equity in the region. Bay Area social equity groups found that “It was an improvement over past planning cycles [for MTC] to establish the Regional Equity Working Group and to conduct equity analyses at earlier stages before selecting a preferred alternative.”⁷² In the SCAG region, equity and transportation policy groups worked with SCAG throughout the RTP process to ensure that public outreach included meetings in disadvantaged communities throughout the region, including in the Inland Empire. They also worked with SCAG to identify different types of environmental justice communities impacted by the RTP EJ analysis, including those defined by CalEnviroScreen, SB 535 and the “Communities of Concern” model used in the Bay Area.⁷³
- Ensure that community residents have the opportunity to deliberate together to achieve consensus on their most pressing needs and recommendations.
- Hold public meetings at times and locations that allow a diverse range of individuals and organizations to attend. Consider public facilities such as libraries, community based organizations or community centers that residents are already familiar with and that are convenient to other destinations they may have to go before or after the meeting.
- Avoid holding public meetings during the day. Ensure opportunities for underserved residents to speak directly with decision makers.
- Avoid government office buildings that require photo ID and security to enter.
- Ensure that interpreters are available in all appropriate languages when holding meetings in communities with a large population of people with English as a second language or who do not speak English at all.
- Translate materials, including electronic communications, in Spanish and other languages where appropriate.
- Technology and the Internet can reach many people, but recognize that not everyone has access to the Internet and an email address and that efforts should be made to reach individuals in other ways. As noted above, community groups should be resourced to conduct outreach.
- Pay particular attention to identifying and addressing the specific needs of rural disadvantaged communities and farmworkers.
- Post timely notice of the meetings well ahead of time. In addition to email and the web, consider posting flyers or reaching out to community-based organizations to assist with publicity.

⁷² The groups, however, also noted that “Too often, however, the strong and constructive recommendations of the REWG and other advisory groups were ignored. One key recommendation that should be implemented next time is to **measure equity by first identifying gaps, and then assessing progress toward filling those gaps.**” See letter of May 16, 2013 to MTC Re: Comments on Draft Plan Bay Area by Members and Supporters of The 6 Wins Network.

⁷³ Similar to the Bay Area, groups in the SCAG region felt that their recommendations for substantive changes to the RTP were ignored, and that SCAG moved forward with public outreach at times and locations that communities impacted by the RTP (and even stakeholder groups) could not attend.

- Provide childcare, food and other amenities, or resource community groups to do so.
- Consider access to public transportation, walking and biking routes in addition to parking when selecting a facility. Many times agencies choose locations based on access to parking and busy routes like freeways, which are not as convenient for people who depend on public transportation or other modes.
- Consider professional facilitation of public meetings to manage conflict and keep the meetings running on time.

3.5 A Fair and Timely Share of the Benefits: Best Practices for Meeting the Needs of Low-Income and Minority Communities and Populations

In assessing whether a fair share of the benefits of the RTP and its investments are received by the populations and communities protected by Title VI and EJ requirements, MPOs must first determine what counts as a benefit. A recommended best practice is to align this assessment with the requirement that MPOs “seek[] out and consider[] the needs of . . . low-income and minority households”⁷⁴ (see Sec. 3.4) in the public participation process by ensuring not only an *identification and prioritization* of needs, but also that a fair share of the needs prioritized by those households and populations in the public process are *addressed* by the RTP and its investments.

The California Air Resources Board (ARB) has taken this approach in the context of ensuring that a fair share of investment of revenues from the Greenhouse Gas Reduction Fund (GGRF) under SB 535 (de León) is spent to benefit disadvantaged communities.⁷⁵ While SB 535 does not directly apply to RTP investments (other than those funded by the GGRF), it is a recommended best practice to assess the benefits and burdens of the RTP and its investments for fairness in a similar manner.

ARB’s GGRF Funding Guidelines require implementing agencies to “give priority to those [investments] that maximize benefits to disadvantaged communities” by “favor[ing] the] projects which provide . . . the most significant benefits” to them.⁷⁶ More specifically, the Guidelines require that every investment intended to benefit a disadvantaged community “provide[] direct, meaningful, and assured benefits to one or more disadvantaged communities.”

⁷⁴ 23 C.F.R. § 450.316 (a) (1) (vii).

⁷⁵ That statute requires that “a minimum of 25 percent” of GGRF moneys go “to projects that provide benefits to” disadvantaged communities and “a minimum of 10 percent . . . to projects located within” those communities. Health & Saf. Code § 39713. For purposes of SB 535, “disadvantaged communities” are defined geographically by CalEnviroScreen. MPOs are not required to define low-income populations or minority populations by reference to that tool, but may instead craft a definition, in consultation with affected community members, that is best suited to local needs and conditions. See sec. 3.6 for relevant recommendations.

⁷⁶ Air Resources Board, Cap-and-Trade Auction Proceeds Funding Guidelines for Agencies that Administer California Climate Investments (Dec. 2015), p. 2.A-6, available at <http://www.arb.ca.gov/cc/capandtrade/auctionproceeds/fundingguidelines.htm>

ARB's Funding Guidelines specify the benefit each GGRF investment must provide as "a benefit that *meaningfully addresses an important community need*" in a disadvantaged community.⁷⁷ The definition of a "benefit" as meaningfully addressing an important community need should be used by MPOs in complying with EJ and other requirements, specifically, the requirement to ensure against "the denial of, reduction in, or significant delay in the receipt of benefits by minority and low-income populations."⁷⁸

The GGRF program ensures that the receipt of the benefits of its investments are equally timely by requiring a 25 percent share of *each year's funding* to benefit disadvantaged communities. An RTP best practice would ensure an appropriate share, if not annually, at least over the four-year lifetime of the RTP. A further best practice is to transparently phase the RTP's project and investment implementation, and to specifically identify which investments, in which years, are expected to meet the priority needs of minority and low-income populations.

ARB's definition of "benefit" is also directly relevant to the crafting of an equity and EJ analysis of the RTP, as discussed in the next section.

In addition, ARB's GGRF Funding Guidelines require that "projects be designed to *avoid substantial burdens*, such as physical or economic displacement of low-income disadvantaged community residents and businesses or increased exposure to toxics or other health risks."⁷⁹ This aligns directly with the Environmental Justice requirement "[t]o avoid, minimize, or mitigate disproportionately high and adverse human health and environmental effects, including social and economic effects, on minority populations and low-income populations."⁸⁰ ARB's Guidelines, however, include a recommended best practice of avoiding substantial burdens on protected populations altogether, rather than simply mitigating them.

3.6 Title VI Program and Assurances, and Title VI and EJ Analyses

Requirements:

Every application for federal financial assistance from the U.S. Department of Transportation (including, e.g., MPO planning grants) requires the submission of "an assurance that the program will be conducted or the facility operated in compliance with all requirements imposed by" Title VI.⁸¹ FTA requires that all direct and primary recipients document their compliance with this requirement "by submitting a Title VI

⁷⁷ *Id.*, p. 2-6. *See id.*, p. 1.A-12 (requiring reporting on "disadvantaged community benefits and ... strategies the agency will use to maximize benefits" to them).

⁷⁸ Federal Transit Administration Circular 4703.1, "Environmental Justice Policy Guidance for Federal Transit Administration Recipients" (Aug. 15, 2012), p. 2.

⁷⁹ *Id.* p. 2-12.

⁸⁰ Federal Transit Administration Circular 4703.1, "Environmental Justice Policy Guidance for Federal Transit Administration Recipients" (Aug. 15, 2012), p. 2 (emphasis added).

⁸¹ 49 CFR § 21.7(a).

Program to their FTA regional civil rights officer once every three years, or as otherwise directed by FTA.”⁸² For MPOs, that requirement includes, among other things:

1. “All general requirements set out in section 4 of Chapter III of [the FTA Title VI Circular];
2. “A demographic profile of the metropolitan area that includes identification of the locations of minority populations in the aggregate”;
3. “A description of the procedures by which the mobility needs of minority populations are identified and considered within the planning process”;
4. “Demographic maps that overlay the percent minority and non-minority populations as identified by Census or ACS data, at Census tract or block group level, and charts that analyze the impacts of the distribution of State and Federal funds in the aggregate for public transportation purposes, including Federal funds managed by the MPO as a designated recipient”; and
5. “An analysis of impacts identified in paragraph (4) that identifies any disparate impacts on the basis of race, color, or national origin, and, if so, determines whether there is a substantial legitimate justification for the policy that resulted in the disparate impacts, and if there are alternatives that could be employed that would have a less discriminatory impact.”⁸³

In addition to this disparate impact analysis, MPOs are required “[i]n general [to] have available for the Secretary *racial and ethnic data showing the extent to which members of minority groups are beneficiaries of programs* receiving Federal financial assistance.”⁸⁴ These requirements for a Title VI analysis explicitly applies to MPOs in connection with the RTP.⁸⁵ They require “an analytical process . . . for assessing the regional benefits and burdens of transportation system investments for different socio-economic groups,” as well as “a data collection process to support the analysis effort.”⁸⁶

In developing and adopting the RTP, MPOs are subject to federal requirements to conduct not only a Title VI analysis, but also an Environmental Justice analysis. A separate Environmental Justice analysis is required to “identify” disproportionate adverse impacts on low-income and minority populations, under U.S. DOT’s EJ Order, which states that

⁸² FTA, Title VI Circular, ch. VI, §2.

⁸³ *Id.*

⁸⁴ 49 CFR Section 21.9(b).

⁸⁵ *See, e.g.*, FHWA/FTA, Memorandum re: Implementing Title VI Requirements in Metropolitan and Statewide Planning (Oct. 7, 1999), pp. 1-2 (emphasis added), available at https://cms.fta.dot.gov/sites/fta.dot.gov/files/docs/Implementing_TitleVI_Requirements.pdf (requiring “an analytical process . . . to assess *the benefit and impact distributions of the investments included in the plan*”). *See also* FTA, Title VI Circular, ch. VI, §2 (requiring MPOs to “analyze the impacts of the distribution of State and Federal funds in the aggregate for public transportation purposes” on “minority and non-minority populations” in order to “identif[y] any disparate impacts on the basis of race, color, or national origin”).

⁸⁶ *See, e.g.*, FHWA/FTA, Memorandum re: Implementing Title VI Requirements in Metropolitan and Statewide Planning (Oct. 7, 1999), pp. 1-2, available at https://cms.fta.dot.gov/sites/fta.dot.gov/files/docs/Implementing_TitleVI_Requirements.pdf.

engaging in *environmental justice analysis* under Federal transportation planning and NEPA provisions will not necessarily satisfy Title VI requirements. Similarly, a *Title VI analysis* would not necessarily satisfy environmental justice requirements, since Title VI does not include low-income populations. Moreover, Title VI applies to all Federally-funded projects and activities, not solely those which may have adverse human health or environmental effects on communities.⁸⁷

Despite these differences, the Title IV and EJ Analyses of the RTP share the same fundamental purpose: “to assess *the benefit and impact distributions of the investments included in the plan*”⁸⁸ in order to ensure that racial and ethnic minorities (Title VI) and low-income and minority populations (EJ) will receive a fair and timely share of the benefits of the RTP and its investments, and not bear an unfair share of its burdens.⁸⁹

The design of the Title VI and EJ Analyses themselves, moreover, must be responsive to the needs of affected community residents. As noted in Section 3.4, SB 375 requires the MPO’s participation plan to ensure that it will “provide the public with the information and tools necessary to provide a clear understanding of the issues and policy choices.”⁹⁰ Thus, both of these analyses must be developed with the participation of low-income and minority residents, pursuant to the Public Participation Plan,⁹¹ and must be made “available to participants, beneficiaries, and other interested persons”⁹² Making the Title VI and EJ Analyses available as a part of the public process also serves to meet the obligation to “[p]rovid[e] timely notice and reasonable access to information about transportation issues and processes.”⁹³

Best Practices:

Include a Social Equity Scenario and EIR Alternative: MTC and ABAG included in the EIR for Plan Bay Area an analysis of several alternatives. One of them, the “Equity, Environment and Jobs Alternative” was developed by community groups and proposed as a scenario. The EIR concluded that the “Equity” alternative was “environmentally superior” and that it demonstrated superior performance on a range of the region’s identified performance measures, both those related directly to social equity (such as risk

⁸⁷ U.S. Department of Transportation, Updated Environmental Justice Order 5610.2(a) (amended 5/2/2012), p. 8, sec. 7 (a).

⁸⁸ See, e.g., FHWA/FTA, Memorandum re: Implementing Title VI Requirements in Metropolitan and Statewide Planning (Oct. 7, 1999), pp. 1-2, available at https://cms.fta.dot.gov/sites/fta.dot.gov/files/docs/Implementing_TitleVI_Requirements.pdf.

⁸⁹ In addition, the Title VI analysis, together with the rest of the Title VI Program, serves as the basis to support the MPO’s Title VI Certification.

⁹⁰ *Id.*, § 65080 (b) (2) (F) (i) & (iii). SB 375 also addresses public participation in the related process of developing the Regional Housing Needs Allocation, or RHNA, and its methodology. The RHNA must be consistent with the SCS, and in its development COGs must solicit “[p]articipation by organizations other than local jurisdictions and councils of governments . . . in a diligent effort to achieve public participation of all economic segments of the community...” (Cal. Gov. Code § 65584.04. (c).)

⁹¹ 23 C.F.R. § 450.316 (a) (1).

⁹² 49 CFR Section 21.9(d).

⁹³ 23 C.F.R. § 450.316 (a) (1) (ii).

of displacement and combined housing and transportation cost burden on low-income families) and others.⁹⁴

Problem: Identifying Communities of Concern: Problems inherent in the static definition of communities of concern have been highlighted in the literature.⁹⁵ Typical practice involves using a geographic threshold to define “communities of concern” or “EJ communities” on the basis of concentrations of low-income people, people of color, or other demographics of interest. For example, an agency might define “EJ communities” as TAZs containing greater than 70% people of color and greater than 30% low-income. It would then compare average transportation performance measures calculated for all “EJ TAZs” and all “non-EJ TAZs” (e.g. average travel time, average accessibility by transit). Despite being widely used across the country, this approach embodies a number of serious shortcomings that undercut the utility and validity of the conclusions drawn from it. The emphasis on *communities* means that members of protected *populations* who reside outside of identified EJ TAZs are not included in calculated performance metrics. Conversely, non-protected populations living within EJ TAZs are included in those metrics. For particular protected populations that tend to congregate spatially, such as people of color in some metropolitan regions, static communities of concern may have limited utility, but for those groups evidencing a more spatially dispersed character (e.g. seniors, single-parent households, low-income people) they have little to none.⁹⁶

The problem is compounded when multiple protected populations and other groups of interest are combined to form a single community definition. For example, in MTC’s 2013 RTP, entitled *Plan Bay Area*, the agency defined communities of concern using eight different “disadvantage factors.”⁹⁷ They followed a two-step process. First, all TAZs were included that met both minority population and low-income thresholds. These were set at 70% and 30%, respectively. Next, all TAZs where four or more disadvantage factors overlapped were identified, including minority and low-income. Some of the thresholds used were as low as 10% (zero-vehicle households and seniors), virtually ensuring that the final performance measures calculated for communities of concern would not represent the transportation and land use conditions faced by any one of the component populations. From a Title VI and EJ perspective, including other population groups along with protected populations would be likely to dilute the results of a performance assessment, raising concerns from a compliance perspective.

⁹⁴ See UC Davis report [[insert cite and link](#)]; see also Marcantonio, R. and Karner, A., *Disadvantaged Communities Teach Regional Planners a Lesson in Equitable and Sustainable Development, POVERTY AND RACE*, vol. 23, No. 1 (January/February 2014).

⁹⁵ Karner, A. and D. Niemeier (2013). "Civil rights guidance and equity analysis methods for regional transportation plans: a critical review of literature and practice." *Journal of Transport Geography* 33: 126-134; Rowangould, D., A. Karner and J. London (2016). "Identifying environmental justice communities for transportation analysis." *Transportation Research Part A: Policy and Practice* 88: 151-162.

⁹⁶ Duthie, J., K. Cervenka and S. Waller (2007). "Environmental Justice Analysis: Challenges for Metropolitan Transportation Planning." *Transportation Research Record: Journal of the Transportation Research Board* 2013: 8-12.

⁹⁷ MTC, “Plan Bay Area: Technical Summary of Preferred Scenario Equity Analysis Methodology,” (Oakland, CA: Metropolitan Transportation Commission, 2012).

Solutions: Identifying Communities of Concern: There are a number of practices that MPOs can employ to circumvent these problems. *First*, different demographic groups should be assessed separately. There is no reason to believe, for instance, that the particular transportation equity challenges are the same for both seniors and people of color. *Second*, rather than relying on a single “communities of concern” definition, MPOs should test multiple different definitions and determine how performance measures change.⁹⁸ *Third*, and relatedly, population-weighted metrics can be calculated, using counts of population in particular demographic groups as weights. Results can be reported as a single value, representing the average conditions faced by a demographic group, regardless of their location in the region, or they could be presented as cumulative distributions, giving an indication of whether majorities of members of a group experience better or worse conditions than the population as a whole or than other groups.⁹⁹ *Fourth*, in regions that have implemented activity-based models, average performance measures for demographic groups can be directly reported as means or distributions.

Problem: Limitations on Modeling Equity: Modeling of the transportation investments contained in the RTP/SCS can be helpful in determining whether it meets the region’s GHG-reduction targets, and to forecast other specific conditions, such as road congestion and air pollution emissions. Some MPOs, however, also utilize modeling to generate the primary data used for their Title VI and Environmental Justice analyses. This practice raises serious concerns with federal compliance, in two respects. First, land use models cannot currently predict, with reasonable certainty, future movement of racial or ethnic groups at a neighborhood scale, and travel demand models are generally not sensitive to observed differences in travel behavior between racial and ethnic groups.¹⁰⁰ This is particularly problematic in many places in California in which racial demographics have shifted dramatically in just ten years.¹⁰¹ Both Title VI and Environmental Justice require a focus on the impacts on racial and ethnic minorities as such, and a modeled analysis that is not responsive to race or ethnicity does not comply with that requirement. Stated differently, the inability of models to predict population shares and travel behavior *by race and ethnicity* renders a modeled analysis incapable of determining whether the RTP and its investments are fair to minority populations defined by “race, color or national origin.” The second reason rests on the fact that the modeled equity analyses typically focus *solely on the horizon year* of the RTP. The failure of a modeled analysis to specifically account for the timeliness in the distribution of benefits renders it useless for

⁹⁸ This approach would be similar to conducting a sensitivity analysis on the threshold definition and would be much more likely to provide results of value, capable of guiding policy and investments. For example, increasingly strict minority population thresholds could be used (ranging from 20% to 90% in 5 percentage point increments) and would demonstrate the effect of segregation on transportation outcomes.

⁹⁹ For an example of the latter, see Golub, A. and K. Martens (2014). "Using principles of justice to assess the modal equity of regional transportation plans." *Journal of Transport Geography* 41: 10-20.

¹⁰⁰ Metropolitan Transportation Commission, Staff memo of 9-6-11 to Equity Working Group, p. 2.

¹⁰¹ For instance, according to the decennial census, between 2000 and 2010 many California cities lost a large share of their African-American population, including 23 percent in the cities of Oakland and Richmond, 24 percent in Pasadena and Pomona, 19 percent in San Francisco and 12 percent in Los Angeles. Over the life of the RTP, much larger shifts in the racial geography of cities must be anticipated, and even more so at the level of the individual census tract or TAZ.

ensuring that there will be no “significant delay in the receipt of benefits by minority and low-income populations.”¹⁰²

As a result, when MPOs use modeling of horizon year outcomes as their primary Equity and EJ Analysis tool, they have faced intense criticism from low-income and minority stakeholders. Those stakeholders have expressed skepticism because the modeled analysis, on the one hand, does not account for the *existing* baseline of inequities they perceive to exist today while, on the other hand, it defines static “communities of concern” based on today’s demographics despite the potential for significant demographic change in those communities over the next 25 years.

Solution: Near-Term Equity Analysis: A best practice, as described in recent literature, is to “[s]upplement[] the standard, long-range forecasting approach [to analyzing Title VI and EJ]¹⁰³ with nearer-term analyses.”¹⁰⁴ The general methodology prescribed by HUD for the Assessment of Fair Housing is a model that MPOs can consult in implementing this best practice. That general methodology¹⁰⁵ consists of the five steps which are described in Section 3.3. It begins with (1) identifying, with the participation of affected low-income and minority residents, current patterns and conditions relating to an unfair share of the benefits and burdens based on race, ethnicity and income. While these current patterns and conditions may not have been created by the MPO, the RTP and its investments can play a significant role in determining whether they will be maintained, exacerbated, or ameliorated. Once those current conditions have been identified, the analysis can focus on the most significant ones that the RTP and its investments have the power to influence, by (2) identifying key contributing factors, (3) setting quantified goals for impacting those factors, and (4) identifying the actions and investments that will be made during the four-year life of the RTP to achieve those goals. This approach also allows the MPO to (5) track progress toward those goals over the lifetime of the RTP.¹⁰⁶

¹⁰² Federal Transit Administration Circular 4703.1, “Environmental Justice Policy Guidance for Federal Transit Administration Recipients” (Aug. 15, 2012), p. 2.

¹⁰³ Modeled forecasting of Title VI and EJ compliance is not required by U.S. DOT, and in fact has compliance drawbacks, as described below.

¹⁰⁴ Karner, A. and D. Niemeier (2013). “Civil rights guidance and equity analysis methods for regional transportation plans: a critical review of literature and practice.” *Journal of Transport Geography* 33: 126-134, p. 132. “This approach “allows for adaptive responses that can help to guard against unexpected incremental inequities that lock in larger effects, potentially improving the analytical treatment of race. Conducting these types of analyses would also serve to increase responsiveness to public input.”

¹⁰⁵ The Secretary of Transportation, in a joint letter with the Secretaries of Education and of HUD, has “urged [transportation agencies] to take full advantage of the community participation process of the AFFH rule, so that regional planning promotes economic mobility and equal access to the many benefits provided by affordable housing, great schools, and reliable transportation.” As discussed in Section 3, MPO alignment with the methodology that local jurisdictions must utilize as a condition of receiving HUD funding for affordable housing and community development is not only a best practice for meeting MPO requirements, but also brings benefits to the local jurisdictions, and the region as a whole. The tri-agency letter is available at <https://www2.ed.gov/documents/press-releases/06032016-dear-colleagues-letter.pdf>.

¹⁰⁶ See 24 C.F.R. § 5.154 (a), (d).

This methodology is a best practice, not a requirement. However, whether or not an MPO utilizes this methodology, it *must* conduct a Title VI and an EJ analysis that is sensitive to race and ethnicity, *and* that is sensitive to the timing of RTP policies and investments.

As a long-term goal, MPOs should consider incorporating race and ethnicity as independent variables into their travel demand and land use models.

Multi-County Regions: Two best practice are recommended for the five multi-county regions – the Association of Monterey Bay Area Governments (AMBAG), the Metropolitan Transportation Commission (MTC), the Southern California Association of Governments (SCAG), the Sacramento Area Council of Governments (SACOG), and the Tahoe Metropolitan Planning Organization:

1. In large regions comprised of more than one county, a region-wide equity analysis can easily miss inequities at a smaller scale. A best practice comes from MTC, which adopted new “Guidelines for County Transportation Plans” in 2014.¹⁰⁷ MTC’s Guidelines recommend that County CMAs conduct an equity analysis of their long-range transportation plans “with input from the public, tailored to the specific character of the county, and with a focus on minority, low-income, and other underserved communities,” and MTC offers data and technical assistance to the CMAs in doing so.¹⁰⁸ County-level equity analyses should also comply with the recommendations above to ensure against the limitations of modeled equity analyses.

2. For both social equity and consistency reasons, and to ensure an MPO’s compliance with its federal obligation to monitor the Title VI compliance of its subrecipients and with CEQA, a further best practice of multi-county MPOs is to exclude from the RTP a program of projects proposed by a CMA or other sub-recipient that has not demonstrated full compliance with Title VI and Environmental Justice requirements, including the preparation of a valid equity analysis, and that has not identified and mitigated impacts on low-income populations and minority populations.

Providing Transparent Information about the Timing of Projects in the RTP: MPOs should provide transparent project listings based on timing, e.g., disaggregating proposed investments in five year clusters.¹⁰⁹

Identify the Priority Needs of Underserved Populations: MPOs should use the results of a robust and meaningful public involvement effort to identify challenges in particular underserved communities. Such communities, often composed of only several TAZs, may face profound transportation disadvantages that would be rendered invisible in a

¹⁰⁷ Available at http://files.mtc.ca.gov/pdf/ctp/CTPGuideliensRevisedUpdate_Sept.pdf.

¹⁰⁸ *Id.*, pp. 7-8.

¹⁰⁹ See Karner, A. and D. Niemeier (2013). "Civil rights guidance and equity analysis methods for regional transportation plans: a critical review of literature and practice." *Journal of Transport Geography* 33: 126-134, p. 132. (“During the 2013 RTP update, participants in an equity working group convened by MTC ... requested that ‘information about [the] MTC’s transportation improvement program (what projects will be funded in the RTP and when), as well as the results of the corresponding Equity and [performance measures] Analysis, be disaggregated into five-year increments.’” (citations omitted.)

regional analysis.¹¹⁰ Agencies can report performance measures calculated for these smaller aggregations and then use near-term analyses to demonstrate how the RTP policies and investments improve or fail to improve conditions there.¹¹¹

3.7 Joint Planning Certification Review of Title VI Compliance

All MPOs are required to self-certify their compliance with all applicable Federal requirements.¹¹² Planning certification reviews conducted jointly by FTA and FHWA of the metropolitan transportation planning processes include a review of Title VI compliance.¹¹³

As part of the joint planning certification review, FTA/FHWA reviews MPO-developed documentation to determine whether MPOs have, among other things, “[e]nsured that members of minority communities are provided with full opportunities to engage in the transportation planning process” and “[m]onitored the activities of subrecipients with regard to Title VI compliance, where the MPO passes funds through to subrecipients.”¹¹⁴

During the joint planning certification review, FHWA and FTA will also determine whether:

- an MPO’s “[c]riteria (to establish self-certification) appear reasonable”
- “[d]ocumentation [is] available to support self-certification”
- “[p]ublic comments are addressed” and
- “[p]lanning/transportation agencies have procedures, policies, and/or guidelines that address Title VI..., as required by regulation.”¹¹⁵

FHWA and FTA’s joint planning certification review also extends to these issues:

- “[m]inority and low income population concentrations and issues [were] identified”;
- “[s]tandards, measures and benchmarks are reasonable to demonstrate significant disparity of impacts in accessibility to and delivery of transportation facilities/services”;
- “[g]roups provided with various opportunities to meaningfully engage in the regional transportation planning process”;

¹¹⁰ Rowangould, D., A. Karner and J. London (2016). "Identifying environmental justice communities for transportation analysis." *Transportation Research Part A: Policy and Practice* 88: 151-162.

¹¹¹ While there is a wide variety of modeling technology, expertise, and resources deployed across California’s regions, even MPOs with the most basic three-step model can implement many of the best practices recommended above. Those related to community definition, in particular, are agnostic with respect to modeling technology, and once a travel demand model run is complete, testing the effect of different population definitions on outcomes should be a straightforward exercise.

¹¹² Each MPO is required to “certify . . . that the metropolitan transportation planning process is being carried out in accordance with . . . Title VI of the Civil Rights Act of 1964.” 23 C.F.R. § 450.334 (a) (3). See also FTA Title VI Circular 4702.1B, p. VI-3.

¹¹³ FTA Title VI Circular 4702.1B, p. VI-3.

¹¹⁴ *Id.*

¹¹⁵ https://www.planning.dot.gov/documents/primer/intro_primer.asp#2.11

- “[i]dentify and address the needs of groups with limited English proficiency”; and
- “[n]eeds of groups identified and considered during the planning process.”¹¹⁶

Additional areas of review include:¹¹⁷

- “What measures have been used to verify that the multi-modal system access and mobility performance improvements included in the plan and Transportation Improvement Program (TIP) or STIP, and the underlying planning process, comply with Title VI?”
- “Does the planning process seek to identify the needs of low-income and minority populations? Does the planning process seek to utilize demographic information to examine the distributions across these groups of the benefits and burdens of the transportation investments included in the plan and TIP (or STIP)? What methods are used to identify imbalances?”
- “Does the planning process have an analytical process in place for assessing the regional benefits and burdens of transportation system investments for different socio-economic groups? Does it have a data collection process to support the analysis effort? Does this analytical process seek to assess the benefit and impact distributions of the investments included in the plan and TIP (or STIP)?”
- “How does the planning process respond to the analyses produced? Imbalances identified?”
- “What strategies, if any, have been implemented to reduce participation barriers for such populations? Has their effectiveness been evaluated? Has public involvement in the planning process been routinely evaluated as required by regulation? Have efforts been undertaken to improve performance, especially with regard to low-income and minority populations? Have organizations representing low-income and minority populations been consulted as part of this evaluation? Have their concerns been considered?”
- “What mechanisms are in place to ensure that issues and concerns raised by low-income and minority populations are appropriately considered in the decisionmaking process? Is there evidence that these concerns have been appropriately considered? Has the metropolitan planning organization (MPO) or State DOT made funds available to local organizations that represent low-income and minority populations to enable their participation in planning processes?”

¹¹⁶ https://www.planning.dot.gov/documents/primer/intro_primer.asp#2.12

¹¹⁷ FHWA/FTA, Memorandum re: Implementing Title VI Requirements in Metropolitan and Statewide Planning (Oct. 7, 1999), pp. 1-2, available at https://cms.fta.dot.gov/sites/fta.dot.gov/files/docs/Implementing_TitleVI_Requirements.pdf.